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June 19, 2003

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OPINION COMMITTEE

FILE # ML-43159-03

I.D. # 43159

Honorable Gregg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0083-GA

Re: Request for Opinion – Applicability of Texas Constitution and Texas Public Investment Act to El Paso Empowerment Zone Equity Investment Plan.

Dear General Abbott:

On behalf of the Board of Directors of the El Paso Empowerment Zone Corporation (“EPEZ”), I am requesting your opinion regarding the following questions: 1.) whether Article III, §50, Article III, § 51 or Article XVI, §6 of the Texas Constitution prohibit the EPEZ from making equity investments in private businesses pursuant to a specific plan, and 2.) whether the Texas Public Investment Act, Texas Government Code §2256.001 et.seq. (the “act”) prohibits the EPEZ from making equity investments in private businesses.

EPEZ is a Texas non-profit corporation, with its primary purpose being to manage an “empowerment zone” within a portion of El Paso, Texas created by the United States Department of Housing and Urban Development (“HUD”) under 26 U.S.C.A. § 1391 et. seq., based upon a plan and application made to HUD by the City of El Paso (the “City”) and the State (the “State”). The federally designated empowerment zone (the “Zone”) is operated by EPEZ under delegations of powers and authorities from the State to the City and then from the City to EPEZ. EPEZ is a charitable and eleemosynary institution.

As part of its efforts to encourage job-creation within the Zone and for Zone residents, as required by HUD, EPEZ is considering adoption of a plan whereby a portion of EPEZ funds are used for purposes of making, among other things, equity investments in small businesses upon specified terms and conditions (the “Plan”). Many businesses located within the Zone have had great difficulty in obtaining needed financing due to a lack of sufficient equity investment to satisfy loan-to-value requirements of lenders.

The Plan is a method of aiding such businesses in their efforts to obtain loans for expansion of their facilities and workforces, while providing an ultimate return of capital to EPEZ for its charitable grants and programs.

Presently, virtually all funds of EPEZ (including, without limitation, those to be used in the Plan) are received from HUD as part of its grants to empowerment zones nationwide. The remaining monies, of nominal amount, have been or will be generated through charitable gifts, fundraising, and/or administrative fees from recipients of EPEZ awards. The City does act as the fiscal agent for EPEZ with respect to the empowerment zone program, and the funds from HUD are channeled to EPEZ through the City. Importantly, EPEZ does not receive any state or local tax funds from the State or the City. Instead, it is essentially reliant upon federal funding for its operations, at this time.

The City of El Paso has raised the issue of the Plan's validity under Texas statutory and constitutional law. The EPEZ Board wishes to ensure its compliance with Texas law before the Plan is put into effect.

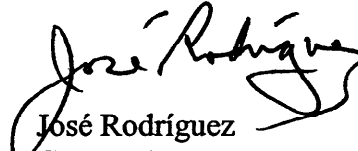
In the first place, there is an issue as to whether Article III, § 50, Article III, § 51, or Article XVI, § 6 of the Texas Constitution would permit EPEZ to make equity investments in private businesses under the Plan. It is the position of EPEZ that those provisions of the Texas Constitution apply to the State of Texas or its political subdivisions, and that the EPEZ, being a Texas non-profit corporation as noted above, is not a political subdivision subject to those laws. Admittedly, the City is subject to those laws. On the other hand, EPEZ notes, the City is not making any investments under the Plan, but instead EPEZ is the entity making those investments. EPEZ requests your opinion as to whether these or other provisions of the Texas Constitution apply to the EPEZ and would therefore prevent its implementation of the Plan.

In addition, the EPEZ questions whether the Texas Public Funds Investment Act, Texas Government Code § 2256.001 et. seq. (the "Act") prohibits the EPEZ from making equity investments in private businesses under the Plan. The Act places limits upon investments by local governments, and does apply to the City. The Act's definition of "local government" in § 2256.002(7) of the Act includes "any profit corporation acting on behalf of any [municipality, county, etc.]" and § 2256.003 of the Act limits investments of "funds" by, among other things, a non-profit corporation. On its face, it may be argued that the EPEZ is acting on behalf of the City with respect to the Zone, and may be subject to the Act. On the other hand, the EPEZ is governed independently of the City by its own volunteer Board of Directors who are not subject to appointment or approval by the City. Further, § 2256.003 of the Act defines "funds" subject to the Act as public funds in the entity's custody not required to be deposited in the state treasury and which the entity has authority to invest. The Texas Attorney General has issued an opinion, DM-489 (1998), interpreting "public funds" as being those collected by a state or a local government under a general law. It is EPEZ's view that its federally granted funds would not be subject to the Act. Again, EPEZ does not have and does not ever expect to receive any state or local tax funds. Nevertheless, an issue remains as to whether the reasoning of this prior Attorney General's opinion would extend to the situation at hand. Accordingly, EPEZ requests that you render an opinion as to whether EPEZ funds are subject to the Act and whether EPEZ may use

such funds for purposes of equity investments under the Plan. If there are any restrictions on such use, in your opinion, please explain those as well.

EPEZ recognizes that your opinion would be limited to Texas law, and would not address any federal law issues relating to the Plan.

Respectfully submitted,


José Rodríguez
County Attorney

cc: Carmen Rodriguez, Chairperson, Board of Directors
Clyde Pine, Mounce, Green, Myers, Safi & Galatzan
Phyllis Rawley, Executive Director EPEZ
Rita Rodriguez, City Attorney, City of El Paso

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