

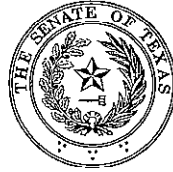
SENATE COMMITTEE ON INTERNATIONAL RELATIONS AND TRADE
79TH LEGISLATURE

SENATOR EDDIE LUCIO, JR.
Chair

September 6, 2006

Via Hand Delivery

The Honorable Greg Abbott
Office of the Attorney General
Attn: Nancy Fuller
Director, Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548



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SEP 06 2006

OPINION COMMITTEE

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RQ-0528-GA

FILE # ML-44981-06

I.D. # 44981

Re: Allowable Improvements Under Chapter 372 of the Texas Local Government Code

Dear General Abbott:

As requested in the attached letter from the City of Port Isabel, please accept this letter as a request pursuant to Texas Government Code Section 402.042 ("Request") for an opinion from your office for guidance on whether certain types of improvements may be funded from assessments levied pursuant to Subchapter A of Chapter 372 of the Texas Local Government Code ("PID Act") and Subchapter B of Chapter 372 (Subchapter B").

The PID Act allows a municipality to establish a public improvement district, levy and collect assessments for the district, and undertake an improvement project that confers a special benefit on a definable part of the municipality. TEX. LOC. GOV'T CODE ANN. § 372.010, 372.017, 372.003. (Vernon 2005).¹ Additionally, Subchapter B allows a home-rule municipality to create improvement districts, assess benefited property owners, and issue bonds to finance certain

¹ Section 372.003 lists the permissible types of public improvement projects:

- (1) landscaping;
- (2) erection of fountains, distinctive lighting, and signs;
- (3) acquiring, constructing, improving, widening, narrowing, closing, or rerouting of sidewalks or of streets, any other roadways, or their rights-of-way;
- (4) construction or improvement of pedestrian malls;
- (5) acquisition and installation of pieces of art;
- (6) acquisition, construction, or improvement of libraries;
- (7) acquisition, construction, or improvement of off-street parking facilities;
- (8) acquisition, construction, improvement, or rerouting of mass transportation facilities;
- (9) acquisition, construction, or improvement of water, wastewater, or drainage facilities or improvements;
- (10) the establishment or improvement of parks;
- (11) projects similar to those listed in Subdivisions (1)-(10);
- (12) acquisition, by purchase or otherwise, of real property in connection with an authorized improvement;
- (13) special supplemental services for improvement and promotion of the district, including services relating to advertising, promotion, health and sanitation, water and wastewater, public safety, security, business recruitment, development, recreation, and cultural enhancement; and
- (14) payment of expenses incurred in the establishment, administration, and operation of the district.

TEX. LOC. GOV'T CODE ANN. § 372.003 (b) (Vernon 2005).



types of projects.² Both the PID Act and Subchapter B are silent as to whether the improvements paid for by the assessments must be located on public property.

The City of Port Isabel, a home-rule municipality, is contemplating creating a public improvement district to finance improvements, including street paving, sidewalks, storm drainage water and sewer lines, street lights, a seawall and dredging and backfill. While most of the improvements will be installed on public property, the proposed seawall would be built on private property along a body of water. The City believes the seawall is a public necessity that will both protect the City's territory and prevent soil erosion from harming the body of water.

The question this Request desires to be answered is whether improvements allowed under the PID Act or Subchapter B must be located on public property, whether through fee ownership or through an easement. The PID Act provides that a city may undertake an improvement project if the city "finds that it promotes the interests of the municipality," and contains a broad list of allowable projects and a catchall that allows "projects similar to those listed." TEX. LOC. GOV'T CODE ANN. § 372.003 (Vernon 2005). Subchapter B specifically authorizes a city to "enclose...[a] body of water," and fill "or otherwise protect and improve the territory within the municipality." *Id.* § 372.041 (a). While the proposed seawall appears to be consistent with the authorized purposes of the PID Act and Subchapter B, does the fact that the seawall would be located on private property cause the project to be ineligible for assessment and financing under the PID Act or Subchapter B?

The primary issue related to the foregoing question is whether the Texas Constitution's prohibition against a city lending its credit or granting public money in aid of an individual encompasses improvements on private property paid for from assessments against the property. *See* TEX. CONST. art. III, § 52(a) ("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 aid of, or to any individual, association or corporation whatsoever"). While the seawall would benefit the private property owners on whose land the wall is located, each property owner would be assessed an amount equivalent to the benefit derived from the seawall, pursuant to the PID Act or Subchapter B. Relevant case law indicates that, if a city's grant of a private benefit is supported by sufficient consideration and the city finds in good faith that the expenditures serve a public purpose and retains sufficient control of the expenditures to ensure the public purpose is carried out, then they are not gratuitous payments in violation of the Texas Constitution. *Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002).

Additionally, a case with analogous facts to the situation in Port Isabel involving a city's purchase of right of way and funding to facilitate the relocation of private railroad crossings held that the city's expenditure of funds accomplished a public purpose, even though the private

² Section 372.041 lists the following types of improvement projects:

- (1) levying, straightening, widening, enclosing, or otherwise improving a river, creek, bayou, stream, other body of water, street, or alley; and
- (2) draining, grading, filling, and otherwise protecting and improving the territory within the municipality's limits.

TEX. LOC. GOV'T CODE ANN. § 372.041 (a) (Vernon 2005).

railroad company obtained a benefit. *Barrington v. Cokinos*, 338 S.W.2d 133, 140 (1960). The Texas Supreme Court explained that the primary purpose of Article XI, Section 3 is to deprive political subdivisions of the power to take stock in or make loans or donations to railroad companies. *Id.* Article XI, Section 3 does not, however, prohibit all business dealings with private corporations and associations. The court explained that municipal funds or credit may not be used simply to obtain for the community and its citizens the general benefits resulting from the operation of such a private enterprise, on the other hand, an expenditure for the direct accomplishment of a legitimate public and municipal purpose is not rendered unlawful by the fact that a privately owned business may be benefited thereby. *Id.*

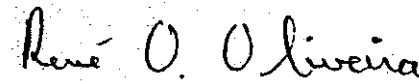
As in *Barrington*, the private property owners in Port Isabel may benefit from the construction of a seawall on their property. The accomplishment of the public and municipal purpose of protecting the body of water and protecting the City's territory, however, would avoid the constitutional prohibitions. Thus, assuming that: 1) the City in good faith finds that the costs for the seawall are for a public purpose; 2) any benefit to a property owner is paid for from assessments from that property owner; and 3) the City retains control to ensure the public purpose is carried out, either through agreements with property owners, easements from property owners or otherwise, does the mere fact that the seawall would be located on private property violate the constitutional prohibition against a city lending its credit to a private individual?

Thank you in advance for your consideration of these issues. Please contact me or my committee staff should you have any questions or need any additional information.

Sincerely,



Senator Eddie Lucio, Jr.
Chairman,
Senate Committee on International Relations
and Trade



Rep. René O. Oliveira
District 37

Enclosure

EL/ir



CITY OF PORT ISABEL

"An Equal Opportunity Employer"

305 East Maxam
Port Isabel, Texas 78578
(956) 943-2682
(956) 943-2029 Facsimilie

September 6, 2006

Honorable Senator Eddie Lucio
P.O. Box 12068
Austin, Texas 78711

**Re: Opinion Request Re: Allowable Improvements Under Chapter 372 of the Texas
Local Government Code**

Dear Senator Lucio,

The City of Port Isabel would appreciate if you would request an Attorney General's Opinion on behalf of the City. Attached is the draft letter to the Honorable Greg Abbott regarding "Allowable Improvement Under Chapter 372 of the Texas Local Government Code.

Thank you in advance for your consideration.

If you need any further information, call me at 956-943-2682.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Garcia", is written over the word "Sincerely,".

Roberto H. Garcia
City Manager

PFC/rg

Enclosure:

Cc: Mayor Patrick H. Marchan
City Commissioners