

BOWIE COUNTY CRIMINAL DISTRICT ATTORNEY

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MAR 29 2013

OPINION COMMITTEE

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FILE # ML-47243-13

I.D. # 47243

RQ-1116-GA

March 27, 2013

VIA U.S. Mail, Certified
Return Receipt Requested

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

ATTN: Opinion Committee

Dear General Abbott:

This office has been asked by Bowie County Judge Sterling Lacy to submit the enclosed letters, brief, and supporting documents for an opinion from your office.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry D. Rochelle", written over a circular stamp or seal.

Jerry D. Rochelle

CC: Judge Lacy, County Judge
Williams Tye, County Auditor



OFFICE OF THE BOWIE COUNTY JUDGE

Sterling E. Lacy

710 James Bowie Drive, New Boston, TX 75570
PH 903-628-6718 FAX 903-628-6719

March 21, 2013

Mr. Jerry Rochelle
Bowie County District Attorney
601 Main Street
Texarkana, TX 75501

RE: Attorney General's Opinion

Dear Mr. Rochelle,

Attached is a recommended request for an Attorney General's Opinion regarding some issues dealing with Bowie County's potential responsibilities for costs associated with the relocation of waterlines owned by TWU and member cities along the Hwy 82 Widening Project.

Our legal advisor, Carol Dalby, suggested we consult with our Bond Counsel, Tom Pollan about the waterline relocation cost issue. Mr. Pollan suggested the wording for the request, he also suggested that the opinion request be made by the County Auditor, William Tye. However, William checked with Judge Pesek, and he recommended that I ask you to request the opinion since William is inexperienced at this.

Would you be willing to file the request? Thanks you for considering this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sterling E. Lacy", is written over a printed name.

Sterling E. Lacy

Enclosures

SEL/rc

March ____, 2013

*VIA U.S. MAIL, CERTIFIED,
RETURN RECEIPT REQUESTED*

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Dear General Abbott:

I hereby request an opinion regarding the following:

Is Bowie County legally responsible to reimburse utilities for relocating a water line in Texas Department of Transportation right-of-way?

If Bowie County is legally responsible to reimburse utilities for relocating a water line in Texas Department of Transportation right-of-way, may it do so from bond proceeds?

If Bowie County cannot lawfully reimburse utilities from bond proceeds for relocating a water line in Texas Department of Transportation right-of-way, can Bowie County lawfully reimburse such utilities from its General Fund?

If Bowie County may lawfully reimburse utilities for relocating a water line in Texas Department of Transportation right-of-way, is the County responsible for reimbursing improvements or betterments to the water line?

Background

Bowie County (the "County") entered into a Pass-Through Agreement for the Payment of Pass-Through Tolls (the "Agreement") with the Texas Department of Transportation ("TxDOT") dated May 19, 2011 for the purpose of improving the state

highway system. A copy of the Agreement is attached as Exhibit A. The project is to improve U.S. Highway 82 between State Highway 98 and FM 1840. Under this agreement, the County is the "Developer" and is responsible for the design and construction of the project. The design has been approved by TxDOT, and the County will be reimbursed over a period of years by a formula that is based on the number of vehicles using the project. In order to finance the project, the County issued its \$34,910,000 Bowie County, Texas Pass-Through Toll Revenue and Unlimited Tax Bonds, Series 2012 (the "Bonds").

The cities of Annona, DeKalb, Hooks, Maud, New Boston, Texarkana, and Wake Village own a water line in varying ownership percentages, with Texarkana having the largest ownership percentage. A portion of the line, which is located wholly in TxDOT right-of-way along U.S. Highway 82, will have to be relocated to accommodate the improvements to U.S. Highway 82. These cities, through Texarkana, have asked the County to reimburse them for the cost of relocating the water line. They contend that the County is authorized to reimburse them for the relocation of the water line because the Agreement and the order authorizing the Bonds authorize reimbursement for utility relocations. To this end, the Texarkana City Council passed a resolution requesting that the utilities be reimbursed for the relocation of the water line. A copy of the resolution is attached as Exhibit B. The request for reimbursement was reported in two articles in the *Texarkana Gazette* (attached as Exhibits C and D).

Although the order authorizing the Bonds and the Agreement address relocation of utilities, only those relocations which are eligible under state or federal law could be reimbursed. Under the Agreement, the County is required to follow TxDOT construction requirements. For utility relocations, the Agreement contains the following provision:

8. Utilities

If the Project requires the adjustment, removal, or relocation of existing utilities, the Developer shall be responsible for determining the scope of utility work and notifying the appropriate utility company to schedule adjustments. The Developer shall be responsible for the adjustment, removal, or relocation of utility facilities ***in accordance with applicable state and federal law, regulations, rules, policies and procedures, including 43 TAC §21.31 et seq. (Utility Accommodation); and 23 CFR Chapter 1, Part 645.*** The Developer shall be responsible for all costs associated with additional adjustment,

removal, or relocation during the construction of the Project unless this work is provided by the owners of the utility facilities. Before a construction contract for the Project is let, a utility certification must be made available to the Department stating that all utilities needing to be adjusted for completion of the construction activity have been adjusted.

(Emphasis added)

The County's bond order states:

... the purpose of providing funds for (1) constructing, improving, extending, expanding, upgrading and/or developing of a non-toll project or facility for the U.S Highway 82 Corridor, U.S. Highway 82 between FM 1840 and State Highway 98, including right-of-way acquisition, utility relocation and other transportation related improvements, in the County, a part of the State highway system located in the County; and (2) paying the costs of issuing such Bonds.

The County has advised the cities that the cost of the relocation of the water line was not eligible for reimbursement from bond proceeds because the portion of the water line which will need to be relocated is wholly within the TxDOT right-of-way. No one is contesting that the line in question is located in the TxDOT right-of-way.

Although the order authorizing the Bonds and the Agreement address relocation of utilities, only those relocations which are eligible under state or federal law could be reimbursed. Under the Agreement, the County is required to follow TxDOT construction requirements. The water line is located in the TxDOT right-of-way and is there pursuant to a permit and not under any property interest. Under Texas law, TxDOT is required to permit utilities to use its right-of-way for utility lines if such lines will not interfere with the TxDOT use of the right-of-way. Generally, reimbursement to a utility for TxDOT's improvement of a highway will be limited to those situations where the utility had a prior ownership interest in the land where its utility line is located that was prior to the TxDOT use of the same property. In permitting utilities to use its right of way, TxDOT issues a permit to the utility. The permit that the utilities are operating under was originally issued to Lake Texarkana Water Supply Corporation and is attached as Exhibit E. That permit contains language that is similar to what is included in permits that TxDOT issues today. The permit contains the following statement:

It is expressly understood that the State Highway Department does not purport, hereby, to grant any right, claim, title, or easement in or upon this highway; and it is further understood that the State Highway Department may require the owner to relocate this line, subject to provisions of governing laws, by giving thirty (30) days written notice. It is expressly understood that the State Highway Department does not purport, hereby, to grant any right, claim, title, or easement in or upon this highway; and it is further understood that the State Highway Department may require the owner to relocate this line, subject to provisions of governing laws, by giving thirty (30) days written notice.

Brief

State law addresses when a utility relocation will be reimbursable or nonreimbursable. Reimbursable relocations occur when the utility has a property interest, such as an easement or fee ownership of where its line is located. If the line is in TxDOT right-of-way where the utility does not have an ownership interest and is located pursuant to a permit, such as the line in question, the relocation is not reimbursable. The Texas Transportation Code in Section 203.092(a) sets forth those instances which are reimbursable:

(a) A utility shall make a relocation of a utility facility at the expense of this state if relocation of the utility facility is required by improvement of:

(1) a highway in this state established by appropriate authority as part of the National System of Interstate and Defense Highways and the relocation is eligible for federal participation;

(2) any segment of the state highway system and the utility has a compensable property interest in the land occupied by the facility to be relocated; or

(3) a segment of the state highway system that was designated by the commission as a turnpike project or toll project before September 1, 2005.

The improvement of U.S. Highway 82 does not come within any of these provisions. U.S. Highway 82 is not a part of the National System of Interstate and Defense Highways, the utilities do not have a compensable property interest in the land where the line is located, and it has not been designated as a turnpike or toll project.

Section 203.0921 of the Transportation Code sets forth situations where TxDOT has the discretion to require a utility to relocate a line which is not eligible for reimbursement under Section 203.092 upon making certain findings. In such instances, TxDOT may advance funds for the relocation which the utility must repay with interest within five years. To date, TxDOT has not made those findings.

To assist utilities to understand the process of locating facilities in its right-of-way, TxDOT has published a "ROW Utility Manual."¹ The ROW Utility Manual provides in Appendix A Reimbursement Guidelines and Billing Procedures for Utility Adjustments:

Where the existing utility facilities are located on public property by statutory right, any right-of-way costs incurred will be ineligible for State participation.

and the related forms make it clear that if a utility requests to locate a line in TxDOT right-of-way, the utility will be responsible for relocating its lines. The utility will get a permit to locate its lines on TxDOT right-of-way, which will exclude reimbursement if the lines need to be relocated. That is how the line in question was placed in the TxDOT right-of-way.

The Agreement provides that the County is "responsible for the adjustment, removal, or relocation of utility facilities in accordance with applicable state and federal law, regulations, rules, policies and procedures, including 43 TAC §21.31 et seq. (Utility Accommodation)." The purpose of these regulations is set forth in 43 TAC §21.32:

§21.32. Purpose. This subchapter prescribes the minimum requirements for the accommodation, method, materials, and location for the installation, adjustment, and maintenance of public and private utilities within the right of way of the state highway system. These requirements are provided in the interests of the safety, protection, use, and future development of highways with due consideration given to the public service afforded by adequate and economical utility installations.

Throughout these regulations, TxDOT addresses its reimbursement responsibility for relocations pursuant to Section 203.292 of the Transportation Code. Reimbursement for utility relocations is addressed in 43 TAC §21.37(g) which provides in part:

¹ This manual may be accessed at http://onlinemanuals.txdot.gov/tsdotmanuals/utl/manual_notice.htm.

(g) Design and construction responsibility.

(1) The utility is responsible for the design of the installation, adjustment, or relocation of a utility facility.

(2) If a state highway improvement project requires the adjustment or relocation of a communication, water, or waste water facility that is 100 percent reimbursable by the department under the requirements of Transportation Code, § 203.092 or the adjustment or relocation of a facility of an electric distribution provider, such as an electric service corporation, regional electric cooperative, or municipal or joint-agency electric service provider, that is 100 percent reimbursable by the department under the requirements of Transportation Code, § 203.092, the utility by agreement with the executive director may authorize the department to procure the design of an adjustment or relocation and include the resulting plan in the construction contract for the adjustment or relocation.

The regulations also provide in 43 TAC §21.28:

§ 21.38. Construction and Maintenance

(a) General.

(1) A utility is responsible for the construction and maintenance of its utility facility, including installation, adjustment or relocation, replacement, expansion, and repair. Construction and maintenance must conform to the requirements of § 21.37 of this subchapter (relating to Design) and shall be accomplished in a manner and to a standard acceptable to the department.

(2) The provisions of this section apply to all utility types, unless otherwise specified in § 21.40 and § 21.41 of this subchapter (relating to Underground Utilities and Overhead Electric and Communication Lines, respectively).

(e) Utility work included in a highway construction contract.

(3) If the adjustment or relocation of the utility facility included in the construction contract is not 100 percent reimbursable by the department under the requirements of Transportation Code, § 203.092, the utility is

responsible for advancing or otherwise paying to the department the utility's prorata share under state law of the funds necessary for construction work related to the adjustment or relocation.

(8) If the adjustment or relocation of the utility facility is reimbursable by the department under the requirements of Transportation Code, § 203.092, the department will reimburse the utility for eligible expenses incurred in approving and inspecting the construction work.

Under the Agreement, the County would be responsible for reimbursing the utility if the costs are costs that TxDOT would have been responsible for reimbursing. Consequently, it would seem that any expenditure of Bond proceeds must be for one of the stated purposes. Although utility relocation is one of the stated purposes in the bond documents, it would appear that the utility relocation must be one that TxDOT would be responsible for paying before the County could expend bond proceeds for that purpose. Lochner, the engineering firm the County hired for the project, has prepared a list of items for which the County will need to expend Bond proceeds on the Project. A copy is attached as Exhibit F. It is significant the engineer has not allocated any amount in the column "Bowie County Direct Cost Associated with Utility Adjustment." The engineering firm determined that since all affected utilities pipes are located completely within existing TxDOT right-of-way, the relocations are not eligible for reimbursement. The utilities do not contest the location of the line or that it must be relocated for the project.

From the above provisions and the undisputed location of the water line, it appears that the County would not be responsible for reimbursing for the relocation because the relocation is not reimbursable under Section 203.092 of the Transportation Code. Consequently, since the reimbursement would not be part of the U.S. Highway 82 improvement project, the County would not be authorized to make the reimbursement from proceeds of the Bonds.

As the attached articles indicate, if the County is not legally required to reimburse, then the cities contend that the County could authorize the reimbursement for the relocation from the County's General Fund. If the County is not legally required to make the payment, I cannot find any authority that would permit the County to provide the funds. As such, it would appear that the Texas Constitution in Article III, sections 51 and 53, would prevent the County from providing funding or donating money or other resources to the cities which own the water line that needs to be relocated. Courts have determined that these constitutional provisions prohibit one governmental entity from providing funding for another governmental entity's functions. See, e.g., *San Antonio ISD v. Board of Trustees of San Antonio Elec. & Gas System*, 204 S.W.2d 22 (Tex. Civ. App. – San Antonio 1947, writ ref'd n.r.e.).

The Honorable Greg Abbott

March ____, 2013

Page 8

If the County is responsible to provide the cost of relocating the line to the cities, is the County required to pay for improvements or betterments? The current line is a 16-inch line that has been in place for approximately forty years. If the cities decide to replace the line with a larger line to better address current and future water needs, is the County responsible for paying for the larger line?

As the County would be prohibited from paying for or reimbursing the relocation by article III, sections 51 and 53 of the Texas Constitution, it would likewise be prohibited from paying for improvements to the water line.

Very truly yours,

William Tye
Bowie County Auditor

Enclosures