



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 19, 1994

To All Bond Counsel:

Re: Use of Nonprofit Corporations for Municipal Finance and
Other Matters

1. **Nonprofit Corporations as Issuers on behalf of Home Rule Cities.** As I believe is generally known, this office has for some time been concerned about the creation and use of nonprofit corporations, created under the general nonprofit corporation statutes of the State, to accomplish financings on behalf of or for the benefit of a home rule city. (It has been our position for some time that in the absence of specific statutory authority, school districts and similar political subdivisions, including counties, do not have the necessary powers to take the action needed to authorize financings by such a corporation. See Op. Tex. Att'y Gen. No. JM-1000 (1988).) The basis for this concern is primarily Anderson v. City of San Antonio, 67 S.W.2d 1036 (Tex. 1934) and Davis v. City of Taylor, 67 S.W.2d 1033 (Tex. 1934) regarding the application of Dillon's Rule to home rule charters. Additionally, there is Willman v. City of Corsicana, 213 S.W.2d 155, 160 (Tex. Civ. App. - Waco 1948) aff'd 216 S.W.2d 175 (Tex. 1949), which can be read to the effect that broad charter language granting general powers is insufficient authority, by itself, for financings and similar undertakings. The law in this area, including these cases, must be addressed by bond counsel before further financings by nonprofit corporations on behalf of home rule cities can be approved.

2. **Nonprofit Corporations as Issuers on behalf of Housing Authorities.** There are also unresolved legal questions regarding the use of nonprofit corporations to issue bonds on behalf of housing authorities. However, housing authorities created under Chapter 392, Tex. Local Gov't Code, are special purpose entities which have some grants of authority in addition to those given school districts and similar political subdivisions. Unlike the home rule city situation, we have found no specific legal authority addressing housing authorities in this context. We remain sufficiently concerned about these matters to believe that a

legislative solution is probably necessary. Because of the long-standing use of nonprofit corporations by several housing authorities, and our approval of such financings, we have determined that it is appropriate to continue to approve issues by nonprofit corporations on behalf of housing authorities until the Legislature has had an opportunity to address this area. However, absent other legal authority, in order for any housing authority to utilize a nonprofit corporation for financings after the next regular legislative session, there must be legislative action to clarify this area. If there is no legislative action to clarify the powers of a housing authority in this area, we will be unable to continue approving these financings, as we believe there is a reasonable doubt as to the authority of so doing. Other legal authority which may render legislative action unnecessary would be judicial action at the appellate level or the receipt of a favorable formal Attorney General opinion.

3. **Lease-Purchase by Home Rule Cities.** The same cases cited above raise questions regarding the ability of a home rule city to utilize the lease-purchase method of financing if such methodology is not specified in the city charter and is not otherwise authorized by the general statutes. For any such financings to be approved by this office (if, for example, the lease-purchase agreement is to be certificated), bond counsel must likewise address the law of home rule charter powers. (See the All Bond Counsel Letter of January 20, 1993 for a further discussion of lease-purchase financing and this office's position relating thereto.)

4. **Reimbursement of Expenditures Prior to Issuance.** In paragraph 7 of the September 18, 1992, All Bond Counsel Letter, we indicated our requirements with respect to reimbursement of expenditures for a project made before the issuance of the bonds or other obligations. At that time, we additionally stated that evidence of action by a governing body which satisfied federal tax law requirements would generally satisfy our requirements. Since then federal tax regulations have undergone some modification. We will continue to use the federal regulations as a guide, and will now follow the most current version. Thus, evidence that amounts included in an issue of bonds or other obligations for reimbursement purposes qualify for such purposes under the applicable federal regulations will suffice to show such amounts qualify under state law (generally, Tex. Rev. Civ. Stat. Ann. art. 717k-6 (Vernon Supp. 1994)).

5. **Texas Natural Resource Conservation Commission ("TNRCC") Approval for Navigation Districts.** It has come to our attention that certain navigation districts are covered by section 50.107, Tex. Water Code, requiring approval of tax supported bonds by the TNRCC. The effect of this could be to require the TNRCC to review

harbor projects and approve the issuance of bonds for such projects, which, we have been advised by staff of TNRCC, they are not set up to do. (Some districts created jointly under article XVI, section 59 and article III, section 52 of the Texas Constitution which have road powers face a similar problem. That is, their road projects and bonds may require TNRCC review and approval.) Based on conversations with TNRCC staff and others, it appears that it was not the legislative intent that these types of projects be covered by section 50.107. Thus, we have determined that section 50.107 will not be applied to navigation districts, or projects unrelated to TNRCC functions for joint authority districts, until the Legislature has an opportunity to address the situation in the next regular session. However, should the legislature fail to make any exceptions for such districts or projects, we will interpret that as legislative intent that the literal terms of the section are to be applied, and so will require TNRCC approval.

6. Fees for Financings under Sections 4A and 4B of Article 5190.6. Tex. Rev. Civ. Stat. Ann. Unfortunately, it appears that we have not been consistent in the fee charged for these types of financings. Sometimes issuers have been charged the sliding scale fee based on the size of the issue, and other times issuers have been charged the conduit or nonprofit corporation fee. We have determined that the appropriate fee is indeed the nonprofit corporation fee of \$1250 for a single series of such bonds. Multiple series are treated as set out in subsection (c) of section 6A of article 717k-6. Of course, no additional fee will be required of any issuer whose bonds have already been approved. We regret the confusion.

Very truly yours,



Jim Thomassen
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Chief, Public Finance Division