



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

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May 20, 1974

The Honorable Joe Resweber
County Attorney
Harris County Courthouse
Houston, Texas 77002

Opinion No. H- 310

Re: May Harris County Com-
missioners court constitutionally
issue revenue bonds under Clean
Air Financing Act?

Dear Mr. Resweber:

You have requested our opinion as to whether the Harris County Commissioner's Court, acting as the "governing body" of an "issuer" (as those terms are used by the Texas Clean Air Financing Act), may authorize issuance of "revenue" bonds to finance the acquisition or construction of an air control facility.

The Texas Clean Air Financing Act, newly enacted in 1973, is codified as Article 4477-5a, V. T. C. S. Generally, it complements the Texas Clean Air Act, Art. 4477-5, V. T. C. S., and provides a means by which local governmental units may finance the construction of air pollution control facilities by issuing tax-exempt bonds to be repaid or retired out of the revenues of the new facilities, or of certain public systems, and not out of tax revenues. See § 5 (h). Section 4 (a) of the Clean Air Financing Act reads:

"Sec. 4 (a). Each issuer is authorized to acquire, construct, and improve, or cause to be acquired, constructed, and improved, control facilities. The issuer is also authorized to acquire real property as deemed appropriate by the issuer for the control facilities. Such control facilities may be located upon property owned by the issuer or upon property of another person or persons. The issuer is authorized to enter into leases

or other contracts with persons whereby such persons shall use or acquire control facilities of the issuer. The issuer is authorized to sell such facilities to any person or persons including a person or persons using such facilities, such sale to be by installment payments or otherwise and upon such conditions as the issuer deems desirable."

The definition of "governing body," with reference to an issuer, expressly includes a commissioners court [§ 3(6)]. The term "issuer" expressly includes a county [§ 3(7)]. If a county is to be the issuer, the control facilities must be located wholly or partially within its boundaries [§ 4(d)].

Your request letter to us states:

"The peril upon which the Commissioners Court hesitates relates to whether or not this Act would violate Texas Constitutional Law inasmuch as it may be viewed as authorizing the granting of public credit in aid of an individual, association or corporation."

Article 11, § 3, of the Constitution, which has been a part of the Constitution of Texas since it was adopted in 1876, reads:

"No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not affect any obligation heretofore undertaken pursuant to law."

Article 3, § 52, of the Constitution presently reads:

"(a) 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 aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. "

This section, last amended in 1970, contains no express authorization to issue bonds for the construction, maintenance or operation of air pollution control facilities, but the absence of such a constitutional authorization for tax bonds is held not determinative of the power of a political subdivision to issue revenue bonds. Atkinson v. City of Dallas, 353 S. W. 2d 275 (Tex. Civ. App. --Dallas 1961, error ref'd, n. r. e.). Cf. Lower Colorado River Authority v. McGraw, 83 S. W. 2d 629 (Tex. 1935). The reason is that revenue bonds do not pledge to bondholders the full resources of government (the public credit) for their repayment. Only certain revenues, excluding taxes, are pledged to repay them, and the governmental issuer of the bonds has no liability if the pledged revenues prove insufficient.

Section 5 (h) of the Clean Air Financing Act specifies:

"All such bonds or notes shall be special obligations payable solely from the revenues pledged to their payment and shall not be considered general obligations of the governing body, an issuer, or the State of Texas. The holder of the bonds shall never have the right to demand payment from moneys derived by taxation or any other revenues of the issuer except those revenues pledged to the payment of the bonds or notes. "

You have not provided us particulars, so we cannot specifically answer in response to the Harris County plans as to whether those plans amend or would not constitute an improper lending of credit or an improper grant. Generally it can be said that when a public body properly issues revenue bonds to construct a revenue producing facility to be owned by it,

the operation of which is reasonably necessary or desirable for the health and welfare of its general constituency, the courts will ordinarily conclude that the public body's expenditure is for a proper public purpose and not an improper grant or an improper loan of credit to the users of the facility from which the revenue is derived, and this, even if some private corporation is incidentally benefited. See Brazos River Authority v. Carr, 405 S. W. 2d 689 (Tex. 1966); Atkinson v. City of Dallas, 353 S. W. 2d 275 (Tex. Civ. App. Dallas, 1961, error ref'd, n. r. e.).

We can advise, therefore, that an improper grant of public funds does not necessarily occur just because a public body accomplishes its purpose through the agency of a private person or organization. See Barrington v. Cokinos, 338 S. W. 2d 133 (Tex. 1960); State v. City of Austin, 331 S. W. 2d 737 (Tex. 1960). These cases hold that the State, where it exercises its police powers, has discretion to share the expenses where the public purpose is served and there is no net gain to the individual. And see, Brazos River Authority v. Carr, 405 S. W. 2d 689 (Tex. 1966).

In this area, the constitutional restrictions on "grants" of public money or things of value to individual or corporations and those restrictions on "lending the public credit" are analyzed by Texas courts in the same way. A "public benefit" is presumed to flow from the utilization of public funds or credit for a proper "public purpose." The existence of a proper public purpose in any given case must be measured by the specific plans and arrangement called for in such case. In each instance it is a mixed question of law and fact which can be ultimately and finally determined only by the courts, though much deference will be given to legislative expressions on the matter. See Davis v. City of Lubbock, 326 S. W. 2d 699 (Tex. 1959). Compare State ex rel Hammermill Paper Co. v. La Plante, 205 N. W. 2d 784 (Wis. 1973) with State v. City of York, 82 N. W. 2d 269 (Neb. 1957) and with Cosentino v. City of Omaha, 183 N. W. 2d 475 (Neb. 1971). The courts would undoubtedly give considerable weight to the fact that the Legislature has specifically provided that "the

holder of the bonds shall never have the right to demand payment from moneys derived by taxation or any other revenues of the issuer except those revenues pledged to the payment of the bonds or notes."

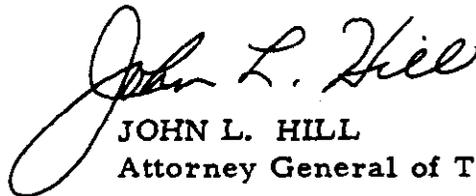
We are of the opinion that, generally, a commissioners court may issue revenue bonds under the Clean Air Financing Act, Art. 4477-5a, V. T. C. S. However, it is possible that the facts of a particular case will cause the issuing of such bonds to be unconstitutional. Travelers' Ins. Co. v. Marshall, 76 S. W. 2d 1007, 1010 (Tex. 1934).

In answer to your inquiry, therefore, we can only reply that, generally the Harris County Commissioners Court may legally and constitutionally authorize the issuance of revenue bonds to finance the acquisition or construction of an air control facility. However, not every arrangement made purportedly for that purpose would be legal or constitutional. The details of the written arrangement would control.

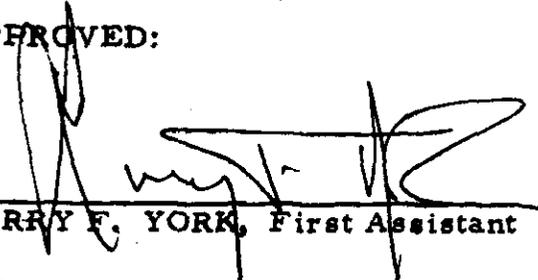
SUMMARY

Generally a commissioners court may issue revenue bonds under the Clean Air Financing Act, but whether a specific issue is valid will depend on the specific arrangements of each case. Much reliance will be placed on the legislative mandate that the bonds provide that their repayment be made solely from revenues of the issuers and not from monies derived from taxes.

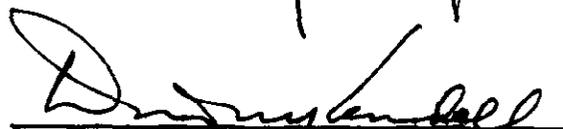
Very truly yours,


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