



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 30, 1994

Honorable Robert Earley  
Chair  
Committee on Energy Resources  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 94-078

Re: Whether a municipality may provide  
lighting on private streets (ID# 26393)

Dear Representative Early:

You have asked this office to consider whether the City of League City, Texas ("the city") may use public funds to pay for the lighting of private streets in the community of South Shore Harbour. You express particular interest in the question of whether this is a permissible expense in the light of article XI, section 3 of the Texas Constitution.

As we understand it, the city entered into private streets agreements with South Shore Harbour Development, Ltd. ("the developer"), which agreements were transferred to the South Shore Harbour Community Association, Inc. ("the homeowners' association"). Exhibit "A" of each of these agreements included, *inter alia*, conveyance to the city of "necessary non-exclusive easements and rights-of-way" for the provision of fire and police protection and other city services, an agreement that the developer (and, subsequently, the homeowners' association) would properly maintain the streets, and "that the developer shall make arrangements to be agreed to with the City regarding the maintenance of street lighting along the Private Streets."

After the transfer of the agreement to the homeowners' association, the city passed Ordinance No. 94-11, which evinced an intent to authorize the payment of the utility bills for the cost of lighting the private streets. The purposes articulated in the ordinance for such payments were "to provide substantially equal services to all citizens of the City" and "to light the City's police and fire fighting easements as well as public utility easements." Ordinance 94-11 further authorizes the city's mayor to seek an opinion from this office as to whether such payments comply with article XI, section 3 of the Texas Constitution. League City, Tex. Ordinance 94-11 (Feb. 10, 1994).

Article XI, section 3 forbids a city "to make any appropriation or donation to [any private corporation or association], or in anywise loan its credit." The principal end of the section is to prevent the use of public funds or credit for a private purpose. Attorney General Opinion JM-1229 (1990). In *Brazoria County v. Perry*, 537 S.W.2d 89 (Tex.

Civ. App.--Houston [1st Dist.] 1976, no writ), the court in discussing the parallel constitutional provision in article 3, section 52 articulated the appropriate general test:

The clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use. The Constitution does not, however, invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose.

*Id.* at 90-91.

The determination that a public purpose is being served by an expenditure of funds or an extension of credit rests in the first instance within the governmental entity's discretion, subject to judicial review. Attorney General Opinion JM-1229 at 6-7.

We note that the city has expressed two purposes for this expenditure. The first, "to provide substantially equal services to all citizens of the city," does not seem to us adequately to state a public purpose. It could, we would note, be argued that the paving of private as well as public streets could be described in such a fashion. Yet we think it clear that the city would have no power to do this. *Cf.* Attorney General Opinion DM-13 (1991). The mere desire to treat private property in substantially the same fashion as public property is not a public purpose. *Cf. Ex parte Conger*, 357 S.W.2d 740, 742 (Tex. 1962).

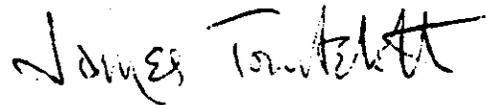
The second expressed purpose of the ordinance, "to light the city's police and fire fighting easements as well as public utility easements," presents a closer question. The fact that private persons or entities may benefit incidentally from an expenditure for a legitimate public purpose does not invalidate that expenditure. *Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex. 1960). The question here is a balancing question. Is the principal effect of this expenditure to light the roadway for ambulances and police cars, so as to make the residents of the private streets merely incidental beneficiaries of these expenditures for the purposes of a *Barrington v. Cokinos* analysis? Or is the principal effect to give the benefit of public funds to this private homeowners' association, with only a limited benefit flowing to the public? We cannot answer such questions in the opinion process, since they would require findings of fact as to such issues as, for example, how frequently the city had need to use its easements, and how regularly ambulances and police cars used the private streets.

Accordingly, we cannot say whether the proposed payments are permissible under article XI, section 3. A decision as to whether this expenditure is for a public purpose is, as we have noted, within the sound discretion of the city, subject to judicial review. In our view, it would be prudent for the city in exercising that discretion to consider the questions we have suggested here.

**S U M M A R Y**

Article XI, section 3 of the Texas Constitution requires that expenditures by a city be for a public purpose. The decision as to whether a public purpose is being served rests within the discretion of the city, subject to judicial review. The mere desire to treat private property in substantially the same fashion as public property is not a public purpose. Whether, in the particular case, an expenditure to light a city's right of way on private streets serves a public purpose and the owners of the streets are mere incidental beneficiaries of the expenditure requires factual determinations of a sort which cannot be addressed in the opinion process; it would however be prudent for the city in exercising its discretion in this matter to consider such questions.

Yours very truly,

A handwritten signature in black ink that reads "James Tourtelott". The signature is written in a cursive style with a long horizontal stroke at the end.

**James Tourtelott**  
**Assistant Attorney General**  
**Opinion Committee**