



# ELLIS COUNTY AND DISTRICT ATTORNEY

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The Honorable Dan Morales  
Attorney General Of Texas  
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FILE # ML-39901-97  
I.D.# 39901 REC...  
NOV 10, 1997

Re: Request for Attorney General's Opinion

Opinion Comm...  
RD-1031

Dear Attorney General Morales:

The following requested Attorney General's opinion is based on these facts:

Ellis County, Texas was the geographic site of the proposed Superconducting Super Collider (SSC) project. The land on which the SSC was located was purchased by the State of Texas. A portion of that land was conveyed by the State of Texas to the United States government for use by the United States Energy Department. Subsequent to the conveyance to the United States government by the State of Texas the SSC project was abandoned.

Following abandonment of the SSC project, claims were made against the United States by various parties including the County of Ellis and the Waxahachie Independent School District. In late 1996 a settlement was entered into between the United States, acting through the Department of Energy, and both Ellis County and the Waxahachie Independent School District. On October 30, 1996, as a part of said settlement, a portion of the real property which had been a part of the real property purchased by the State of Texas and conveyed by Texas to the United States was transferred by the United States to Ellis County, Texas and, consistent with the settlement agreement, a portion of said property was transferred by Ellis County to the Waxahachie Independent School District.

The 75th Legislature of the State of Texas passed Senate Bill 728, a portion of which amended the Natural Resources Code of the State of Texas so that effective January 1, 1998, Subtitle C, Subchapter G, Chapter 31, Natural Resources Code reads as follows:

"Sec. 31.309. PREFERENCE RIGHT TO PURCHASE CERTAIN LAND.  
(a) A person or the person's heirs who conveyed land to the state for use by the superconducting super

collider research facility has a preference right to purchase the same tract of land previously conveyed before the tract is offered for sale by the state to any other person."

**Question:**

Since a county is a public entity with a separate status from the state for purposes of owning real property, is Texas Natural Resources Code Section 31.309 inapplicable to former SSC real property being offered for sale by the county?

**Answer: Yes**

The question posed here is one unique to Ellis County. Because Ellis County is actively seeking to market the real property mentioned hereinabove and title company underwriters have indicated an unwillingness to provide title insurance for such transaction without either a declaratory judgment or an attorney general opinion. Clarification of the new statute is sought by the herein requested Attorney General's Opinion.

In this case Ellis County, Texas is holding title to real property by fee simple and a law is passed which negatively affects that title. A logical analysis of the facts and their application to several areas of law need to be considered.

**Plain Language Interpretation**

First, the very words of the statute say "a preference right to purchase the same tract of land previously conveyed before **the tract is offered for sale by the state** to any other person" (emphasis added). The tract in question is not offered by the state. It is offered for sale by Ellis County and therefore Ellis County is not covered by the statute.

Attached hereto is a "House Bill Analysis" which gives some indication of legislative intent in passing this statute. The purpose section of the house bill analysis of the legislation states the following:

"C.S.S.B. 728 authorizes the commissioner of the General Land Office (GLO) to deal with the status, control over, and disposition of state property relating to the superconducting super collider research facility. Additionally, this bill transfers authority of the Texas National Research Laboratory Commission relating to the control, marketing, and disposing of

real property and interests in real property relating to the superconducting super collider research facility to GLO."

Nothing in the purpose analysis or in the remainder of the body of the legislative analysis document gives any indication of any intent of the legislature to burden any land not owned by the state of Texas with any obligations. Further Sec. 2 of C.S.S.B. 728 explaining Sec. 31.307 of the Natural Resources Code recognizes the distinction between the "state" and a "county" in connection with state dedication of roads to Ellis County.

### **County's Quiet Possession**

Second, §270.001 of the Local Government Code states in part the following:

"A deed, grant, or conveyance that is made, is acknowledged or proven, and is recorded as other deeds of conveyance to a county,.....vests in the county the right, title, interest, and estate that the grantor had in the property at the time the instrument was executed and that the grantor intended to convey."

This provision of the Local Government Code allows counties to own property. There appears to be some language to the contrary in *Robbins v. Limestone County* (1925) 268 S.W. 915 (919), but that case is distinguishable. The *Robbins* case primarily involved the relationship "of the state of Texas to the public roads in the state and in the counties thereof-the title and ownership of the public roads" and states as follows:

"Where not restricted by the Constitution, the Legislature has full control of the property held by a county as an agency of the state, and may exercise dominion and control over it without the consent of the county, and without compensating the county for it."

This statement is distinguishable from our question because the substance of the *Robbins* case was dealing with an issue that is the most basic of governmental functions, that of providing public roads for the purpose of interstate and intrastate commerce. In our question involving the private, peaceful, and undisturbed ownership of property, there is no fundamental governmental function or public interest.

Further, in Section 9.1 Texas Practice regarding the ownership of property by counties, Brooks makes the following statements:

"There has never been any serious question

regarding a county's capability of possessing title to real or personal property. To a large extent such authority is just implied."

"The implied authority on the part of counties to hold property is derived from the county's status as a legal entity, in addition to the various statutes regulating the manner in which property is sold or otherwise disposed of (from which one could infer that there existed authority to take title in the first instance)."

"A county may, under certain circumstances, come into possession of real property without any present intention or plan to put it to public use."

"[o]ther opinions have given considerable latitude to counties in their acquisition of property by essentially putting them on the same footing as private parties in the conveyance and acquisition of real estate."

#### **Wrongful Taking**

Third, the taking of property from private ownership for public use by the state without just compensation is prohibited from the Magna Carta through the 5th Amendment of the United States Constitution and the Texas Constitution Art. 1, Sec 17. No compensation has been offered to Ellis County for negatively affecting title to property held by Ellis County. Also, while the power of the sovereign state over the property of that state is basic and fundamental, the "taking" here, whether it be direct or indirect by passage of this new law, is not for a public use and does not meet the test of *Leathers v. Craig*, Civ. App., 228 S.W. 995 (1921) which defined a public use as one "which concerns the whole community in which it exists, as contradistinguished from a particular individual or a number of individuals." In *Saunders v. Titus County*, Ct. of App., 847 S.W. 2d 424 (p. 428) in an eminent domain case in reference to the public use question, the Texarkana court states the following:

"We recognize that in some instances public use has been broadly construed. In *Atwood*, 271 S.W.2d 137, the court states that one of the tests of a public use within the meaning of the constitutional provision prohibiting the taking of private property for other than public use is whether the purposes for which the land is acquired are reasonably essential to the successful operation of the governmental entity."

No public use is benefited by the statute we are examining.

Because the public use definition is not met, the statute in question is therefore unconstitutional under the federal and the state constitutions in its application to Ellis County, Texas.

#### **Retroactive Effect**

Fourth, Blacks Law Dictionary defines a retroactive statute as "a statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights". It defines "retrospective law" in part as "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." It further defines an "ex post facto" law as "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relation of such fact or deed". An extract from *Bay v. Gage*, 36 Barb., N.Y., 447 is cited in Blacks Law Dictionary to aid in the explanation of ex post facto law. The extracted quote states, "retrospective laws which do not impair the obligation of contracts, or affect vested rights, or partake of the character of ex post facto laws, are not prohibited by the constitution". The contrary of that statement would also be true. By passage of this retroactive, retrospective law, clearly vested rights of Ellis County, Texas which existed prior to the passage of the statute in question were affected. This negative effect makes this law an ex post facto law prohibited under U.S. Constitution article 1 Section 10 unless by interpretation this law is determined to apply to state owned property only as the state legislature may impose burdens on its own property if it so chooses.

#### **Free To Own**

Fifth, counties are not part of the "state" as the term is used in the statute in question. In Section 1.4 on page 15 of volume 35 of Texas Practice, David B. Brooks writes the following:

"The characterization of a county as a separate legal entity is important only to determine the county's scope and quality of authority in addition to its liability. By whatever name, a county should be considered a sub-part of the state, although a separate legal entity which can sue and hold property, which is authorized to act for and on behalf of the state."  
(emphasis added)

Section 71.001 of the Local Government Code states that "a county is a corporate and political body." Brooks further states in

section 1.4 on page 15 of Volume 35 of Texas Practice, in reference to a county being "a corporate and political body" that "all this really means is that a county is a public entity with separate status, which permits it to hold property, sue, and contract." (emphasis added) Brooks continues his characterization of counties as having dual roles. One role is as an agent of the state for state purposes and as "a local government pursuing strictly local interests". In the question before us the ownership by Ellis County of the real property in question was strictly a local interest. No state interest or purpose of the State of Texas existed in the ownership of the real property by Ellis County.

The State of Texas has been scrupulously careful that counties are responsible for their own indebtedness and liability. Absent an overriding public interest, since a county is liable for its own debts, it must and should be permitted to own, possess, and hold property, as is provided for in the Local Government Code, to pay such debts that exist or may exist in the future.

#### Conclusion

Ellis County has the legal right to the undisturbed ownership and possession of real property especially when such property is not held for a fundamental public purpose like a public roadway. Whether by interpretation of the language of Sec. 31.309 of the Natural Resources Code or by the retroactive and therefore unconstitutional effect of said statute, the land owned by Ellis County should not be encumbered by this new statute.

Very truly yours,



Joe F. Grubbs

cc Al Cornelius, Ellis County Judge  
Judy Wallace, Trinity Abstract and Title Co.  
David Montgomery, Superintendent, Waxahachie Ind. Schools