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COMMITTEE ON COUNTY AFFAIRS

Texas House of Representatives

April 21, 2008

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

RECEIVED

FILE # ML-45648-08

I.D. # 45648

APR 21 2008

OPINION COMMITTEE

Re: Attorney General Opinion

RQ-0702-GA

Dear General Abbott:

We are requesting your opinion on the scope of the powers of the Cedar Bayou Navigation District (the "District"), including those pertaining to permitting and/or regulating of structures on and near Cedar Bayou to the extent that the same may affect water transportation activities within the District. The District, while primarily within Chambers County, has its western boundary within Harris County and is, in part, located within the incorporated limits of the City of Baytown. Since its inception, the main focus of the District has been to act as the local sponsor of a dredging project to improve Cedar Bayou. In furtherance thereof, it has secured a Feasibility Report and Environmental Impact Statement, as required by federal law, which were approved by the Assistant Secretary of the Army in July of 2006.

Recently, a planned container-on-barge facility¹ within the territory of the District on the shore of Cedar Bayou is being considered by property owners along the Cedar Bayou. While this commercial barge development is not a part of District's dredging project, it negatively affects such project as well as the health, safety and general welfare of property owners, residents and the general public. It is the firm belief of some members of the District that the development of the container-on-barge facility could have devastating impacts on the bayou also, as the proposed project will require considerable dredging and filling of coastal wetlands together with the destruction of tidal mud flats and other unique environmental resources. The construction and operation of the proposed barge terminal will constantly disturb the benthic zone of Cedar Bayou causing suspension of any pollutants which are currently settled and generally considered safe when undisturbed. Suspension of these pollutants may create a potential health hazard to those entering and using the bayou for the contact recreation activities that are so popular in the immediate vicinity of the proposed development.² Besides these vast environmental concerns and

¹ The property was initially permitted in 1980 as a private boat slip under Corps Permit No. 14044. In 1982, the permit was modified to allow additional dredging to expand this facility. That permit (No. 14044-01) expired in 1985 without any facility expansion or additional dredging. In 2004, the property owner applied to the Army Corps of Engineers (Corps) for an extension of the expired permit and another increase in the amount of dredging to expand this facility to a commercial barge operation. In a letter dated January 26, 2005, the TCEQ issued a Section 401 certification letter to the owner, provided he comply with a condition that effluent from the dredging activity not exceed 300 mg/l total suspended solids ("TSS"). Incredibly, the Corps re-issued the permit (Permit No. 14044-02) in 2005 with little additional review or consideration of the harmful effects to the general public and the water quality of Cedar Bayou. This permit remains in place to date although no dredging activities have been undertaken.

² It is important to note that Cedar Bayou is currently identified as an "impaired water" in the Texas Water Quality Inventory conducted pursuant to Section 303(d) of the Clean Water Act ("CWA"). Cedar Bayou (Seg. ID 0901) was

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deleterious effects to the water quality of Cedar Bayou, the proposed development creates potential navigation and life-safety hazards because the proposed development is directly across Cedar Bayou from a heavily-utilized municipal water access park for contact water recreation. Due to these concerns, it is desired by some of the members of the District to permit and regulate structures on and near Cedar Bayou within the District's boundaries in efforts to address these matters. Prior to promulgation and enforcement of such regulations, the District seeks your interpretation of its powers with regard to the same in order that the District may, without trepidation, move forward with accomplishing its constitutional and statutory purposes.

The District, like other navigation districts, is "subject to several layers of laws." Tex. Atty Gen. Op. No. JC-0354 (2001). First is the constitutional provision found in Article XVI, Section 59 of the Texas Constitution, which authorized the legislature to create the District "with the authority to exercise such rights, privileges and functions . . . [to conserve and reclaim natural resources] as may be conferred by law." Tex. Const. art XVI, §59(a)(b). Next, pursuant to the Constitution, the legislature in 1997 adopted specific enabling laws creating the Chambers County-Cedar Bayou Navigation District (now the Cedar Bayou Navigation District) (the "Act") to:

- promote, develop, expend, encourage and maintain . . . the public welfare;
- promote the health, safety and general welfare of property owners, residents . . . in the district and the general public;
- promote improvement of rivers, bays, creeks, streams and canals to permit or to aid navigation and commerce;
- accomplish the public purposes set out in Section 59, Article XVI, Texas Constitution;
- [benefit] all of the land and other property included within the boundaries of the district . . . by services to be provided by the district; and
- to serve a public use and benefit.

Act of May 19, 1997, 75th Leg., R.S., ch. 589 §1(c), (d), (e). The Act enumerates general powers of the District, including, but not limited to the following:

- the rights, powers, privileges, and authority conferred by the general law of th[e] state applicable to districts created under Chapters 60, 62, and 63, Water Code; and
- the rights, powers, privileges, and authority granted to districts by Subchapters E and M, Chapter 63, Water Code, and Section 61.116, Water Code.

Id. at §6. The Legislature expanded these powers in 2007 to expressly authorize the District to regulate not only activities on the water such as piers and docks but also land, roads and other structures and facilities related to commerce and navigation. These expanded powers include the following:

- develop navigation and improve bayous, bays, creeks, and streams inside or adjacent to the district;
- construct and maintain harbors, basins, and waterways to permit or aid navigation; and

first listed as impaired in 2002 for the presence of dioxins in edible tissues of aquatic organisms. It was additionally listed as impaired for the presence of bacteria in the 2006 inventory. More recently, Cedar Bayou was identified in the December 21, 2007, inventory as impaired for the presence of PCBs in edible tissue of aquatic organisms. The TCEQ is in the process of developing Total Maximum Daily Loads ("TMDLs") for Cedar Bayou to address these contaminants.

- purchase or otherwise acquire, establish, construct, own, maintain, operate, develop, and regulate wharves, piers, docks, fleeting areas, land, roadways, and other structures and facilities incident to or accommodating of commerce or navigation.

Act of June 15, 2007, 80th Leg., R.S., ch. 1365, §4 (*emphasis added*). Those powers enumerated in the state law referenced hereinabove include, but are not limited to:

- “absolute control over channels or other waterways within the corporate limits of the district”; Tex. Water Code Ann. §60.043 (Vernon 1971);
- general rule-making authority; *Id.* at §§ 60.071, 60.072.;
- the improvement, preservation and conservation of inland and coastal water for navigation;
- other purposes necessary or incidental to the navigation of inland and coastal water or in aid of these purposes. *Id.* at §§ 62.101; 63.152.;
- any purpose stated in Article XVI, Section 59, of the Texas Constitution necessary or incidental to the navigation of inland and costal water; *Id.*;
- regulate land, waterways, improvements, facilities or aids incident to or necessary in the proper operation and development of ports and waterways in the districts, including wharves, docks . . . commercial and industrial buildings. . . and all appurtenances; *Id.*; and
- exercise of all powers relating to regulation of wharfage and facilities connected with waterways and ports inside the district to the fullest extent consistent with the Texas Constitution. *Id.*

Although the District “has only those powers that are expressly delegated to it by statute or that are clearly implied from its express powers,” the Texas Attorney General has taken a rather expansive view of the powers of a negation district. *See* Tex. Att’y Gen. Op. No. JC-0202 (2000) at 2 (citing *Tri-City Fresh Water Supply Dist. No. 2 v. Mann*, 142 S.W.2d 945, 946 (Tex. 1940)); Tex. Att’y Gen. Op. No. JC-0354 (2001). In 2001, the Texas Attorney General determined that Port of Port Arthur Navigation District could adopt a policy concerning the number of times a contract may be renewed even when no statutory authority existed which permitted or prohibited the adoption of such a policy. Tex. Att’y Gen. Op. No. JC-0354 (2001). The instant case is much clearer in that the above-referenced constitutional and statutory authority expressly allow and/or clearly imply that the District may enact legislation pertaining to permitting and/or regulating of structures on and near Cedar Bayou to the extent that the same may affect water transportation activities within the District and/or to further the purposes of the District.

We ask your confirmation that the Cedar Bayou Navigation District under the broad powers granted to it by the legislature, the constitution, and the laws of this state may proceed with enacting reasonable regulations pertaining to permitting and/or regulating of structures on and near Cedar Bayou within the District’s boundaries to the extent that the same (i) may affect water transportation activities within the District; (ii) are incident to or accommodating of commerce or navigation; and/or (iii) are incident to or necessary in the proper operation and development of ports and waterways.

Thank you for your prompt consideration of this request. Please let us know if you have any questions or require additional information.

Respectfully,



Rep. Wayne Smith
State Representative District 128

Respectfully,



Sen. Tommy Williams
Texas State Senator District 4



WAYNE SMITH
HOUSE OF REPRESENTATIVES
DISTRICT 128

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April 21, 2008

The Honorable Greg Abbott
Texas Attorney General
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Dear General Abbott,

We the undersigned, author and sponsor respectively of House Bill 3158 passed during the 80th regular Legislative Session, hereby submit this letter of legislative intent in addition to the Attorney General request for opinion transmitted herewith.

HB 3158 passed the House of Representatives 133 Yeas, 0 Nays and the Texas Senate 31 Yeas, 0 Nays. The purpose of the legislation is as follows:

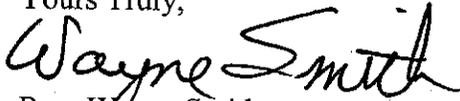
1. Rename the Chambers Cedar Bayou Navigation District to the Cedar Bayou Navigation District
2. Add two (2) additional board members to the Board of Directors so that the Board will consist of seven (7) members in lieu of the previous five (5)
3. The two (2) new Board members would be selected by the Mayor and City Council of the City of Baytown respectively. The City limits of the City extends to both sides of Cedar Bayou and therefore the citizens of the city reside in both Harris and Chambers County.
4. Give additional powers and regulatory authority to the Cedar Bayou Navigation District to empower the District to develop comprehensive authority in the development of the Bayou thus allowing all stakeholders (public and private) an opportunity to voice their opinion and be involved in the activities on the Bayou.

5. Authorize the district to develop navigation and improve bayous, bays, creeks, and streams inside or adjacent to the district; construct and maintain harbors, basins, and waterways to permit or aid navigation; and purchase or otherwise acquire, establish, construct, own, maintain, operate, develop, and regulate wharves, piers, docks, fleeting areas, land, roadways, and other structures and facilities incident to or accommodating of commerce or navigation.

All of these changes were intended to benefit the stakeholders involved in the development of the bayou. However, one of the most important changes from our perspective was made in SECTION 4 of the bill which amends Section 6, Chapter 589, Acts of the 75th Legislature, Regular Session, 1997, by adding Subsections (a-1). Although we thought this change was very clear, some people are claiming that the Cedar Bayou Navigation District still has limited powers with no regulatory control and can only engage in dredging activities. This confusion has dramatically hindered any progress concerning the development of any activities along the bayou.

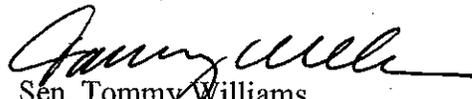
Your prompt attention would be appreciated so that the Board can proceed with its statutory charges and if any unintended consequences are discovered, proper legislation to clarify the issue can be proposed for introduction in the 81st legislature.

Yours Truly,



Rep. Wayne Smith
Author

Yours Truly,



Sen. Tommy Williams
Sponsor