



Office of the Attorney General
State of Texas

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December 16, 1996

The Honorable Gonzalo Barrientos
Chair, Committee of the Whole on Legislative
and Congressional Redistricting
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 96-138

Re: Municipality's authority under the Tax
Increment Financing Act, Tax Code chapter 311,
to condemn property and implement a
redevelopment plan (RQ-896)

Dear Senator Barrientos:

On behalf of Senator Mario Gallegos, you ask whether a city is authorized by section 311.008(a) of the Tax Code to delay condemning property in a reinvestment zone needed to implement a redevelopment plan that the city has approved "through an agreement with a third party." Additionally, you ask whether such section authorizes a city to condemn all property in the reinvestment zone as a group or must each parcel be condemned in a separate proceeding.

The Tax Increment Financing Act, chapter 311 of the Tax Code (the "act"), authorizes a municipality to designate by ordinance an area within its jurisdiction as a reinvestment zone ("zone") to promote its development or redevelopment after complying with certain procedures including preparation of a tentative plan for developing the area. Tax Code § 311.003. To qualify for the designation, an area must substantially arrest growth of the municipality, retard provision of housing accommodations or constitute an economic or social liability, *id.* § 311.005(a)(1), (2), be in or immediately adjacent to a federally assisted new community,¹ *id.* § 311.005(a)(3), or be described in a petition submitted by property owners in the area requesting such designation, *id.* § 311.005(a)(5). In the ordinance designating the zone, the municipality must, among other things, create a board of directors (the "board") to administer and establish a tax increment fund² for the zone. *Id.* § 311.004. The board is required to prepare and adopt a project plan and a financing plan for the zone and submit them to the governing body of the municipality for its approval. *Id.* § 311.010. The municipality may

¹A federally assisted new community is a "federally assisted area that has received or will receive assistance in the form of loan guarantees under title X of the National Housing Act, if a portion of the federally assisted area has received grants under section 107(a)(1) of the Housing and Community Development Act of 1974." Tax Code § 311.005(b) (footnotes omitted).

²The tax increment fund includes all or a portion of the "tax increment" deposited by each taxing unit that taxes real property contained in the reinvestment zone. Tax Code § 311.013. Such "tax increment" is the amount of tax levied by the taxing unit on the difference between the appraised value of property in the zone for that year minus the appraised value for the zone in the year in which it was established. *Id.* § 311.012. The fund may also include revenues derived from the sale of tax increment bonds and notes or property or other sources. *Id.* § 311.014.

pay the costs of improvements in the zone with revenues deposited in the tax increment fund, including proceeds of bonds or notes issued for such a purpose. *Id.* § 311.014.

Section 311.008 of the act sets forth the powers of a municipality and provides, in pertinent part, as follows:

(a) A municipality *may* exercise any power *necessary and convenient* to carry out this chapter, including the power to:

(1) cause project plans to be prepared, approve and implement the plans, and otherwise achieve the purposes of the plan;

(2) *acquire real property by purchase, condemnation, or other means* to implement project plans and sell that property on the terms and conditions and in the manner it considers advisable;

(3) enter into agreements, including agreements with bondholders, determined by the governing body of the municipality to be necessary or convenient to implement project plans and achieve their purposes . . . ; and

(4) consistent with the project plan for the zone:

(A) acquire blighted, deteriorated . . . property in a blighted area . . . ; or

(B) acquire, construct, reconstruct, or install public works, facilities, or sites or other public improvements [Emphasis added.]

You ask whether the use of the word “may” in section 311.008(a) gives a city the discretion to delay “implementing a plan which it has approved through an agreement with a third party, or is the city obligated to use its powers by virtue of the agreement itself.”

It is our view that section 311.008(a) vests discretion in a city to exercise the powers listed, including the power to acquire property through condemnation proceedings, to implement a redevelopment plan.³ Subsection (a) states that a municipality *may* exercise the powers enumerated.

³Section 311.008(a)(2) authorizes a municipality to acquire property by condemnation to implement a project plan and sell that property as it considers advisable. You do not ask and we do not consider whether condemnation of property for sale to a private person constitutes “public use.” See Tex. Const. art. I, § 17; *infra* note 5. But see *Housing Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940) (“The question of what is a public use is a question for the determination of the courts; however, where the legislature has declared a certain thing to be for a public use, such (continued...)”).

Although the word "may" is sometimes construed as "shall," its primary and ordinary meaning is a word of permission and not of command. *San Angelo Nat'l Bank v. Fitzpatrick*, 30 S.W. 1053, 1054 (Tex. 1895). It will not be treated as a word of command unless there is something in the context or subject of an act to indicate a legislative intent to employ it in that sense. *San Angelo*, 30 S.W. at 1054. Neither the context nor subject of the act indicates such an intent. Subsection (a) in fact states that such powers may be exercised *as necessary and convenient* to carry out the purposes of the act; more specifically, subsection (a)(2) provides that a city is authorized to acquire real property by *purchase, condemnation, or other means* to carry out such purposes, further indicating the legislature's intent to vest discretion in the city to exercise the power as well as the mode. The purpose of the act is to "aid cities and towns in financing public improvements in blighted or underdeveloped areas." *City of El Paso v. El Paso Community College Dist.*, 729 S.W.2d 296, 296 (Tex. 1986). Thus the act grants a city the discretion to exercise the powers listed to effectuate this purpose but does not require it to do so.

Notwithstanding such discretion, your question suggests that the city has contractually bound itself to begin proceedings to condemn property in the zone and implement a redevelopment plan. We have not been provided with any ordinances or other documents evidencing such agreement nor any information with respect to its terms. We do not know whether the city has attempted to bind itself to proceed to condemn property in the zone, but assuming that to be the case, this office does not construe ordinances or contracts in the opinions process. Thus, we could not advise you whether the city could delay commencing condemnation proceedings and implementing the plan adopted under such contract. As a cautionary note, however, we question whether the city can attempt to bind itself to condemn property. Although a contract may, as a general matter, be as binding on a municipal corporation as an individual, a municipal corporation cannot bind itself by contract or otherwise so as to restrict the free exercise of its governmental functions and powers. *See generally* 52 TEX. JUR. 3D *Municipalities* § 354 (1987). The power to condemn private property for a public purpose involves the exercise of such governmental function and power.⁴ *See* 32 TEX. JUR. 3D *Eminent Domain* §§ 1, 5 (1984).

You next ask whether section 311.008(a)(2) authorizes a city to condemn all the property in a zone as a group or whether individual condemnation proceedings must be conducted for each individual parcel. We assume from your question that various parcels are owned by different

³(...continued)

declaration of the legislature must be given weight by the courts.")

⁴We note that there are Texas cases that indicate that although a city may abandon public improvement projects at any time such abandonment may constitute a breach of certain types of contracts entered into for the project. *See Superior Incinerator Co. v. Tompkins*, 59 S.W.2d 102, 103 (Tex. Comm'n App. 1933, judgm't adopted) (contract for construction of an incinerator plant); *Breckenridge v. Stoker*, 264 S.W.2d 511, 517 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.) (contract to extend water and sewer mains). In such cases, the abandonment may subject a municipality to liability for damages sustained by the other contracting party provided that the latter can establish that the contract was made in accordance with law. *Superior Incinerator*, 59 S.W.2d at 103; *Stoker*, 264 S.W.2d at 518. Given its power to abandon public improvements at any time, a city cannot be compelled, however, to perform such contract. *Superior Incinerator*, 59 S.W.2d at 104; *Stoker*, 264 S.W.2d at 517-18.

individuals and the question presented is whether the separate owners of the separate parcels of land may be joined in a single proceeding. Section 311.008(a)(2) neither authorizes nor prohibits such joinder and is, in fact, silent as to any procedures to be followed in condemnation proceedings.⁵ In such case, we look to the procedures set forth in the general condemnation statute,⁶ sections 21.001 through 21.065 of the Property Code. See Prop. Code § 21.011 (in all cases, exercise of eminent domain authority is governed by Prop. Code §§ 21.012 - .016); 32 TEX. JUR. 3D *Eminent Domain* § 178 (1984). The general statutory procedures do not specifically provide for nor prohibit such joinder either. See generally Prop. Code §§ 21.001 - .016, .012 (petition must describe property to be condemned and name owner of property if known); 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.09[1] (3d ed. 1996).

Notwithstanding the lack of express statutory authorization, under certain circumstances Texas courts have allowed joinder of separate owners of separate and distinct tracts of land in a single condemnation proceeding. See *Houston v. Culmore*, 278 S.W.2d 825 (Tex. 1955); *Houston v. North Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786 (Tex. 1936); *Davidson v. Texas & N. O. R. Co.*, 67 S.W. 1093 (Tex. Civ. App. 1902); see also 6 SACKMAN, *supra* §§ 24.09, 26.1132. Additionally, in a 1939 opinion, this office concluded "that in Texas a joinder, in a single condemnation proceeding, of separate owners of separate and distinct tracts of land is permissible." Attorney General Opinion O-221 (1939) at 5. Such a procedure, however, may be permissible only in limited circumstances. In *Houston v. Culmore*, the court stated that:

The controlling question for decision is whether or not irreconcilable conflicts exist in the titles, boundaries, and locations of the various tracts of land involved. If such conflicts exist, the procedure followed by the trial court was correct. That procedure, as indicated above, was to permit the City [of Houston] to proceed in one suit against all parties whose interests it was necessary to preclude by the judgment, and to award damages for the land taken in a lump sum to be apportioned by that court after the conflicting claimants had litigated their titles and boundaries in the district court.

Culmore, 278 S.W.2d at 826. The Texas Supreme Court in *Culmore* concluded that such conflict did exist. *Id.* at 828; see also *Tyrrell*, 98 S.W.2d at 789-90 (unknown owners and potentially conflicting interests in lands condemned by inter-urban railroad for right-of-way); *Davidson*, 67 S.W. at 1095-96 (unknown owners and conflicting claims of ownership in tracts condemned by railroad company for right-of-way); Attorney General Opinion O-221(1939) at 1 (unknown owners of land

⁵Any condemnation proceedings, of course, must comply with the provisions of the Constitution of the United States and the Constitution of Texas that property may not be taken for public use without adequate or just compensation and that no one may be deprived of his or her property except by due course of law. See generally 32 TEX. JUR. 3D *Eminent Domain* §§ 2-4 (1984).

⁶Statutory procedures must be strictly adhered to in condemnation proceedings since a property owner is given a single opportunity to recover damages for the taking of his or her property for public use. *Coastal Indus. Water Auth. v. Celanese Corp. of America*, 592 S.W.2d 597, 599 (Tex. 1979).

condemned by city for highway purposes).⁷ We therefore conclude that a city may condemn property as a group but may be limited to doing so only in certain circumstances at the discretion of the court.

S U M M A R Y

Section 311.008(a) of the Tax Increment Financing Act authorizes but does not require a city to exercise the powers listed, including the power to condemn property, to implement a reinvestment zone redevelopment plan. A city may be permitted to condemn property as a group under certain circumstances at the discretion of the court.

Yours very truly,



Sheela Rai
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Opinion Committee

⁷Clearly there may be additional limited circumstances in which such procedure may be permissible.