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ATTORNEY GENERAL OF TEXAS

June 15, 2020

Mr. Darrell T. Brownlow  
Chairman  
San Antonio River Authority  
100 East Guenther Street  
San Antonio, Texas 78204-1401

**Opinion No. KP-0316**

Re: Whether the San Antonio River Authority may release an inundation easement that has been declared surplus without receiving fair market value (RQ-0325-KP)

Dear Mr. Brownlow:

You ask whether the San Antonio River Authority (“Authority”) may release an inundation easement that has been declared surplus without receiving fair market value.<sup>1</sup> Specifically, you ask whether the Authority may release the surplus easements without receiving fair market value when, (1) the easement had been acquired without the payment of valuable consideration, or (2) the easement had been acquired for valuable consideration.<sup>2</sup> *See* Request Letter at 1.

You describe the Authority’s management of flood control structures in its territory, telling us that most “of the dams were built on private lands through the acquisition of land rights in the form of easements.” Brief at 1. You state that the easements “include inundation easements authorizing the storage of water that may be impounded by the dams.” *Id.* You tell us that “[s]ome of these easements were acquired for valuable consideration and others were acquired without the payment of valuable consideration.” *Id.*

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<sup>1</sup>*See* Letter and Brief from Mr. Darrell T. Brownlow, Chairman, San Antonio River Auth., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 18, 2019), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0325KP.pdf> (“Request Letter” and “Brief,” respectively).

<sup>2</sup>“Consideration is a fundamental element for any valid enforceable contract. A contract without consideration is unenforceable. Consideration is a bargained-for exchange of promises or return performance and consists of benefits and detriments to the contracting parties.” *Marx v. FDP, LP*, 474 S.W.3d 368, 378 (Tex. App.—San Antonio 2015, pet. denied) (citations omitted).

You explain that the Authority has developed a process to review a landowner's request that the Authority release the landowner's property from the easement.<sup>3</sup> *See id.* In order to evaluate the landowner's request, the Authority "has conducted engineering analysis . . . to identify portions of the property . . . that exceed the areas necessary for the operation and maintenance of the dam and that are not required to be subject to an inundation easement by applicable state law." *Id.* You note that many of the easements are blanket easements<sup>4</sup> and "could be reduced without adversely affecting public health and safety and without falling short of legal requirements." *Id.* Lastly, you tell us that the Authority co-holds some of these easements with the Alamo Soil and Water Conservation Services, which "supports the release of these surplus portions of the inundation easements." *Id.* (inviting us to assume the release "will be found to be acceptable to the co-holders of the easement," as well as relevant state and federal regulatory bodies). With this background, we consider your question.

By special act, the Legislature created the Authority as a conservation and reclamation district under article XVI, section 59 of the Texas Constitution.<sup>5</sup> *See City of San Antonio v. Trease*, 243 S.W.2d 187, 189 (Tex. App.—San Antonio 1951, writ ref'd) (discussing the Authority's broad and extensive powers). Under its enabling act, the Authority may "sell or otherwise dispose of any property of any kind, real, personal, or mixed, or any interest therein, which shall not be necessary to the carrying on of the business" of the Authority. Enabling Act § 3(k)(4) (providing the disposal authority is subject to the provisions of the Enabling Act); *see also Roberson v. City of Austin*, 157 S.W.3d 130, 135–36 (Tex. App.—Austin 2005, pet. denied) (recognizing that an easement is a nonpossessory property interest). This provision authorizes the Authority to sell or otherwise dispose of the easements provided they are not necessary to the business of the Authority. *See* Brief at 1 (stating that there are some circumstances where the easements could be reduced without adversely affecting public health and safety).

We next examine the Authority's power under the general statutes. You tell us the Authority is a "district" for purposes of Water Code chapter 49. *See id.* at 2. Chapter 49 generally applies to all general and special districts. *See* TEX. WATER CODE § 49.002(a). Section 49.226 governs a district's sale or exchange of real or personal property. In relevant part, section 49.226 provides:

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<sup>3</sup>Fair market value would take into account the value of the property as encumbered by the easement. *See* Tex. Att'y Gen. Op. No. GA-0634 (2008) at 8 (determining that the valuation of real property owned and proposed for sale by a river authority but leased to private individuals should be valued as encumbered by the leases).

<sup>4</sup>A blanket easement is "[a]n easement without a metes and bounds description of its location on the property." *First Am. Title Ins. Co. v. Willard*, 949 S.W.2d 342, 344 n.2 (Tex. App.—Tyler 1997, writ denied).

<sup>5</sup>*See* Act of May 3, 1937, 45th Leg., R.S., ch. 276, 1937 Tex. Gen. Laws 556, 556–64, *amended by* Act of Mar. 24, 1939, 46th Leg., R.S., ch. 9, 1939 Tex. Spec. Laws 1083, 1083–97, Act of Mar. 25, 1953, 53d Leg., R.S., ch. 60, 1953 Tex. Gen. Laws 82, 82–6, Act of May 16, 1957, 55th Leg., R.S., ch. 504, Tex. Gen. Laws 1469, 1469–70, Act of Mar. 18, 1959, 56th Leg., R.S., ch. 37, 1959 Tex. Gen. Laws 78, 78–9, Act of May 11, 1961, 59th Leg., R.S., ch. 233, 1961 Tex. Gen. Laws 466, 466–91, Act of May 15, 1969, 61st Leg., R.S., ch. 836, 1969 Tex. Gen. Laws 2488, 2488–93, Act of May 17, 1975, 64th Leg., R.S., ch. 301, 1975 Tex. Gen. Laws 776, 776–86, Act of May 30, 1975, 64th Leg., R.S., ch. 604, 1975 Tex. Gen. Laws 1893, 1893–96, Act of Apr. 2, 1981, 67th Leg., R.S., ch. 60, 1981 Tex. Gen. Laws 123, 123–34, Act of May 27, 1987, 70th Leg., R.S., ch. 701, 1987 Tex. Gen. Laws 2568, 2568–2570, Act of May 31, 2015, 84th Leg., R.S., ch. 1148, § 15, 2015 Tex. Gen. Laws 3862, 3866 ("Enabling Act").

(a) Any . . . interest in land owned by the district which is found by the board to be surplus and is not needed by the district may be sold under order of the board either by public or private sale, or the . . . interest in land . . . may be exchanged for other land, interest in land, or personal property needed by the district. Except as provided in Subsection (b), . . . [an] *interest in land* . . . *must be exchanged for like fair market value*, which value may be determined by the district. In connection with the sale of surplus land, the board, at its discretion, may impose restrictions on the development and use of the land.

(b) Any property dedicated to or acquired by the district *without expending district funds* may be abandoned or released to the original grantor, the grantor's heirs, assigns, executors, or successors upon terms and conditions deemed necessary or advantageous to the district and without receiving compensation for such abandonment or release. District property may also be abandoned, released, exchanged, or transferred to another district, municipality, county, countywide agency, or authority upon terms and conditions deemed necessary or advantageous to the district. . . . Chapter 272, Local Government Code, does not apply to this section.

*Id.* § 49.226(a)–(b) (emphasis added).

Because it involves an interest in land that is purchased, we first consider subsection 49.226(a) and address your second question. *See* Request Letter at 1. Attorney General Opinion GA-0634 assumed without deciding that the “fair market value” requirement in subsection 49.226(a) applied to a sale of property as well as an exchange of property. *See* Tex. Att’y Gen. Op. No. GA-0634 (2008) at 3–4. This office noted that “[w]hile by its literal terms this provision regarding fair market value applies to an exchange of real property, [but the parties] assume that it also applies or would effectively apply as a matter of practice to the proposed sale of real property here.” *Id.* In directly considering the issue here, we examine the text as the best indicator of the Legislature’s intent. *See Brazos Elec. Power Coop. Inc. v. Tex. Comm’n on Envtl. Quality*, 576 S.W.3d 374, 383–84 (Tex. 2019). Subsection (a) authorizes a district to do two things with a surplus interest in land: it may sell it “by public or private sale” or it may exchange it for other “land, interest in land, or personal property.” *See* TEX. WATER CODE § 49.226(a); *see also* Tex. Att’y Gen. LO-96-106, at 2 (distinguishing a sale of property from an exchange of property); *Jones v. State*, 175 S.W.3d 927, 932 (Tex. App.—Dallas 2005, no pet.) (“Typically, the term ‘or’ is disjunctive and signifies a separation between two distinct ideas.”) (citation omitted); Tex. Att’y Gen. Op. No. GA-0371 (2005) at 3 (determining that if a private sale of land is authorized by section 49.226(a), the requirements of Local Government Code chapter 272 regarding the sale of public property does not apply). By its express terms, subsection (a) requires “like fair market value” only with respect to an “exchange” of property. *See* TEX. WATER CODE § 49.226(a). Thus, a court is not likely to construe subsection (a) to require a district to obtain fair market value in a sale of its surplus personal or real property. Accordingly, the Authority is not required to obtain

fair market value for the public or private sale of a surplus inundation easement that the Authority has acquired through purchase.

Your remaining first question involves an easement the Authority acquired by dedication or otherwise, i.e., that the Authority did not purchase. *See* Request Letter at 1. Subsection (b) provides an option other than what is provided for in subsection (a) that applies to surplus property a district acquired “without expending district funds.” TEX. WATER CODE § 49.226(b). Such property may be “abandoned or released” to the specified persons on terms and conditions a district deems necessary or advantageous. *See id.* And a district may abandon or release such property “without receiving compensation.” *Id.* (providing also that such property may be “abandoned, released, exchanged, or transferred to another district . . . upon terms and conditions deemed necessary or advantageous to the district”). Under the express terms of subsection (b), the Authority may release property it acquired without expending Authority funds and is not required to obtain compensation for the property. Accordingly, the Authority is not required to obtain fair market value to release a surplus inundation easement that it did not purchase.

You raise article III, section 52(a) of the Texas Constitution. *See* Brief at 2. Article III, section 52(a) prohibits the Legislature from authorizing a “political corporation or subdivision of the State to . . . grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.” TEX. CONST. art. III, § 52(a). Yet, a transfer of a real property interest in exchange for adequate consideration is not an unconstitutional gratuity under article III, section 52(a) of the Texas Constitution. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 739–40 (Tex. 1995). “A political subdivision’s paying public money is not ‘gratuitous’ if the political subdivision receives return consideration.” *Tex. Mun. League Intergov’tl Risk Pool v. Tex. Worker’s Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002); *see also Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex. App.—Austin 2002, pet. denied) (recognizing that a city’s lease of lands was supported by valuable consideration and thus was not a gratuitous donation). Adequate consideration may take the form of a non-monetary benefit to the Authority or relief from a burden. *See* Tex. Att’y Gen. Op. Nos. GA-0894 (2011) at 2 (recognizing nonmonetary consideration), DM-268 (1993) at 3 (same). Courts generally do not look beyond the face of a transaction to determine the adequacy of consideration absent evidence the conveyance was tantamount to a gift or the result of unconscionability, bad faith, or fraud. *City of Lubbock v. Phillips Petroleum Co.*, 41 S.W.3d 149, 161 (Tex. App.—Amarillo 2000, no pet.) (holding that conveyance of pipeline easement did not violate article III, section 52). In any given transaction, the adequacy of consideration is for the Authority to determine. Tex. Att’y Gen. Op. No. GA-0894 (2011) at 3.

To the extent the release or sale of the surplus easements involve an element of a donation, the transaction implicates article III, section 52(a). Article III, section 52(a) does not prohibit a public expenditure or grant that “incidentally benefits a private entity if it is made for the accomplishment of a legitimate public purpose.” *Walker*, 86 S.W.3d at 260. The Texas Supreme Court has established a three-part test to determine if a public expenditure accomplishes a public purpose. *See Tex. Mun. League*, 74 S.W.3d at 384. A public gift that benefits a private person does not violate article III, section 52(a) if (1) the “predominant purpose is to accomplish a public purpose, not to benefit private parties”; (2) there are adequate public controls in place to “ensure that the public purpose is accomplished and to protect the public’s investment”; and, (3) the

“political subdivision receives consideration.” *Id.* It is for the governmental body of the Authority in the first instance to determine whether the transaction satisfies the *Texas Municipal League* three-part test. *See* Tex. Att’y Gen. Op. No. GA-0599 (2008) at 4.

**S U M M A R Y**

Water Code section 49.226 provides for the sale or exchange of surplus real or personal property of certain water districts. The San Antonio River Authority may dispose of, sell, or release a surplus inundation easement without receiving fair market value pursuant to section 49.226.

A transfer of a real property interest in exchange for adequate consideration is not an unconstitutional gratuity under article III, section 52(a) of the Texas Constitution, which prohibits the gratuitous donation of public funds or a thing of value.

It is for the governing body of the San Antonio River Authority in the first instance to determine whether any particular transaction is supported by adequate consideration; and, if the transaction includes any element of donation, whether the transaction satisfies article III, section 52(a).

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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