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ATTORNEY GENERAL OF TEXAS

February 16, 2024

The Honorable Matthew E. Minick
Hardin County Attorney
Post Office Box 516
Kountze, Texas 77625

Opinion No. KP-0456

Re: Whether an elected county commissioner may use county equipment and labor to maintain an outfall ditch that lies solely on private property (RQ-0512-KP)

Dear Mr. Minick:

You ask whether “an elected County Commissioner [may] use county equipment and county labor to provide maintenance to a self-made outfall ditch that lies solely on private property (if that outfall ditch provides a public purpose of providing drainage to multiple subdivisions)[.]”¹ You also ask whether the commissioner could do so “if given permission by the private property owners[.]” Request Letter at 1. You explain that within a commissioner’s precinct “there is a self-made outfall ditch that provides drainage to certain nearby subdivisions.”² *Id.* You describe the ditch as running through several parcels of private property and state that you are unaware of any Hardin County (“County”) easement or right-of-way for the ditch. *Id.* Lastly, you tell us that the ditch has previously been maintained by other commissioners. *Id.*

In order for a single county commissioner to use county equipment and labor to maintain an outfall ditch that lies solely on private property, three items must be reviewed. First, the county must have the authority, second the use of public resources must be for a public purpose, and finally the authority must fall into one of the few situations where a county commissioner may act individually and not through the commissioners court. These items are fact specific, so we do not answer your question as a matter of law. *See* Tex. Att’y Gen. Op. No. KP-0099 (2016) at 2 (acknowledging that fact questions cannot be answered in an Attorney General opinion). However, we can advise you generally as to the legal analysis for each of them.

¹Letter from Honorable Matthew E. Minick, Hardin Cnty. Att’y, to Off. of the Att’y Gen. at 1 (Sept. 15, 2023), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2023/RQ0512KP.pdf> (“Request Letter”).

²“Outfall” means “the place where a river, drain, or sewer empties into the sea, a river, or a lake.” NEW OXFORD AMERICAN DICTIONARY 1244 (3d ed. 2010). One court characterizes an “outfall ditch” as a structure, among others, necessary for the drainage of a highway. *Fuller-Ahrens P’ship v. S.C. Dep’t of Highways & Pub. Transp.*, 427 S.E.2d 920, 922 (1993).

A county has authority to maintain ditches in connection with its provision of drainage on certain roads.

We first consider a county's authority under state law with respect to the maintenance of ditches. As "creatures of the Texas Constitution, counties and commissioners courts are subject to the Legislature's regulation." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003). Accordingly, a county's "power is limited to that which is expressly delegated to it by the Texas Constitution or Legislature, or necessarily implied to perform its duties[.]" *Id.* at 29.

Transportation Code chapter 251 provides general authority for a county with respect to county roads and bridges, which could include the maintenance of drainage facilities in certain instances. *See* TEX. TRANSP. CODE §§ 251.001–.161; *see also id.* §§ 251.012(a)(3) (authorizing a county to spend money in a city for, among other things, the maintenance of drainage facilities), 251.014(a), (b) (providing county authority to carry out an improvement project, including drainage facilities, for a segment of the state highway system).

Particularly relevant to your inquiry, Transportation Code chapter 254 grants a county express authority to provide drainage on public roads, which includes certain authority relating to ditches. *See id.* §§ 254.001–.019; *see also id.* §§ 254.002–.004 (authorizing a county to establish a drainage system). Section 254.005 provides that the "commissioners court . . . may order the construction or maintenance of ditches as provided by [chapter 254] at any regular session of the court." *Id.* § 254.005(a). Further, "[i]n connection with its authority to construct and maintain ditches, the commissioners court may construct any necessary side, lateral, spur, or branch ditch." *Id.* § 254.005(d). And with respect to a ditch on private property, chapter 254 confers on a commissioners court express authority, in certain circumstances, to remove blockages of a ditch on private property "if the ditch connects with a drainage ditch constructed or maintained by the county[.]" *Id.* § 254.008(a)(1).

Yet, under chapter 254, a county's express authority with respect to drainage ditches is generally connected to the establishment of a drainage system and providing drainage on public roads. *See generally id.* §§ 254.002–.004 (providing for the establishment of a drainage system); *see also id.* § 254.005(b) (providing that a ditch constructed under chapter 254 "must be placed on or within the exterior lines of a public road in the county"). You tell us the ditch is located on private property and provides drainage to multiple subdivisions. Request Letter at 1. You do not tell us about its precise location or about any relationship it has to the public roads of the county, nor do you tell us the nature of the maintenance required or whether the County has established a drainage system. *See id.* Thus, we cannot make any determinations as a matter of law about the County's express authority with respect to maintaining this particular ditch.

Texas Constitution article III, subsection 52(a) limits the expenditure of public funds and public resources for private purposes.

In addition to the question of statutory authority, any maintenance of a ditch on private property would also require overcoming the general prohibition against the use of public funds and resources for private purposes found in Texas Constitution, article III, subsection 52(a). *See* TEX. CONST. art. III, § 52(a). The purpose of article III, subsection 52(a) is to "prevent the

gratuitous grant of [public] funds to any individual, corporation, or purpose whatsoever.” *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. [Comm’n Op.] 1928). Thus, generally, a county may not repair or maintain a private road or private property.³ *See* TEX. CONST. art. III, § 52(a); *see also Ex parte Conger*, 357 S.W.2d 740, 742 (Tex. 1962) (prohibiting county commissioners from using county equipment to clear brush from a private lot, benefiting the landowner); Tex. Att’y Gen. Op. No. GA-0085 (2003) at 2.

Texas courts acknowledge that article III, subsection 52(a) does not invalidate an expenditure which incidentally advances a private purpose if it is made for the direct accomplishment of a legitimate public purpose. *See, e.g., Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). The Texas Supreme Court uses a three-part test to determine whether an expenditure of public funds satisfies article III, subsection 52(a). *Tex. Mun. League Intergov’tl Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 384 (Tex. 2002). The three-part test requires the public entity to: (1) ensure that the expenditure is to “accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Id.* Whether a particular expenditure satisfies the three-part test is a determination for the county commissioners court to make in the first instance, subject to judicial review for abuse of discretion. Tex. Att’y Gen. Op. Nos. KP-0204 (2018) at 2, GA-0843 (2011) at 2.

Concerning the first prong’s requirement that an expenditure serve a public purpose, “we emphasize that the public purpose to be served is not the general good of the public, but a specific purpose” of the County. Tex. Att’y Gen. Op. No. KP-0204 (2018) at 3; *see also* Tex. Att’y Gen. Op. No. GA-0743 (2009) at 2 (“The public purpose served by the expenditure must be an authorized public purpose of the political subdivision.”). The use of county funds to fulfill a statutory function of a county generally serves a public purpose of a county. *See* Tex. Att’y Gen. Op. No. KP-0237 (2019) at 2; *see generally* TEX. LOC. GOV’T CODE §§ 232.001–.901 (providing for a county’s regulation of subdivisions, including review of drainage matters). Even assuming the County finds that a public purpose is served in this instance, the County must also consider whether its maintenance of an outfall ditch that lies solely on private property would bestow more than an incidental benefit to the particular private property owners and thus fail to predominantly serve the public purpose. *See* Tex. Att’y Gen. Op. No. GA-0553 (2007) at 3–4. We again note that any of the County’s findings on the matter would be subject to judicial review for abuse of discretion. Tex. Att’y Gen. Op. Nos. KP-0104 (2016) at 2, KP-0007 (2015) at 2; *see also Comm’rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997) (recognizing a district court’s supervisory control over a commissioners court that abused its discretion).

The second and third prongs require that the public entity retain sufficient control to ensure the public purpose is accomplished and that the public entity receives a return benefit. *See Tex.*

³Texas Constitution article III, section 52f authorizes counties with a population of 7,500 or less to “construct and maintain private roads if it imposes a reasonable charge for the work.” TEX. CONST. art. III, § 52f. This provision does not apply to the County, which has a population of 57,811. *See* U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hardincountytexas/PST045222> (last visited Nov. 15, 2023). Moreover, this office previously opined that article III, section 52f “does not authorize a county to maintain private non-road property.” Tex. Att’y Gen. Op. No. GA-0085 (2003) at 2.

Mun. League, 74 S.W.3d at 384. Were the County to proceed with the maintenance of the outfall ditch, it should take affirmative steps to satisfy these prongs. Previous opinions of this office advise that the requirements of these prongs can often be addressed through a contract or agreement that ensures the public purpose is accomplished and that the public entity receives the return benefit.⁴ See generally *Tex. Att’y Gen. Op. Nos. KP-0181* (2018) at 2, *KP-0204* (2018) at 3.

A single county commissioner has limited authority to act independently with respect to county roads.

Finally, we note you ask specifically about the authority of a single county commissioner, and not the county commissioners court as a whole. Request Letter at 1. The Texas Constitution provides that the commissioners court is the governing body of a county. TEX. CONST. art. V, § 18(b) (providing that a county commissioners court “shall exercise . . . power[] and jurisdiction over all county business”); see also *City of San Antonio*, 111 S.W.3d at 27 (“A commissioners court’s primary function is to administer its county’s business affairs.”). It is well established in Texas that individual commissioners generally have no authority to independently bind the county. *Canales v. Laughlin*, 214 S.W.2d 451, 455 (Tex. 1948) (“[I]ndividual commissioners have no authority to bind the county by their separate action.”).

Yet, regulation of county roads is one area of the law in which an individual commissioner may have limited authority to act independently. Under Transportation Code chapter 251, county commissioners are the supervisors of public roads, and an individual commissioner has certain duties with respect to the roads in his or her precinct, subject to the commissioners court’s general supervision. TEX. TRANSP. CODE § 251.004(a); see *Guerra v. Rodriguez*, 239 S.W.2d 915, 920 (Tex. Civ. App.—San Antonio 1951, no writ). A county operates under chapter 251 unless it has adopted one of the optional systems of road administration under chapter 252. TEX. TRANSP. CODE § 251.004(a); see also *id.* §§ 252.001–.006 (providing for an ex officio road commissioner system), 252.101–.111 (providing for a road commissioner system), 252.201–.216 (providing for a road superintendent system), 252.301–.314 (providing for a county road department system).

Of the four optional systems in chapter 252, subchapter A provides that each county commissioner is the ex officio road commissioner of his or her precinct and has certain powers and duties with respect to that precinct. See *id.* §§ 252.001–.006. The ex officio county road commissioner is responsible for the “vehicles, tools, and machinery belonging to the county,” “shall direct” certain activities with respect to roads, and has the duties of a supervisor under sections 251.004 and 251.005. *Id.* § 252.006(a), (b), (e). Moreover, an ex officio road commissioner has express authority to determine the condition of public roads in his or her precinct and to “direct the manner of grading, draining, and otherwise improving the roads.” *Id.* § 252.006(f)(3). Yet, a commissioner exercising that authority is still subject to some oversight from the commissioners court. See *id.* § 252.006(a) (“Under the direction of the commissioners court . . .”), 252.006(b) (“Under rules adopted by the commissioners court . . .”); see also *Tex. Att’y Gen. Op. No. GA-0295* (2005) at 9 (“An ex officio road commissioner . . . implements the

⁴You ask about permission from the property owner. See Request Letter at 1. While having the property owner’s permission may matter for trespass and other purposes, it is likely not determinative in the analysis of the expenditure of public funds.

commissioners court's decisions on a day-to-day basis, by directing the work [of the] precinct according to rules established by the court."); *Guerra*, 239 S.W.2d at 920 (recognizing that the commissioners court "retains general supervision"). If the County operates under chapter 252, subchapter A, an individual commissioner may have some authority to act independently. Otherwise, it is the commissioners court that acts on behalf of a county.

S U M M A R Y

While in some instances state law authorizes a county to provide for drainage in connection with public roads, which could include the maintenance of a ditch, any such use of county labor and resources on private property must comply with article III, subsection 52(a) of the Texas Constitution.

Article III, subsection 52(a) prohibits the gratuitous payment of public funds for a private purpose. The determination whether a particular expenditure or use of public resources comports with article III, subsection 52(a) is, in the first instance, for the commissioners court to make subject to judicial review for abuse of discretion. Thus, this office cannot conclude as a matter of law that Hardin County may maintain an outfall ditch on private property.

A county commissioners court is the governing body of a county and administers the county's business. A single county commissioner may have limited authority to act independently with respect to county roads in his or her precinct but absent such authority a county acts through the county commissioners court.

Very truly yours,



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