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OPINION COMMITTEE

JOHNSON COUNTY
BILL MOORE
COUNTY ATTORNEY

FILE # ML-45880-08
I.D. # 45880

October 20, 2008

Hon. Greg Abbott
Attorney General of Texas
Opinions Section
P.O. Box 12548
Austin, TX 78711-2548

Sent Certified Mail RRR 70051160000194828802

RE: Request for Opinion

RQ-0756-GA

Dear Attorney General Abbott:

At the request of the Commissioners Court of Johnson County, I am seeking an opinion from your office on the following question:

1. Can the Commissioners Court of Johnson County lease county owned office space to a private non-profit organization for less than fair market value and remain in compliance with the competitive bidding procedures of § 263.007 of the Texas Local Government Code when no statutory exception to § 263.007 exists?

Statement of Facts

On March 5, 2008, the Johnson County Commissioners Court purchased and closed on real property located in Cleburne, Texas. The property, located within Johnson County, was previously owned by the Cleburne Independent School District. The property has a building on it. Prior to Johnson County's acquisition of the property, the Cleburne ISD had a lease agreement with the United Way of Johnson County (hereinafter referred to as "United Way") and Court Appointed Special Advocates of Johnson County (hereinafter referred to as "CASA").

The United Way is a non-profit organization which operates as a 501 (c)(3) tax-exempt organization. On its website, the United Way describes itself as "a local network of volunteers, agencies and donors united in the belief that we can make a real difference as problem solvers in Johnson County, addressing issues ranging from critical needs to quality of life." The website further states that the organization brings "people and resources together to address the most urgent problems in our community and work toward long-term solutions to create real impact. Whether it is addressing the needs of

children, families, the elderly or people living with disabilities, helping our neighbors in Johnson County is a great investment in our community.”

CASA is also a non-profit organization which operates as a 501 (c)(3) tax-exempt organization. On its website, CASA states that “CASA volunteers are Court Appointed Special Advocates for children-trained community volunteers appointed by a judge as Officers of the court to speak up for children in court, and to help to humanize the often frightening and confusing child welfare and legal systems for these children.”

Upon purchasing the property, Johnson County honored the existing lease agreements between the Cleburne ISD and the United Way and CASA through the end of the lease term. The Cleburne ISD had leased one-half of the building to the United Way and the other one-half of the building to CASA. The Cleburne ISD had leased the portions of the building to each organization for \$1.00 per year for rent and payment of utilities.

After the term of the lease agreements between the Cleburne ISD and the two organizations expired, the Commissioners Court opened bidding for lease of the property pursuant to § 263.007 of the Texas Local Government Code. Only the United Way and CASA submitted bids to Johnson County to lease the property which were for \$1.00 per year and payment of utilities. On September 22, 2008, the Johnson County Commissioners Court approved and accepted the bids of each organization. The Johnson County Commissioners Court approved a lease agreement with each organization with the following provisions. Each organization is to pay rent of \$1.00 per year to Johnson County. Additionally, each organization is to pay their own utilities (gas, water, and electric), provide their own phone and own janitorial services, and in the event any ad valorem taxes are assessed, the organizations would pay those taxes. The current leases are for a one year term and provide that the leases may be terminated by either party upon thirty days written notice to the other party. The Commissioners Court recognizes that rent of \$1.00 per year is less than fair market value.

Argument

A county commissioners court may exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. *Tex. Att’y Gen. Op. No. JC-0439 at 2* citing *Tex. Att’y Gen. Op. JC-0171 (2000) at 1*. A county commissioners court exercises powers and jurisdiction only over county business as conferred by law. *Id.* citing *TEX. CONST. art. V, § 18(b)*. A commissioners court thus does not have power to accomplish something that is not county business. *Id.* citing *Tex. Att’y Gen. Op. No. JC-0036 (1999) at 2*. The phrase “county business” has been broadly

construed to “encompass matters of general concern to county residents.” *Id.* citing Tex. Att’y Gen. Op. No. JC-0036 (1999) at 2.

The Texas Constitution generally prohibits counties from granting or donating a thing of value to a private entity. *See* TEX. CONST. arts. III, § 52(a), XI, § 3. Chapter 263 of the Texas Local Government Code provides competitive bidding procedures that a county generally must follow to sell or lease county property. Tex. Att’y Gen. Op. No. JC-0582 (2002) at 4. § 263.007 sets out the procedure that a commissioners court is to use in regard to the sale or lease of county owned real property, including space in a building, through a sealed-bid procedure. Tex. Loc. Gov’t Code Ann. § 263.007 (Vernon 2005).

The Texas Legislature has carved out certain statutory exceptions to the competitive procedures required under Chapter 263 of the Texas Local Government Code for the sale or lease of real property. For example, Chapter 319 of the Local Government Code authorizes a commissioners court to establish and maintain a museum. *Id.* at 3. The commissioners court “may lease the buildings, improvements or exhibits.” Tex. Loc. Gov’t Code Ann. § 319.004(c) (Vernon 2005). § 319.004 authorizes a commissioners court to permit the use of a building or improvement “for any public purpose the court determines to be of benefit to the county and its residents.” *Id.* citing Tex. Loc. Gov’t Code Ann. § 319.004(d) (Vernon 1999 & Supp. 2002). A lease or contract pursuant to 319.004 “must be evidenced by an order of the commissioners court and entered in the minutes of the court.” Tex. Loc. Gov’t Code Ann. § 319.004(c) (Vernon 1999 & Supp. 2002). The Texas Attorney General’s Office opined that “when another statute authorizes the county to lease a certain kind of real property, the provisions of chapter 263 do not apply...The county is not required to competitively bid a contract entered into pursuant to section 319.004” Tex. Att’y Gen. Op. No. JC-0582 (2002) at 4 citing Tex. Att’y Gen. LO-98-057 at 2-3.

Even within Chapter 263 of the Texas Local Government Code, the Texas Legislature has identified a scenario where the commissioners court may lease property without using sealed-bid process or competitive bidding process. The commissioners court of a county may “lease real property owned or controlled by the county that was formerly owned or controlled by the Texas Department of Mental Health and Mental Retardation to a federal, state, or local government entity for any purpose or to a nonprofit organization that is exempt from federal taxation under Section 501(c)(3), Internal Revenue Code of 1986 (26 U.S.C. Section 501(c)(3)), to conduct health and human service activities which the commissioners court finds to be in the public interest, without using the sealed-bid or sealed-proposal process described in Subsection (a) and without using any other competitive bidding process which would otherwise be required by law.” Tex. Loc. Gov’t Code Ann. § 263.007(e)(1) (Vernon 2005). There does not

appear to be, and our research did not find, any statutory exception to the competitive bidding requirements that would apply to the fact scenario in Johnson County regarding a lease to the United Way and CASA for less than fair market value.

Once a statutory exception to the competitive bidding requirements under § 263.007 of the Texas Local Government Code applies, the question was raised as to whether a lease agreement between a county and a museum violates limitations on the use of public funds in article III, section 52 and restrictions on public debt in article XI, section 7 of the Texas Constitution. Tex. Att’y Gen. Op. JC-0582 at 5. The museum in this case was a private, non-profit corporation governed by a board of trustees. *Id.* at 2. The lease agreement did not require the Museum to make lease payments other than an initial \$1.00 payment, but did require the Museum to operate the leased premises as a Museum, to maintain the interior of the buildings, and to pay for the cost of the telephone services. *Id.* Under the terms of the lease agreement, the County was to insure the buildings and structures located on the premises; to maintain the exterior structural condition of the buildings, including the foundations, walls, roofs, and doors; and to maintain the grounds and landscaping at the leased premises...County also required to bear the cost of utilities (except telephone) and to service and maintain the heating, air conditioning, and plumbing systems. *Id.* For a fiscal year, the County paid about \$64,000 to meet its obligations under the lease. *Id.*

The lease agreement expressly provided that the leased premises shall be used for the purposes of: maintaining a public museum...in accordance with the provisions of Articles 2372d and 2372d-3, Vernon’s Annotated Civil Statutes (or any successor provision or provisions thereto), for the display of the products there specified and for such other displays, exhibits and endeavors as are of educational, cultural or intellectual interest to the citizens of Midland County, Texas. *Id.* at 4.

The Office of the Attorney General concluded that the above referenced lease agreement did not violate article III, section 52 of the Texas Constitution for the following reasons. First, “we conclude that the commissioners court that entered into the lease agreement could have reasonably determined that the County and Museum’s respective obligations under the lease agreement comported with article III, section 52.” *Id.* at 5. Furthermore, “In making an expenditure of county funds that benefits a private person or entity, however, a commissioners court will avoid violating article III, section 52 if it (i) determines in good faith that the expenditure serves a public purpose and (ii) places sufficient controls on the transaction, contractual or otherwise, to ensure that the public purpose is carried out.” *Id.* The opinion further states that “Although courts and this office have concluded that the lease of public property to a private entity does not violate article III, section 52 where the transaction serves a public purpose and where an adequate rental is paid, article III, section 52 does not necessarily require a county to

lease property for fair market value if the lease serves a public purpose.” *Id.* at 6. For these reasons, the Honorable John Cornyn found that the lease for less than fair market value, in the context of Chapter 319 of the Texas Local Government Code, did not amount to a gift or grant in violation of article III, section 52 of the Texas Constitution.

Generally, Article III, section 52 and article XI, section 3 of the Texas Constitution proscribe gratuitous transfers of public funds to private entities. Tex. Att’y Gen. Op. No. JC-0439 (2001) at 2 citing TEX. CONST. art. III, § 52; *id.* art. XI, § 3. A county “is not prohibited from contracting with a private nonprofit corporation to provide services that the county is authorized to provide so long as the county receives adequate consideration.” *Id.* citing Tex. Att’y Gen. Op. No. JC-0335 (2001) at 7. The Constitution limits a county’s authority to grant public funds to a private nonprofit corporation to only those situations where the grant serves a public purpose that the county is authorized to accomplish and is subject to adequate controls, “contractual or otherwise, to ensure that the public purpose is accomplished.” *Id.*; see TEX. CONST. art. III, § 52; *id.* art. XI, § 3; see also *id.* art. VIII, § 3 (directing that taxes be collected “for public purposes only”). A transfer for a public purpose is constitutionally permissible even if a private interest benefits incidentally. *Id.* citing *Barrington v. Cokinos*, 338 S.W.2d 133,139 (Tex. 1960). A contract that imposes on the nonprofit organization an obligation to perform a function that benefits the public may provide adequate control. *Id.* citing *Key v. Comm’rs Court of Marion County*, 727 S.W.2d 667,669 (Tex. App.-Texarkana 1987, no writ) (per curiam).

For example, Kerr County entered into a contract with CASA, and under the contract, CASA, in consideration of \$3,000 from the county, was bound to provide guardians ad litem for use in appropriate court cases relating to children, in accordance with a court order; and provide family studies and ... such other information gathering services as the county courts request. *Id.* at 2-3. The statutory authority that the County cited in the contract with CASA was section 264.006 of the Family Code. *Id.* at 2. § 264.006 of the Texas Family Code expressly empowers a county to provide “for services to and support of children in need of protection and care without regard to the immigration status of the child or the child’s family.” *Id.* at 5 citing TEX. FAM. CODE ANN. § 264.006 (Vernon Supp. 2001). The Office of the Attorney General opined that “A county may grant funds to a nonprofit entity to accomplish a statutorily authorized purpose, provided that the county determines the transaction will achieve a public purpose and that adequate controls are placed on the expenditure to ensure that the public purpose is accomplished.” *Id.* at 8.

Summary

A county commissioners court may exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. Tex. Att’y Gen. Op. No. JC-0439 at 2 citing Tex. Att’y Gen. Op. JC-0171 (2000) at 1. A county commissioners court exercises powers and jurisdiction only over county business as conferred by law. *Id.* citing TEX. CONST. art. V, § 18(b). The phrase “county business” has been broadly construed to “encompass matters of general concern to county residents.” *Id.* citing Tex. Att’y Gen. Op. No. JC-0036 (1999) at 2. The Texas Constitution generally prohibits counties from granting or donating a thing of value to a private entity. *See* TEX. CONST. arts. III, § 52(a), XI, § 3. Chapter 263 of the Texas Local Government Code provides competitive bidding procedures that a county generally must follow to sell or lease county property. Tex. Att’y Gen. Op. No. JC-0582 (2002) at 4. § 263.007 sets out the procedure that a commissioners court is to use in regard to the sale or lease of county owned real property, including space in a building, through a sealed-bid procedure. Tex. Loc. Gov’t Code Ann. § 263.007 (Vernon 2005).

A county “is not prohibited from contracting with a private nonprofit corporation to provide services that the county is authorized to provide so long as the county receives adequate consideration.” *Id.* citing Tex. Att’y Gen. Op. No. JC-0335 (2001) at 7. The Constitution limits a county’s authority to grant public funds to a private nonprofit corporation to only those situations where the grant serves a public purpose that the county is authorized to accomplish and is subject to adequate controls, “contractual or otherwise, to ensure that the public purpose is accomplished.” *Id.*; *see* TEX. CONST. art. III, § 52; *id.* art. XI, § 3; *see also id.* art. VIII, § 3 (directing that taxes be collected “for public purposes only”). A transfer for a public purpose is constitutionally permissible even if a private interest benefits incidentally. *Id.* citing *Barrington v. Cokinos*, 338 S.W.2d 133,139 (Tex. 1960). A contract that imposes on the nonprofit organization an obligation to perform a function that benefits the public may provide adequate control. *Id.* citing *Key v. Comm’rs Court of Marion County*, 727 S.W.2d 667,669 (Tex. App.-Texarkana 1987, no writ) (per curiam).

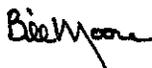
The Johnson County lease agreements for less than fair market value with CASA and the United Way are not in violation of § 263.007 of the Texas Local Government Code for the following reasons. First, the Johnson County Commissioners Court followed the protocol under § 263.007 by using the sealed bid process. Significantly, the United Way and Casa were the only two bids that were received. Second, the Johnson County Commissioners Court has the implicit power to provide for the needs of children, families, and the elderly within Johnson County and is not prohibited from contracting with a private nonprofit organization. Both the United Way and CASA are private

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nonprofit organizations that serve and aid in addressing the needs of children, families, and the elderly within Johnson County. The United Way and CASA serve a public purpose within Johnson County. Therefore, Johnson County may lease office space to the United Way and CASA at a lease amount that is less than fair market value.

Thank you for your time and consideration with regard to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,



Bill Moore
Johnson County Attorney

cc: Honorable Roger Harmon,
Johnson County Judge