



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 10, 2020

Mr. Mike Novak
Executive Director
Texas Facilities Commission
Post Office Box 13047
Austin, Texas 78711-3047

Opinion No. KP-0314

Re: Authority of the Texas Facilities Commission and the State Preservation Board in relation to a Bill of Rights monument authorized by House Concurrent Resolution No. 111, adopted by the Eightieth Legislature (RQ-0322-KP)

Dear Mr. Novak:

You ask three questions related to a proposed monument within the Capitol Complex dedicated to the Bill of Rights.¹ In 2007, the Legislature passed a concurrent resolution authorizing the State Preservation Board (“the Board”) and the Texas Facilities Commission (“the Commission”) “to approve and permit the construction of a monument on the Capitol grounds or adjacent state property commemorating the Bill of Rights of the United States Constitution.” Tex. H.R. Con. Res. 111, 80th Leg., R.S., 2007 Tex. Gen. Laws 6022. You explain that the monument “was to be entirely privately funded by the organization MyBillofRights.org.” Request Letter at 1. You further explain that “a preliminary schematic for the memorial site was presented” to the Commission in July 2009, but the Commission has not granted final approval of any plan. *Id.* at 2.² Briefing submitted in response to your request explains that funding raised for the monument was exhausted in 2009, and the plan lay dormant until 2016.³ During that intervening time, the Legislature directed the Commission to prepare a Capitol Complex Master Plan. *See* TEX. GOV’T CODE § 2166.105(a).⁴ That plan, first adopted in 2016 and updated in 2018, includes extensive

¹See Letter from Mr. Mike Novak, Exec. Dir., Tex. Facilities Comm’n, to Honorable Ken Paxton, Att’y Gen. of Tex. at 4–5 (Dec. 13, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs>.

²See Letter from Mr. Edward Johnson, Exec. Dir., Tex. Facilities Comm’n, to Mr. Chris Bliss, President, MyBillofRights.org at 1 (Jan. 9, 2009) (attached to Bliss Brief, *infra*) (on file with the Op. Comm.).

³See Brief from Mr. Chris Bliss, Exec. Dir., MyBillofRights.org, to Honorable Ken Paxton, Att’y Gen. of Tex. at 2 (Jan. 21, 2020) (“Bliss Brief”) (on file with the Op. Comm.).

⁴The term “Capitol Complex” includes, among other locations, “the area bounded on the north by the inside curb of Martin Luther King, Jr., Boulevard, on the east by the outside curb of Trinity Street, on the south by the outside curb of 10th Street, and on the west by the outside curb of Lavaca Street.” TEX. GOV’T CODE § 411.061(a)(1).

monument guidelines and proposals for specific sites.⁵ The intervening time and the changes to Capitol Complex planning have resulted in multiple questions about the status of the Bill of Rights monument authorized in 2007.

In your first question, you ask the following:

Because more than 5 years have elapsed since H.C.R. No. 111 (80R), and as no appropriate construction permit was issued during those first five years, does this failure to act on the part of an organization to submit a preliminary proposal for review and approval, as stated by [Board] rule 111.25(c)(8)(M), allow both the [Board] and [Commission] discretion in determining whether to accept a proposal from an organization if now filed?

Request Letter at 4. Board Rule 111.25(c)(8)(M) provides:

The legislative authority for a memorial and/or monument should be reviewed at the end of the five-year period beginning on the date of the enactment of such authority, unless an appropriate construction permit by the office of the State Preservation Board for the work has been issued within that period.

13 TEX. ADMIN. CODE § 111.25(c)(8)(M) (2019) (State Preservation Board, Memorials/Monuments on the Capitol Complex). Rule 111.25(c)(8)(M) does not require an organization to submit a preliminary proposal for review and approval within five years of the enactment of legislative authority. *See id.* It instead requires the Board, before approving any monument in the Capitol Complex, to ensure the Legislature has not revoked its authority to do so. *See id.* However, the language of House Concurrent Resolution 111 itself provides the Board and the Commission discretion to determine whether to accept any given proposal, and it requires both entities to consider state law and their own rules before approving construction of the monument. The exact language of the Resolution provides:

RESOLVED, That the 80th Legislature of the State of Texas hereby *authorize* the State Preservation Board and the Texas Building and Procurement Commission, subject to state law and rules of the board and commission, to approve and permit the construction of a monument . . . commemorating the Bill of Rights of the United States Constitution.

Tex. H.R. Con. Res. 111, 80th Leg., R.S., 2007 Tex. Gen. Laws 6022 (emphasis added).⁶ Courts consistently construe the word “authorize” as permissive, creating a discretionary function rather

⁵Tex. Facilities Comm’n, 2018 Tex. Capitol Master Plan Update at 76 (June 2018) (Monument Guidelines) <http://www.tfc.state.tx.us/divisions/commissionadmin/tools/>.

⁶In 2007, the Legislature renamed the Texas Building and Procurement Commission as the Texas Facilities Commission. *See* TEX. GOV’T CODE § 2152.0011(a).

than a mandatory duty. See *Gutierrez v. Collins*, 583 S.W.2d. 312, 314 (Tex. 1979); *Pablo Rion y Asociados, S.A. de C.V. v. Dauajare*, 495 S.W.3d 494, 497 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Nothing in the language of the resolution requires either the Board or the Commission to accept a proposal from an organization interested in building the monument.

In other instances, the Legislature enacted statutes requiring the Board to establish a monument commemorating a specific event or group. Cf. TEX. GOV'T CODE § 443.01525 (“The State Preservation Board *shall* establish a Tejano memorial monument” (emphasis added)). Here, the Legislature “authorized” the monument through a concurrent resolution and not through a bill. “Although such resolutions may express the will of the legislature, they cannot be given the effect of law.” TEX. CONST. art. III, § 30 interp. commentary (West 2007) (Article III, section 30 provides: “No law shall be passed, except by bill”). “The Constitution draws a clear distinction between ‘laws’ and ‘Resolutions.’” *Commercial Standard Fire & Marine Co. v. Comm’r of Ins.*, 429 S.W.2d 930, 934 (Tex. App.—Austin 1968, no writ) (discussing the constitutional distinctions found in Texas Constitution article III, sections 30 and 34). Texas courts have explained that the Legislature typically uses a resolution when “it wishes to merely express an opinion as to some given matter or thing.” *Conley v. Tex. Div. of United Daughters of the Confederacy*, 164 S.W. 24, 26 (Tex. App.—Austin 1913, writ ref’d). Thus, the Board and Commission have discretion about whether to approve and permit the construction of a monument commemorating the Bill of Rights.

In your second question, you ask:

As [the Commission] serves as consultant to [the Board] in the review and selection of a monument site in relation to the master plan, does the significant change in the Capitol Complex master plan remove any obligation by [the Commission] to reserve a potential site, to the exclusion of other applicants, when an organization has not properly or timely applied for monument approval through the [the Board] within the 5 year timeframe since legislative passage of an H.C.R.?

Request Letter at 4–5. The resolution “encouraged” the Board and Commission “to locate the monument on the Supreme Court Plaza, unless another more appropriate site within the Capitol Complex becomes available.” Tex. H.R. Con. Res. 111, 80th Leg., R.S., 2007 Tex. Gen. Laws 6022. While this provides evidence of the Eightieth Legislature’s desire that a Bill of Rights monument be constructed in a specific area, the word “encouraged” does not create a mandatory duty. It instead gives discretion to the Commission and the Board regarding a location for the monument. Furthermore, the Resolution requires the Board and Commission to ensure that any monument is consistent with state law and rules of the Board and Commission. *Id.*

In your final question, you ask:

Does the [Commission] have the authority to issue a conditional approval of a site outside the process required by [the Board] for the

procedures for approval of memorials/monuments in the Capitol Complex?

Request Letter at 5. The Board possesses review and approval authority over the site selection and construction of monuments within the Capitol Complex. *See* TEX. GOV'T CODE §§ 443.007(a)(4) (“The board shall . . . approve all changes to the [Capitol] buildings and their grounds . . .”), 443.0152(a) (listing requirements for Board approval of permanent monuments on Capitol grounds); 13 TEX. ADMIN. CODE § 111.25(c). The Board has adopted procedures for approval of such monuments and their locations. *See* 13 TEX. ADMIN. CODE § 111.25(c). The Commission is responsible for generally defining potential locations suitable for monuments within the Capitol Complex master plan. *Id.* § 111.25(c)(2). We find no separate authority on the part of the Commission to approve, or conditionally approve, a site location for a specific monument.

S U M M A R Y

House Concurrent Resolution 111, adopted in 2007 by the Eightieth Legislature, authorized the State Preservation Board and the Facilities Commission to approve and permit the construction of a monument on the Capitol grounds commemorating the Bill of Rights of the United States Constitution. The Legislature gave the Board and the Commission discretion about whether to approve and permit the construction of such a monument and where to locate the monument.

The Legislature requires the State Preservation Board to review and approve the site selection and construction of monuments within the Capitol Complex.

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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