



Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

October 6, 1999

RQ-0126-JC

RECEIVED

OCT 07 1999

RECEIVED

OCT 06 1999

Opinion Committee

OPEN RECORDS DIVISION

The Honorable John Cornyn
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML 41045-99

I.D. # 41045

Re: Whether the Department of Transportation
May Establish Advisory Committees on
Bicycles and on Transportation Planning

Dear General Cornyn:

On February 18, 1998, the Opinion Committee issued Letter Opinion 98-009. That letter informed the Commission of Licensing and Regulation that it did not have the authority to form an advisory committee to aid in its regulation of the staff leasing services industry. This letter has caused some confusion in the Department of Transportation ("TxDOT"), which has formed advisory committees on various subjects in the past. If read broadly, Letter Opinion 98-009 might be seen as calling into question TxDOT's authority to establish necessary advisory committees.

We submit that the logic in Letter Opinion 98-009 is flawed, and therefore the letter opinion should be withdrawn or strictly limited to the specific question addressed. TxDOT has general powers sufficient to permit it to form advisory committees. Moreover, in the case of these particular committees, the legislature has implicitly sanctioned them and indeed has placed requirements on TxDOT that make these committees essential to TxDOT's ability to fulfill its statutorily mandated mission. Three successive legislatures have even gone so far as to appropriate travel expenses for one advisory committee created by TxDOT on its own initiative. This constitutes legislative recognition not only of that particular committee, but also of TxDOT's general authority to create advisory committees as necessary to achieve the goals set by the legislature.

Letter Opinion 98-009

In Letter Opinion 98-009, the Opinion Committee staff noted that Section 2110.001 of the Government Code defines an advisory committee, in relevant part, as an entity "created by or under state law." The letter opinion explained further that "an administrative agency, such as the

commission 'has only such powers as are expressly conferred on it by statute together with those necessarily implied from powers and duties expressly given or imposed.' 2 Tex. Jur. 3d, Administrative Law, § 11 (1979)." The Commission of Licensing and Regulation, the opinion went on, had no general authority to create advisory committees and no specific authority to create an advisory committee on staff leasing services. The staff also took note that the legislature had mandated the creation of seven advisory boards and one council to advise the commission. The legislature should not be presumed to do a useless act, the staff opined, and the legislative creation of these other advisory committees would be a useless act if the commission had its own authority to create advisory committees. Thus, the conclusion was reached that the commission had neither the express nor the implied power to create an advisory committee on staff leasing services. We believe that the staff followed a line of reasoning which was in error.

First, the staff specifically stated that an agency has the power to do what is *necessarily implied* from powers and duties expressly given or imposed. Nonetheless, the staff never considered the powers and duties of the commission for the purpose of determining whether the creation of advisory committees might be necessary to the exercise of those powers or the accomplishment of those duties. The main focus of the staff was on whether any statute expressly authorized the creation of advisory committees. That is the beginning of a proper inquiry, but it is only the beginning.

Second, the staff quoted the Government Code's definition of an advisory committee as arising "by or under state law." It is a commonplace that in construing a statute, one should, if possible, give weight to every word. *E.g., Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998). The letter opinion places all its weight on the phrase "by . . . state law," but reads the phrase "under . . . state law" entirely out of the statute. A proper reading of the definition would recognize that the legislature contemplated that some advisory committees would be created by statute, but that others would be created by agencies under the general powers conferred on them by law.

Third, the staff placed great weight on the notion that the legislature should never be presumed to perform a useless act. Since the legislature had created several advisory committees on its own, the staff surmised that these acts would be useless if the commission could also establish advisory committees. Unfortunately, this amounts to a huge, and totally unjustified, logical leap. The legislature might form an advisory committee because it wants to be certain that this particular advisory committee is created and that its existence is not left to the agency's discretion. Moreover, the legislature might form an advisory committee because the legislature wants to direct it in a certain way or to dictate its composition. In any of these cases, an agency might have discretionary authority to form other committees with different purposes and compositions. The legislature's actions would not at all be useless because the legislature has chosen, in one particular area, to ensure that a particular committee will be formed with a specific goal and a known composition. The staff's characterization of such a legislative action as "useless" is totally unfounded.

At best, Letter Opinion 98-009 is a superficial treatment of the authority of an agency to create advisory committees. Certainly it should not be extended beyond the confines of the particular

commission and committee to which it was directed. In fact, however, its logic and law simply do not hold up. The subject definitely needs to be reconsidered.

TxDOT's General Powers

Under policies adopted by the Transportation Commission, TxDOT manages an annual budget of over \$4 billion and employs approximately 15,000 persons. Its responsibilities touch upon the full range of transportation issues in Texas, including the construction and maintenance of roads and bridges; registration of motor vehicles; licensing of motor carriers, motor vehicle dealers, and salvage dealers; aviation; railways; navigation; public transportation; toll roads; auto theft prevention; and tourist information.

In keeping with its responsibilities, TxDOT has been given broad powers. Transportation Code, §201.103 directs that the Transportation Commission “shall plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads.” Under Transportation Code, §201.601(a),

The department shall develop a statewide transportation plan that contains all modes of transportation, including:

- (1) highways and turnpikes;
- (2) aviation;
- (3) mass transportation;
- (4) railroads and high-speed railroads; and
- (5) water traffic.

The breadth and intensity of the effort required to achieve these ends is staggering. To fulfill the legislative objective, TxDOT must consider everything from the planting of wildflowers to the salvage value of railroad tracks, from the safety of fiberglass buses to weight limits on bridges leading into Mexico, from technical specifications for asphalt to the landing of seaplanes on recreational lakes. To develop and maintain the expertise needed, TxDOT employs a host of professionals and other specialists. TxDOT also accepts bids on literally billions of dollars worth of outside contracts for road construction and maintenance and for professional services running the gamut from patent lawyers to computer software designers. All this responsibility rests ultimately on the shoulders of a three-member Transportation Commission, which sets policy, and an executive director, who manages the department.

In fulfilling these tasks, TxDOT has been enjoined by the legislature to take into account the views of those outside the state bureaucracy. Transportation Code, §201.161(b) directs TxDOT that “in developing the [state transportation] plan, the department shall seek opinions and assistance from other state agencies and political subdivisions that have responsibility for the modes of transportation” Transportation Code, §201.802(a) dictates, “The commission shall develop and implement policies that provide the public with a reasonable opportunity to appear before the commission and speak on any issue under the jurisdiction of the commission.”

The broad powers delegated to TxDOT, combined with the specific legislative direction to consider the views of other groups, may make the formation of advisory committees a virtual necessity in some cases. Advisory committees have the ability not only to advise based on the expertise of their own members, but can also undertake a degree of investigation and weighing of competing public views. To place this entire burden on the Transportation Commission, operating without advisory committees, would be unfair and unrealistic. Therefore, the formation of advisory committees is within the broad powers of TxDOT.

Transportation Code, §201.101 grants the Transportation Commission the blanket authority to “adopt rules for the operation of the department.” Pursuant to that power and other specific rulemaking powers, TxDOT now operates under thousands of rules filling 25 Chapters of Title 43 of the Texas Administrative Code and one Chapter of Title 16. One of those rules is 43 TAC §1.85, which provides for the creation of advisory committees by TxDOT and governs their operation. If the power to create advisory committees were not already inherent in the wide-ranging authority granted TxDOT by the legislature, this rule, promulgated under its rulemaking powers, would provide sufficient legal justification.

Specific Legislative Approval

TxDOT’s broad powers provide ample basis for the creation of advisory committees. But if any doubt remained, it would be handily dispelled by unmistakable evidence that the legislature has approved and indeed has encouraged the formation of advisory committees by TxDOT.

At present, TxDOT relies on advice from five statutory advisory committees dealing with aviation, household goods carriers, public transportation, vehicle storage facilities, and port authorities. See 43 TAC §1.83. Each of these advisory committees were created by statute, often with specific statutory direction with regard to their composition, purposes, and powers. Surely, the legislature has taken notice that an agency as large and diverse as TxDOT will benefit from the input advisory committees offer.

At present, TxDOT has created two advisory committees on its own initiative. These are the Statewide Transportation Policy Committee and the Bicycle Advisory Committee. See, 43 TAC §1.85(a)(2), (8). (Six other advisory committees are created in the rule, but are no longer operational, and a general provision for ad hoc committees is not currently being used.) Each committee was made necessary by state and federal mandates that TxDOT must follow if it is to achieve the goals set by the legislature. These mandates require TxDOT to consider the views of a wide range of persons, and an advisory committee is the best and perhaps the only way of fulfilling those requirements.

As noted above, Transportation Code, §201.161(b) directs TxDOT, in its plans for the state transportation system, to consider input from other governmental entities. Federal law is even

more specific. In 23 USC §135(e)(2), federal law requires TxDOT to consult with other governmental entities in developing the plan. *See also*, 23 USC §135(f)(1)(B). In 23 USC §135(e)(3), Congress requires state transportation agencies to “provide citizens, affected public agencies, representatives of transportation agency employees, freight shippers, private providers of transportation, representatives of users of public transit, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed plan.” *See also*, 23 USC §135(f)(1)(C).

Thus, both state law and federal law require TxDOT to engage in transportation planning. Both state law and federal law require that TxDOT develop this plan in active cooperation with other governmental entities. Federal law further requires that many private interests be given an opportunity to comment. Under these circumstances, the formation of an advisory committee, including representatives of other governmental entities, armed with the ability to solicit and receive comments from throughout the state, is an obvious and inevitable corollary to the statutory directives.

The need for a Bicycle Advisory Committee arises similarly from legislation. Both state law and federal law require appointment of a bicycle coordinator. *See*, Transportation Code, §201.902(a); 23 USC §217(d). Moreover, under Transportation Code, §201.902(c)(2), TxDOT is required to adopt rules permitting comments from bicyclists. Once again, the obvious way to obtain input from interested parties is an advisory committee.

Both the Statewide Transportation Policy Committee and the Bicycle Advisory Committee were created before the 1999 legislative session, but the legislature failed to object to their existence. Nor is this mere passive acquiescence. In the case of the Bicycle Advisory Committee, the legislature explicitly and unambiguously approved its existence by permitting appropriated funds to be used for reimbursing its members for travel expenses. *See*, HB 1, General Appropriations Act for Fiscal Years 2000-2001, Art. VII, item 30, at VII-29. Indeed, two years earlier, the legislature had also approved reimbursement of travel expenses for members of the Bicycle Advisory Committee. *See*, HB 1, General Appropriations Act for Fiscal Years 1998-1999, Art. VII, item 32, at VII-28. And two years before that, the legislature had done the same. *See*, HB 1, General Appropriations Act for Fiscal Years 1996-1997, Art. VII, item 34, at VII-33. This legislative recognition of the Bicycle Advisory Committee—by three successive legislatures—shows not only that the legislature has been aware of and has fully approved that committee, but also that the legislature is aware of and approves TxDOT’s clear power to create advisory committees as needed to aid it in discharging its statutory responsibilities.

Conclusion

The above review shows that TxDOT has the authority to form advisory committees on its own initiative. This authority derives from TxDOT’s general powers and statutory responsibilities, and existing advisory committees were formed to meet specific duties imposed by state and federal statutes. The appropriateness of this power has been recognized implicitly by three successive legislatures in permitting reimbursement of travel expenses to one advisory

The Honorable John Cornyn

6

October 6, 1999

committee created by TxDOT on its own initiative. Letter Opinion 98-009 should therefore be withdrawn or limited to its facts.

My staff and I are available to assist your office. If you have any questions, please call Richard Monroe, General Counsel, at 463-8630.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles W. Heald".

Charles W. Heald, P.E.
Executive Director