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SEP 17 2002
OPINION COMMITTEE

FILE # ML-42796-02
I.D. # 42796

September 13, 2002

CM/RRR

Honorable John Cornyn
Attorney General of Texas
Supreme Court Building
P.O. Box 12548

RQ-0608-JC

Austin, Texas 78711-2548

Attention: Opinion Committee

Re: Is Harris County authorized to participate in the design and construction of a proposed bridge wholly outside of Harris County from Galveston Island to Point Bolivar?

Dear Sir:

On June 5, 2001, the Harris County Commissioners Court approved a resolution pooling several toll road projects. This resolution listed the proposed Galveston Island to Point Bolivar Bridge as one of the pooled projects.

On December 13, 2001, the Texas Department of Transportation (TxDOT) promulgated a minute order proposing that Harris County (the "County"), Galveston County, and the Federal Highway Administration participate with TxDOT in discussing various alternatives for a proposed toll bridge from Galveston Island to Bolivar Peninsula and possibly to develop an agreement outlining each agency's participation. The TxDOT District Director has now proposed that the County enter into an agreement under which the County will acquire a preliminary engineering report for the project.

The Director of the Harris County Toll Road Authority has advised that the project would allow traffic to Galveston from the east to avoid Interstate 10 and Harris County, lessen the burden upon Harris County's infrastructure, and contribute to air quality. The route could also serve as an additional hurricane evacuation route from the island, again relieving congestion. The Director also suggests that by allowing TxDOT to discontinue its high-maintenance ferry facility between Galveston and Bolivar, state funds could be reallocated for use in Harris County.

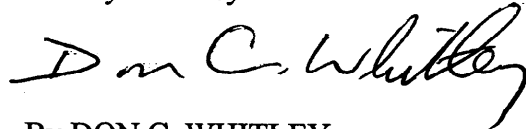
On February 19, 2001, the Galveston County commissioners court passed a resolution stating that if the project became a reality, Harris County could provide engineering, construction, operation and maintenance of the project "on the condition that all such activities will be performed at no expense to the County of Galveston."

It has been suggested that the county is authorized under Chapter 284 of the Texas Transportation Code to participate in this project. A question has arisen as to whether the statute, any other statute, or the Constitution authorizes the county to participate in such a project, no part of which is located within Harris County.

We are asking that your office please furnish us with your opinion on the question presented. A Memorandum Brief is enclosed.

Sincerely,

MIKE STAFFORD
County Attorney



By DON C. WHITLEY
Assistant County Attorney

Approved:


JOHN R. BARNHILL
First Assistant County Attorney

MS:DCW

MEMORANDUM BRIEF

Re: Is Harris County authorized to participate in the design and construction of a proposed bridge wholly outside of Harris County from Galveston Island to Point Bolivar?

On December 13, 2001, the Texas Department of Transportation (TxDOT) promulgated a minute order proposing that Harris County (the "County"), Galveston County, and the Federal Highway Administration participate with TxDOT in discussing various alternatives for a proposed toll bridge from Galveston Island to Bolivar Peninsula and possibly to develop an agreement outlining each agency's participation. The TxDOT District Director has now proposed that the County enter into an agreement under which the County will acquire a preliminary engineering report for the project.

The Director of the Harris County Toll Road Authority has advised that the project would allow traffic to Galveston from the east to avoid Interstate 10 and Harris County, lessen the burden upon Harris County's infrastructure, and contribute to air quality. The route could also serve as an additional hurricane evacuation route from the island, again relieving congestion. The Director also suggests that by allowing TxDOT to discontinue its high-maintenance ferry facility between Galveston and Bolivar, state funds could be reallocated for use in Harris County.

On February 19, 2001, the Galveston County commissioners court passed a resolution stating that if the project became a reality, Harris County could provide engineering, construction, operation and maintenance of the project "on the condition that all such activities will be performed at no expense to the County of Galveston." This was apparently done at least in part to meet the requirements of TEX. TRANSP. CODE ANN. § 284.067 (Vernon 1999), which provides:

Projects Extending Into Other Counties

- (a) A county may not construct or acquire a project that is financed under this chapter and any part of which is in another county until the commissioners court of the other county adopts a *resolution consenting to the construction or acquisition*.
- (b) A part of a project that has not been designated as part of the state highway system and that is not a turnpike project as defined in Chapter 361 is a part of the county road system of the county in which the part is located. A law relating to the maintenance and operation of a county road applies to a project constructed or acquired under this chapter to the extent the law does not conflict with this chapter.

(c) Each county into which the project extends, by condemnation or another method under general law, may acquire the property necessary for the project. The county issuing the bonds may use the bond proceeds to acquire property necessary for the project in any county into which the project extends.

(d) Payment of the purchase price, award, or other cost of the project may be on the terms to which the commissioners courts of the county issuing the bonds and the other county agree. Proceeds from bonds issued under this chapter may be used to pay a cost incurred under this section.

TEX. TRANSP. CODE ANN. § 284.067 (Vernon 1999) [emphasis added].

This section is part of Chapter 284 of the Texas Transportation Code (the “Toll Road Statute”), the statute under which Harris County generally builds and operates toll roads. While § 284.067 provides for certain prerequisites that must be met before the County can exercise such authority as it may have to construct any part of a toll project outside of the County, any such project must also be within the scope of the projects authorized by TEX. TRANSP. CODE ANN. § 284.003 (Vernon 1999), which provides:

Project Authorized; Construction, Operation, and Cost

A county, acting through the commissioners court of the county, or a local government corporation, without state approval, supervision, or regulation, may:

- (1) construct, acquire, improve, operate, maintain, or pool a project exclusively *in the county or in the county and outside the county*;
- (2) issue tax bonds, revenue bonds, or combination tax and revenue bonds to pay the cost of the construction, acquisition, or improvement of a project; or
- (3) impose tolls or charges as otherwise authorized by this chapter.

TEX. TRANSP. CODE ANN. § 284.003 (Vernon 1999) [emphasis added].

Under Texas law, a city generally cannot exercise powers outside its boundaries except with express statutory authority, unless the power is reasonably incident to powers expressly granted, and doubts about the existence of such power are resolved against the city. *Hope v. Village of Laguna Vista* 721 S.W.2d 463, 463-464 (Tex. App.--Corpus Christi. 1986, writ ref'd n.r.e.). We are unaware of any reasonable argument that a county would have greater authority than a city to act outside of its borders without express statutory authority to do so. TEX. TRANSP. CODE ANN. § 284.003 (Vernon 1999), quoted above, is the only authority found expressly authorizing Harris County to design and construct a toll facility not entirely within its boundaries. Thus, it must be determined whether that provision would authorize the proposed project.

On April 2, 2002, the Harris County Attorney issued an opinion, a copy of which is attached, that this provision on its face authorized the County to participate in the construction of certain toll roads in Fort Bend County connecting to toll roads within Harris County. The question presented to the Attorney General differs from that in the opinion because the proposed

bridge has no connection to a toll road project within Harris County. It has been suggested that the bridge is neither “exclusively within the county” or “in the county *and* outside the county” as required by the statute.

On June 5, 2001, the Harris County Commissioners Court approved a resolution pooling several toll road projects. This resolution listed the proposed Galveston Island to Point Bolivar Bridge as one of the pooled projects. Pooling of projects is authorized by the following statute:

Pooled Projects

- (a) A commissioners court of a county by resolution may pool two or more *projects* the county constructs under this chapter.
- (b) An existing project may be pooled in whole or in part with a new *project*.
- (c) A *project* may not be pooled more than once.
- (d) The resolution of the commissioners court establishing a pooled project shall set a date when each of the *projects* being pooled will be available for the free use of the public. The date must be consistent with the bond instrument applicable to bonds for any of the pooled *projects*.
- (e) Subject to the terms of a bond instrument, a county proceeding under this chapter may, from time to time, issue bonds, including bonds that are payable either in whole or in part from the revenues of a pooled project, to:
 - (1) pay all or a part of the cost of the pooled project or the cost of a part of the pooled project;
 - (2) pay the costs of constructing improvements, extensions, or enlargements to all or part of a pooled project; or
 - (3) refund outstanding bonds issued for any part of a pooled project, including payment of a bond redemption premium and any interest to the date of redemption; and
 - (4) pay the cost of constructing improvements, extensions, and enlargements to any part of a pooled project for which any part of the bonds to be refunded were issued.
- (f) Revenues of any part of a pooled project may be pledged to pay the bonds.
- (g) Improvements, extensions, or enlargements to be paid from refunding bonds issued under this chapter may be constructed on any part of the pooled project without regard to the parts of the pooled project covered by the bonds to be refunded.
- (h) The refunding bonds may be issued in exchange for outstanding bonds or may be sold and the proceeds used to redeem outstanding bonds.
- (i) A county may, from time to time, amend the extent or component parts of a designated pooled project, consistent with the terms of related bond instruments.
- (j) This chapter applies to a pooled project and an amended pooled project in the same manner that it applies to any other project.

TEX. TRANSP. CODE ANN. § 284.067 (Vernon 1999) [emphasis added].

It has been suggested that the requirement of being “inside and outside the county” can be satisfied if the requirement is applied to the pooled project as a whole. This raises the question of whether, since the statute indicates that only “projects” can be pooled with other “projects,” each separate project being pooled must satisfy the requirements of Section 284.003.

It has also been suggested that the words “in the county and outside the county” do not require that a project outside the county actually be physically connected to a part of the project within the county. A review of the pre-codification version of the Toll Road Statute may be instructive. The statute originally provided that certain counties could act in regard to projects only “from one point in said county to another, . . .” Acts 1947, ch. 304, §1, 1947 Tex. Gen. Laws 515. In 1955, that act was amended to expand the authority to read “from one (1) point in said county to another, or from one (1) point in said county to a point in another county (regardless of the population of such other county), . . .” Acts 1955, ch. 446, §1, 1955 Tex. Gen. Laws 1163. TEX. TRANSP. CODE ANN. § 284.003 (1) (Vernon 1999), quoted above, is the codified version of the 1955 version.

Thus, the law as it existed prior to codification appears to have required that each project connect to at least one point within the constructing county. The present provision was enacted as part of the Transportation Code, by Acts 1995, 74th Leg., ch. 165, Section 25 of which provides:

Sec. 25. Legislative Intent of No Substantive Change. This Act is enacted under Section 43, Article III, Texas Constitution. *This Act is intended as a recodification only, and no substantive change in law is intended by this Act.*

Acts 1995, 74th Leg., ch. 165, Section 25 [emphasis added].

Further indication of the legislature’s intent may be found in the first paragraph of the Revisor’s Note found after TEX. TRANSP. CODE ANN. § 284.003 (Vernon 1999):

- (1) Section 1, V.A.C.S. Article 6795b-1, refers to a project extending “from one (1) point in said county to a point in another county (regardless of the population of such other county).” The revised law omits the reference to the population of the other county and substitutes the phrase “outside the county.” The substituted phrase includes any county regardless of the county’s population.

This indicates that at least one purpose of the changed wording was to avoid the parenthetical phrase in the old statute. The original parenthetical was apparently inserted to act as an exception (applicable to counties with insufficient population into which a covered county constructs a project) to the requirement of the Toll Road Statute and its predecessors that the statute apply only to counties with certain minimum populations. See TEX. TRANSP. CODE ANN. § 284.002 (Vernon 1999). The revisers were apparently, at least in part, attempting to avoid

making the under-populated county a county to which the Toll Road Statute applies by not referring to such county, but merely to any place “outside the county.”

One cannot merely look to the prior statute to determine the construction of its codified form. The Texas Supreme Court has held that despite a statement of intent by the legislature to make no substantive change, when “specific provisions of a ‘nonsubstantive’ codification and the code as a whole are *direct, unambiguous, and cannot be reconciled* with prior law, the codification rather than the prior, repealed statute must be given effect.” *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 286 (Tex. 1999) [emphasis added]. But if the codified and prior versions of a statute are reconcilable, the statute should be construed to reflect the legislature’s stated intent of no substantive change. *Austin v. Southwestern Bell Telephone Company*, No. 01-0086 (Tex., June 6, 2002) (citing *Fleming Foods*). The issue becomes whether there is a direct and unambiguous, irreconcilable conflict between the pre-codification and codification versions. The codification, by requiring that a project be both inside **and** outside the County might arguably be construed to require, like its predecessor, that a project, unless exclusively within the County, make a contiguous connection between a point within the County and a point outside the County..

Another issue that needs to be resolved is the effect, if any, of TEX. TRANSP. CODE ANN. § 283.003(b) (Vernon 1999), which states:

(b) A county may not construct a bridge that traverses a ship channel or waterway with a maintained depth of 20 feet or more.

It is our understanding that the ship channel between Galveston Island and Point Bolivar has a maintained depth of over 20 feet. Thus, when read by itself, this statute appears to prohibit the construction by Harris County of the Bolivar Bridge. But, TEX. TRANSP. CODE ANN. § 283.002 (Vernon 1999) states:

This chapter [which includes the above quoted prohibition] applies only to a county that:

- (1) **borders on the Gulf of Mexico**; and
- (2) has a population of at least 20,000 as determined before the issuance of bonds under this chapter.

[emphasis added]. Thus, the prohibition against building the bridge would not appear to apply to Harris County because it does not border on the Gulf of Mexico, but on Galveston Bay. It should be noted that the Toll Road Statute, while once limited to counties bordering on the Gulf of Mexico of a certain population [see Acts 1947, ch. 304, §1, 1947 Tex. Gen. Laws 515] was later amended to apply to “[a]ny county in the State of Texas which borders on the Gulf of Mexico or any bay or inlet opening thereinto” of a certain population [Acts 1977, ch. 861, §1, 1977 Tex. Gen. Laws 2160, emphasis added] and now applies to such counties plus any county with a population of 1.5 million or more or adjacent to a county of such population. TEX.

TRANSP. CODE ANN. § 284.002 (Vernon 1999). Thus, while the prohibition may apply to Galveston County, it does not appear to apply to Harris County. [See Op. Tex. Att’y Gen. No. V-291 (1947) regarding proposed contract between the Texas Highway Commission and Galveston County for construction of a tunnel to replace the Bolivar ferry].

If the Toll Road Statute is construed to authorize the County to construct projects with no connections to any toll road within the County, it remains to be determined whether such authority constitutionally authorizes the County to construct this particular bridge. The Texas Supreme Court has indicated that the legislature is limited as to the authority that can be delegated to a local government, stating:

Much has been said as to the nature and powers of municipal corporations. We refer to the able authors, encyclopaedias and other treatises, without citing them.

The limitation of power in mind and adhered to here is that the jurisdiction and power exercised by a municipal corporation is and must be confined to the territory of its situs (except where authorized for purely local purposes), to its inhabitants, to its corporate entity, “and cannot be divorced therefrom either in fact, thought or law.”

Judge Cooley, in Cooley’s Constitutional Limitations (7th Ed.), says:

“The powers conferred on municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government. The state can create them for no other purpose, and it can confer powers of government to no other end, without at once coming in conflict with the constitutional maxim, that the legislative power cannot be delegated, or with other maxims designed to confine all the agencies of government to the exercise of their proper functions. *And wherever the municipality shall attempt to exercise powers not within the proper province of local self-government, whether the right to do so be claimed under express legislative grant, or by implication from the charter, the act must be considered as altogether ultra vires, and therefore void.*”

City of Arlington v. Lillard, 294 S.W. 829, 830 (Tex. 1927) [emphasis added].

The Texas Constitution provides a specific limitation on the legislature’s power to grant authority to Counties, as follows:

Each county shall, in the manner provided for justice of the peace and constable precincts, be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall

exercise such powers and jurisdiction over *all county business*, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

TEX. CONST. art. V, §18(b) [Emphasis added].

In Op. Tex. Att’y Gen. No. JC-0036 (1999), the attorney general construed the constitutional provision regarding county business as follows:

Therefore, matters that serve a county purpose are county business for the purposes of article V, section 18(b) of the Texas Constitution. . . . Therefore, in accordance with article V, section 18(b), we read section 251.102 as requiring a commissioners court finding that a particular expenditure is ‘county business.’

Ibid, p. 7.

The issue becomes whether construction of the Bolivar Bridge would service a local county purpose. In the attached prior County Attorney opinion concerning extension of toll roads into Fort Bend County, the County Attorney’s office stated that a finding by commissioners court of a county purpose for the proposed agreement could be justified based upon such matters as the proposed connection of the toll roads to the county toll road system, anticipated heavy use of the roads by county residents, and anticipated increased toll collection due to such connections. As stated above, it has been suggested that the Bolivar Bridge project would serve the purposes of and benefit Harris County by allowing traffic to Galveston from the east to avoid Interstate 10 and Harris County, lessen the burden upon Harris County’s infrastructure, and contribute to air quality. The route could also serve as an additional hurricane evacuation route from the island, again relieving congestion. It has also been suggested that the County will be benefited by controlling toll road construction and operation in the region. It is also suggested that by allowing TxDOT to discontinue its high-maintenance ferry facility between Galveston and Bolivar, state funds could be reallocated for use in Harris County.