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OPINION COMMITTEE

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May 31, 2011

Office of the Attorney General
Opinions Committee
P.O. Box 12548
Austin, Texas 78711

RE: Request for Attorney General Opinion

Dear Sir or Madam:

Pursuant to Section 402.042 of the Texas Government Code, and on behalf of Regent Glenn Lewis, Chairman of the Board of Regents of Texas Southern University, I request an Attorney General Opinion as to whether Texas Southern University may exchange and/or gift land to a non-profit corporation.

Texas Southern University (hereinafter referred to as "TSU"), one of the nation's largest HBCUs (Historically Black Colleges and Universities) is a coeducational institution of higher education located in the city of Houston. In addition to its designation as a statewide general purpose institution of higher education, TSU is designated as a special purpose institution of higher education for urban programming. Tex. Education Code §§ 106.01 and 106.02.

Within its enabling statute, the Board is charged with governing the university and is authorized to "(a)... acquire by purchase, exchange, or otherwise any tract or parcel of land or other real property necessary or convenient for carrying out the purposes of state-supported institutions of higher education, and may sell, exchange, or lease any land owned by the university. (b) The proceeds from any lease of land or other real property shall be added to the general funds of the university. The proceeds from any sale of land or other real property shall be added to the capital funds of the board. The board has the power of eminent domain for land acquisitions permitted by Subsection (a) of this section." Tex. Education Code § 106.35

The Olivewood Cemetery (hereinafter referred to as "Olivewood") is the oldest black cemetery in Houston and within the cemetery lie those early black residents who helped form the history of the City of Houston and its environs, including military veterans, ex-slaves, laborers, sororal and fraternal organization members, a former Pastor of Trinity Methodist Episcopal Church, a former City of Houston Alderman, an attorney, an educator, a doctor and

a dentist. Olivewood received historical designation from the Texas Historical Commission in 2009.

The land for Olivewood was acquired in 1875 by instrument recorded in Volume 15, Page 250, of the Harris County Deed Records and the Olivewood Cemetery Association was incorporated that same year. Thereafter, Olivewood was expanded with additional land purchases in 1917 and 1931 by instruments recorded in Volume 383, Page 524, of the Harris County Deed Records and in Volume 871, Page 731, of the Harris County Deed Records, respectively. Olivewood has suffered many years of neglect that has resulted in a loss of markers and, therefore, a loss of part of the Houston community's history.

TSU owns three parcels of land associated with Olivewood (two within and one adjoining). More specifically, lots One (1), Four (4) and Five (5) of the J.R. Bisbee Addition, an addition in Harris County, Texas according to the map or plat thereof recorded in Volume 167, Page 137, of the Map Records of Harris County, Texas, (hereinafter "the Land") were donated to the Board of Regents of TSU pursuant to that certain instrument dated 1982 and recorded at Harris County Clerk's Instrument No. H613418, Film Code No. 025-82-0882. At the time of the donation, there is no evidence that TSU had knowledge that there were graves on the parcels of land. Several grave markings and graves dating back to the 1930's have been discovered on at least two parcels of the Land and used as a burial ground as part of Olivewood. Thus, TSU is for all intents and purposes, the owner of cemetery land because graves exist on two parcels of its land. Further, Texas Health and Safety Code § 711.035(g) provides that "[p]roperty is considered to be dedicated cemetery property if...one or more human burials are present on the property...". Therefore, at least two parcels of the land are dedicated cemetery lands. The remaining small parcel has no apparent graves but is abutting Olivewood.

The Descendents of Olivewood (hereinafter referred to as "the Descendents"), a Texas non-profit corporation since 2007, have been engaged in a major restoration project since April 2004. By Order and Final Judgment and Decree of the 11th Judicial District Court, Harris County, Texas, under Cause No. 2007-30199, dated November 24, 2008, the Descendents have been authorized to restore, operate, and maintain Olivewood Cemetery. As part of their restoration efforts, the Descendents seek to receive from TSU the three parcels of land identified above as part of their efforts to comply with the court order and restore the cemetery. More specifically, the Descendents seek to receive from TSU the three parcels of land for the purposes of enabling the Descendents to incorporate these parcels into the formal cemetery boundaries, allowing restoration efforts by the Descendents, and allowing these parcels to be secured and to prevent thefts of valuable and historical headstones.

TSU understands that the Descendents possess certain historical papers related to Olivewood and those who are buried there. The Descendents propose to donate the historical papers to TSU for the establishment of a collection at TSU in exchange for the title to the land. While there is no appraisal as to the fair market value of the historical papers at this time, TSU is in possession of appraisals for the land. The appraisals reveal that the two parcels that contain graves and grave markings have zero value, while the remaining parcel adjacent to Olivewood has an appraised value of \$11,250.00. TSU requests your formal opinion as to whether it is authorized to exchange the land for the historical papers. Alternatively, the Descendents propose an exchange of the property for an agreement

between the Descendents and TSU which will allow TSU, its faculty, staff and students, all reasonable access to the cemetery for TSU-based educational purposes, consistent with the foregoing Order and Final Judgment and Decree. These activities would be expected to further TSU's educational mission in a variety of fields of study, including history, literature, cultural studies, media, marketing, anthropology, architecture and design, and urban development, to name a few. TSU believes that the benefits to TSU and its students of a tangible and readily accessible classroom and laboratory is valuable and is legitimate consideration for a conveyance of title to the three lots.

As a third alternative, the Descendents propose that TSU gift the property to them to serve the greater public purpose. While TSU is aware of constitutional prohibitions on the gifting of state property or the giving away of public funds, TSU submits that the gifting of the parcels of land would serve a greater public purpose for historical preservation for citizens of the City of Houston and the State of Texas. While TSU would not have any direct control over the activities of the Descendents, there is a court order containing an extensive plan by the Descendents to restore, operate and maintain Olivewood, which plan was modified and approved by the court. The court appointed the City of Houston (acting through its Controller) as the Trustee of the trust funds. Further, the court retains continuing jurisdiction to monitor and review compliance with the court's order. Thus, the court has direct control over the plan to ensure compliance and see that a public purpose is achieved. TSU submits that a public purpose would be served by gifting the land to the Descendents. In any case, TSU requests the Attorney General's opinion regarding whether TSU may gift the two parcels of land which contain burial graves, and have zero appraisal value.

Because the land is dedicated cemetery land (as graves exist on two of the parcels), it would pose an undue financial burden on TSU to remove the designation as cemetery lands as TSU would have to remove the remains, a process that would be very tedious and expensive as graves on the land date back to the 1930's. Further, removal of the graves would negatively impact the historical public purpose as it is TSU's understanding that there is no other place within the cemetery to put the remains.

If you need any additional information, please do not hesitate to contact us at 713-313-7950.

Sincerely,



Tammye Curtis-Jones
Associate General Counsel



Andrew C. Hughey
General Counsel

Cc: Glenn Lewis, Chairman, Board of Regents, Texas Southern University
Dr. John M. Rudley, President, Texas Southern University