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OPINION COMMITTEE

JERI YENNE

**CRIMINAL DISTRICT ATTORNEY
BRAZORIA COUNTY**

October 17, 2011

RQ-1007-GA

Via Certified Mail, Return Receipt Requested

Honorable Greg Abbott
Attorney General of Texas
Opinion Division
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-46849-11
I.D. # 46849

Dear General Abbott:

Pursuant to Texas Government Code, § 402.043, the Brazoria County District Attorney's Office respectfully submits this request for the Attorney General's opinion concerning the enforcement authority for regulations enacted by Commodore Cove Improvement District ("the District"), a water control and improvement district, concerning bulkheads along canals in the District.

FACTS

Commodore Cove Improvement District is located near the Gulf of Mexico in Brazoria County, Texas. The District contains a residential subdivision, in which almost all of the lots are adjacent to canals, which connect to Oyster Creek, which in turn reaches the Intracoastal Waterway and the Gulf of Mexico. The pertinent facts are more fully recited in Section 1 of the enclosed Regulation No. 10 ("the Regulations") of the District.

The District enacted the Regulation on August 23, 2010, to require and regulate bulkheads on lots adjoining canals in the subdivision. The Regulation (1) includes findings of fact that bulkheads and the Regulation are necessary in order to preserve the navigability of the canals and to preserve the usefulness and value of the lots in this boating community. The Regulation (2) requires the owner of any lot adjoining a canal in the subdivision to cause the lot to have bulkheads that meet the specifications in the Regulations. The Regulation provides that a violation is a misdemeanor punishable upon conviction by a fine of up to \$ 500 and that each day or portion of a day that a violation continues is a separate offense.

Pursuant to this Regulation, the District has issued criminal citations to some of its members for alleged violations of this Regulation.

QUESTION PRESENTED

Who is the proper entity to prosecute alleged criminal violations of this regulation in court?
COUNTY COURTHOUSE, 111 E. LOCUST, SUITE 408A, ANGLETON, TEXAS 77515

Angleton Area
(979) 864-1230

Brazosport Area
(979) 388-1230

Houston Area
(281) 756-1230

Fax-Criminal Division
(979) 864-1525

Fax-Civil Division
(979) 864-1712

Fax-CPS Division
(979)-849-8914

ARGUMENT & AUTHORITIES

Creation of District

The District was created by an act (“the Enabling Act”) of the Texas Legislature as a conservation and reclamation district pursuant to Article XVI, § 59 of the Texas Constitution, with the powers and duties of a water control and improvement district under Chapters 49 and 51 of the Texas Water Code. H.B. 786, Tex. Leg. 1965.

Purposes of District

The Enabling Act (1) created the district for the purposes stated in Article XVI, § 59 of the Texas Constitution, which include “the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State...” Tex. Const. Art. XVI § 59 (a).

The Texas Water Code, § 51.121(b) also provides that the purposes of the District include the following:

(b) A water control and improvement district organized under the provisions of Article XVI, § 59, of the Texas Constitution may provide for:

- (1) the control, storage, preservation and distribution of its water and floodwater and the water of its rivers and streams for irrigation, power and all other useful purposes;
- (4) the navigation of its coastal and inland water;
- (7) the preservation and conservation of all natural resources of the state.”

TEX. WATER CODE § 51.121 (b)

Powers to Achieve Purposes

§ 49.211 (a) of the Texas Water Code gives the District the powers to achieve its purposes:

(a) A district shall have the functions, powers, authority, rights and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law.”

TEX. WATER CODE § 49.211 (a)

Likewise, § 51.121 (c) of the Texas Water Code, states, “The purposes stated in Subsection (b) of this Section may be accomplished by any practical means.” TEX WATER CODE § 51.121 (c). Accordingly, the powers of the District to enact regulations should be broadly construed to accomplish the purposes of the District.

Power to Enact Regulations

§ 51.122 of the Texas Water Code authorize the District to adopt rules and regulations:

§ 51.122 Adopting Rules and Regulations

A district may adopt and enforce reasonable rules and regulations to: (*emphasis added*)

- (2) prevent waste or the unauthorized use of water controlled by the district;
- (3) regulate privileges on any land or any easement owned or controlled by the district;

TEX. WATER CODE § 51.122

§ 51.128 states that the adopted rules and regulations are recognized by the courts as if they were penal ordinances of a city. TEX. WATER CODE § 51.128. § 51.241 declare that any offense under Chapter 51 is a Class C misdemeanor. TEX WATER CODE § 51.241.

Duties of the Brazoria County Criminal District Attorney

By way of background, Brazoria County utilizes a criminal district attorney whose duties, in addition to those set forth in § 2.01 & 2.02 of the Texas Code of Criminal Procedure, are as follows:

- (a) the duties of the criminal district attorney of Brazoria County shall attend each term and session of the district courts of Brazoria County and each term and session of the district courts of Brazoria County and each term and session of the inferior courts of the county held for the transaction of criminal business and shall exclusively represent the state in all criminal matters before those courts. He shall represent Brazoria County in any court in which the county has pending business.
- (b) The criminal district attorney has all the powers, duties and privileges in Brazoria County that are conferred by law on county and district attorney in the various counties and districts.
- (c) The criminal district attorney shall collect the fees, commissions, and perquisites that are provided by law for similar services rendered by a district or county attorney.

TEX. GOV'T CODE § 44.120.

The citations at issue were issued by a peace officer who has been appointed, given an oath and executed a bond to the District pursuant to § 49.216 of the Texas Water Code. This section gives the district the right to contract for and employ its own peace officers with power to make arrests when necessary to prevent or abate the commission of offenses against the rules of the district, offenses involving injury or detriment to any property owned or controlled by the district, or any offense against the laws of the state. The citations were filed in the Justice of the Peace Court of Brazoria County, Texas. TEX. WATER CODE § 49.216.

The central issue is determining the proper enforcement entity that is to prosecute any alleged violations of the Regulation at any court proceedings. The alleged regulation is not a law of the State of Texas or any Brazoria County order, but rather a regulation enacted pursuant to the District's authority granted to it by § 49 and 51 of the Texas Water Code. As such, should this regulation be prosecuted in court by the Criminal District Attorney's Office, a prosecutor employed and appointed by the District or a municipal prosecutor?

Would your office please provide this office with a letter opinion setting forth answers to the following question?

1) Who is the proper prosecuting entity for court actions or prosecutions for alleged criminal violations of the District's regulations?

This office is looking forward to your response to this request for your opinion on the foregoing questions. Please let me know if you would like any further briefing.

Sincerely,


JERI YENNE

cc: Commodore Cove Improvement District

Mr. Laurence E. Boyd
Attorney for Commodore Cove
Improvement District