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OPINION COMMITTEE



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FILE # ML-47224-13
I.D. # 47224

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1111-GA

Re: Authority of a county operating under the County Road Department System, Chapter 252, subchapter D, Transportation Code, to enter into binding agreements with private entities in exchange for donations from those companies to work on specific roads as directed under the agreement.

Dear Mr. Abbott:

We respectfully request your opinion regarding the above referenced issue.

I. Facts

Waller County adopted the Optional County Road Law of 1947 shortly after its enactment. Your office has previously ruled that Waller County continues to operate under the Optional County Road Law provisions, now codified in chapter 252, subchapter D, Transportation Code, unless it votes to abandon those provisions. Tex. Att'y Gen. Op. No. DM-368 (1995). There are several private companies that wish to donate money for materials to the county to repair and improve a particular public road as designated by the private companies. In consideration for the donations, the county would agree to expend county labor and equipment to work on the specific roads under the agreement and to complete the work in a set amount of time.

Under the County Road Department System, the county engineer determines, using his professional expertise, in what priority the county roads will be worked on without regard to precinct lines as compared to other systems under Chapter 252. TEX. TRANSP. CODE ANN. §§ 252.303, 252.309 (2012). The Commissioners Court act as the policy making body. *See id.* § 252.302 (2012). If the county agrees to work on specific roads pursuant to agreements entered into with private companies in exchange for money, the

terms of these agreements necessarily allow those roads to take precedence over other roads in the county.

II. The Law

Commissioners courts possess only those powers expressly conferred by the Texas Constitution and legislature. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003); *Canales v. Laughlin*, 147 Tex. 169 (1948). While a commissioners court has broad discretion in exercising powers expressly conferred upon it, the legal basis for any action by the court must be found in the constitution or statutes. *See Canales*, at 453. Chapter 252 of the Transportation Code contains four alternative systems of road management available to counties. Subchapters B and C both contain express donation clauses which authorizes counties operating under those subchapters to accept donations for aid in building or maintaining roads in the county. TEX. TRANSP. CODE ANN. §§ 252.109, 252.214 (2012).

However, subchapter D, concerning the County Road Department System, does not have such an express donation provision. Waller County operates under this subchapter. When the Optional County Road Law was originally enacted in 1947, it did not contain a special donation clause. The Optional County Road Law of 1947, 50th Leg., R.S., ch. 178 (V.C.S. Article 6716-1). The Optional County Road Law was recodified in 1983 without substantive changes. The County Road and Bridge Act, 68th R.S., ch. 288 (1983). It was again recodified in 1995. Acts 1995, 74th Leg. R.S., ch. 165, Sec. 1, eff. Sept. 1, 1995. The subject of the House committee report is titled as “Nonsubstantive recodification of transportation laws.” S.B. 971, 74th R.S. (1995). No changes regarding the authority to accept donations were included in the subsequent recodifications of the Optional County Road Law System. In contrast, the donation provisions available to counties operating under subchapters C and D, the Road Commissioner and the Road Superintendent Systems, were kept intact in the recodifications.

III. A special law will prevail over a general law when there is no manifest intent by the legislature that the general law prevail.

There are several statutes concerning the authority of counties to accept donations. Under the Transportation Code, counties operating under the Road Commissioner System and Road Superintendent System may accept donations to aid in maintenance and improvements of roads. §§ 252.109, 252.214; Tex. Att’y Gen. Op. No. GA-0359 (2005) (“An ex officio road commissioner's powers are limited: a commissioner independently may not accept a donation, for example. See Tex. Att’y Gen. Op. No. JM-1155 (1990) at 2 (determining that an ex officio road commissioner may not accept donations without the commissioners court's approval); cf. TEX. TRANSP. CODE ANN. § 252.109 (Vernon 1999)

(authorizing a county that has adopted a road commissioner system to accept donations "to aid in building or maintaining roads in the county"); *id.* § 252.214 (authorizing a county that has adopted a road superintendent system to accept donations "to aid in building or maintaining roads in the county"). The County Road Department System, under subchapter D, has no such provision.

There is a general donations statute under the Local Government Code which allows the commissioners court to accept any "gift, grant, donation, bequest, or devise" of money or other property so long as it is accepted for the purpose of fulfilling a county function. TEX. LOC. GOV'T CODE § 81.032 (Vernon 2012). However, under the Code Construction Act, a special provision prevails over a general provision. TEX. GOV'T CODE § 311.026 (2012). Though Local Government Code section 81.032 is more recently enacted than chapter 252, subchapter D, there is no "manifest intent" of the legislature that the provisions of section 81.032 prevail over those of chapter 252. Accordingly, a county that has adopted the County Road Department System under chapter 252, subchapter D of the Transportation Code is governed by that subchapter when it concerns management of roads.

Your office held that Waller County must follow procedures outlined in Transportation Code chapters 253 or 281 to bring a private road in Waller County into its county road system instead of the general donation statutes under Local Government Code section 81.032 or Transportation Code section 252.214. Tex. Att'y Gen. Op. No. GA-0345 (2005). In concluding that Waller County could take donations under section 252.214 of the Transportation Code, your office assumed that Waller County had adopted the Road Superintendent System under chapter 252, subchapter C so that section 252.214 would apply. *See id. footnote 5.* As stated above, Waller County adopted the Optional County Road Law shortly after the Legislature adopted it in 1947. *See* Tex. Att'y Gen. Op. No. DM-0368 (1995) (holding that Waller County continues to operate under the Optional County Road Law – now, chapter 252, subchapter D, Transportation Code – unless it votes to abandon those provisions).

We seek clarification from your office on whether Waller County may incorporate the donation statutes from the other subchapters in chapter 252. Furthermore, GA-0345 stated that Waller County may use Transportation Code section 252.214 *or* Local Government Code section 81.032 to accept donations for maintaining roads. It would seem that if a special provision, such as section 252.214 were to apply, a general provision would not be necessary.

Your office discussed the relationship between a general provision concerning purchasing and a special provision concerning road purchases made by counties operating under the county engineer system pursuant to then section 3.201 through 3.213 of article 6702-1, V.T.C.S. *See* Tex. Att'y Gen. Op. No. JM-1027 (1989). In applying the rule of statutory construction provided by Government Code Section 311.026, your office noted that the general purchasing statutes provided under Local Government Code sections

262.023 and 262.024 were enacted later than section 3.211 of article 6701-1 (now codified in Transportation Code Section 252.312), the special provision applicable to the purchase of road materials for counties operating under the county engineer system. However, Your office reasoned that even though the more general provisions under Local Government Code sections 262.023 and 264.024 would not have required competitive bidding of the materials in question, that the more special provisions requiring competitive bidding under Section 3.211 applied because there was no manifest intent of the legislature that the general statute prevail over the special statutes.

In another opinion concerning road systems, your office discussed the operation of the ex officio road commissioner system. *See* Tex. Att’y Gen. Op. No. GA-0295 (2005); TEX. TRANSP. CODE ANN. ch. 252, subch. A (Vernon 2012) (Ex Officio Road Commissioner System). Your office reasoned that two ex officio road commissioners may not jointly hire a person to work in both precincts because there was no such provision to authorize such a practice under chapter 252, subchapter A. In a letter opinion cited by GA-0295, your office stated that chapters not adopted by the counties are not applicable to those counties because they are governed by their special governing statutes. *See* Tex. Att’y Gen. Lo-98-087 (stating that a county which has not adopted any of the optional systems of county road administration under chapter 252 of the Transportation Code is therefore subject to chapter 251 of the Transportation Code, which sets out the general county authority relating to roads and bridges).

IV. Under Rules of Statutory Construction, the absence of a donation statute under chapter 252, subchapter D, should be read as an intentional omission unless there is evidence to the contrary.

Rules of statutory construction support the conclusion that subchapter D of chapter 252 is the controlling special provision regarding the operation of county roads when a county adopts it pursuant to statute. One familiar and established rule is that when two statutes concern the general subject matter, the more special statutory provision prevails. *See Garza v. State*, 687 S.W.2d 325 (Tex. Crim. App. 1985); Tex. Att’y Gen. Op. No. JM-892 (1988) (overruled to extent inconsistent with JC-0036 (1999)).

Under the doctrine of *expression unius est exclusion alterius* ('The expression of one thing is exclusive of another'), a statute's silence can be significant. *See PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004). When the legislature includes a provision in one part of a statute, but omits it in another, that may be precisely what the legislature intended. *Id.* Even though it's possible that an omission may have been due to mistake or other reasons, a court will begin its analysis by presuming the omission was intentional. *Id.*; *see also Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980).

In JM-0995, your office discussed the above maxim:

'When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.'

2A N.J. Singer, Sutherland Statutory Construction s 47.23 (C. Sands 4th ed. 1984). (Footnotes omitted.)

Applying the principles above to this situation, the donative provisions under Transportation Code sections 252.109 and 252.214 are creative statutes in nature in that it confers authority to the commissioners court. Accordingly, it follows that the absence of such a provision under chapter 252, subchapter D would mean that a county operating under that subchapter does not have the authority conferred in the other sections.

V. Incorporating provisions outside of Subchapter D would contravene the original intent of the voters.

The County Road Department System is also distinguished from the other alternative systems in Chapter 252, Trans. Code, because it requires voter approval before adoption by a county. Your office held that a ballot proposition which combined proposals from multiple petitions was invalid as it did not comport with either petition. Tex. Att'y Gen. Op. No. GA-0093 (2003). Here, a ballot petition is required to be submitted to the commissioners court similar to that of a local option stock law discussed in GA-0093. Section 252.301 states:

(a) A county may adopt *this subchapter* at an election held as provided by this section. (emphasis added).

TEX. TRANSP. CODE ANN. §252.301 (2012).

In another opinion, your office held that a petition calling for a county election to adopt the Optional County Road system which contained provisions not authorized under the statute was invalid. Tex. Att'y Gen. Op. No. DM-172 (1992). Incorporating other statutes from different subchapters concerning donations (e.g. TEX. TRANSP. CODE ANN. §§ 252.109, 252.214) would in effect be adding provisions regarding additional county authority not originally adopted by the voters pursuant to statute.

Both the road commissioner and road superintendent systems date back to at least 1925. *See* Tex. Rev. Civ. Stat. Articles 6742, 6754 (1925). Donations provisions for both systems have always been included in these historical statutes. When the Optional County Road Law of 1947 was adopted, the legislature did not include such a donation statute that was contained in the other road management systems existing at the time. The Optional County Road Law of 1947, 50th Leg., R.S., ch. 178 (V.C.S. Article 6716-1).

VI. The “Conditional-Gift Rule” is not applicable to the agreements for road work entered into by the county operating under the County Road Department System.

Texas courts have held that “a gift or contribution is a voluntary transfer of property by one party to another without consideration.” *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961); *Henneberger, v. Sheahan*, 278, 278 S.W.2d 497 (Tex. Civ. App. – Dallas 1955, writ ref’d n.r.e.). In order to constitute a “gift,” the act of giving must be voluntary and the honor must not receive anything of value for the gift, i.e., there must not be consideration for the gift. *Henneberger*, 278 S.W.2d at 498. Another element of a “gift” requires an intention on the part of the donor to make such a gift. *Powell v. Wiley*, 170 S.W.2d 470 (Tex. 1943); see also Tex. Att’y Gen. Op. No. GA-0679 (“While “gift” and “rebate” are not defined, the word “gift” ordinarily implies a lack of return consideration. Citing *Long v. Long*, 234 S.W.3d 34, 40 (Tex. App. – El Paso 2007, pet. denied) (citing *Hilley v. Hilley*, 342 S.W.2d 565, 569)).

Your office applied the common law of gifts in holding that a commissioners court may accept donated funds to be used to compensate a district attorney’s employees or risk revocation of the donation if it fails to use the funds for that purpose. Tex. Att’y Gen. Op. No. GA-0562. In *Curtis v. Anderson*, cited in GA-0562, the court held that the application of the conditional-gift rule assumes that there is no binding agreement between the parties about ownership of the gift should the condition not occur. The court further held that if a binding agreement between the parties exists, the application of the conditional-gift rule is not appropriate.

In this instance, it’s not clear whether there is donative intent on the part of the private entities since these “donations” are made pursuant to and in furtherance of the provisions of an otherwise enforceable contract for the provision of county functions. The “donations” from the companies are offered in exchange for the county agreeing to work on the roads specified in the agreements within a certain period of time, without regard to the priority of the roads under the county-wide system. It allows those who are willing to make “donations” under agreement to take precedence over other roads in the county.

Even assuming that the general provision under Local Government Code section 81.032 applied in this instance, this provision does not authorize counties to enter into *contracts* with private entities for the county to perform a county function in exchange for monetary consideration. The “donations” offered by the private entities in this instance are more akin to monetary consideration. Consideration involves bargained for benefit to the

promisor or detriment to the promisee. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991, no writ); *Connell v. Provident Life & Accident Ins. Co.*, 148 Tex. 311, 224 S.W.2d 194, 196 (1949). What is “bargained for” can be described as something that is sought by the promisor in exchange for his promise and it is given by the promise in exchange for that promise. *See Connell*, 148 Tex. 311, 224 S.W.2d 194, 196 (1949). This concept is also known as the “but for” rule: but for one party’s promise or performance, the other party would not promise or perform. *See Brown v. Montgomery*, 89 Tex. 250, 34 S.W. 443 (1896); *F. & C. Engineering Co. v. Moore*, 300 S.W.2d 323, 327 (Tex. Civ. App.— San Antonio 1957, writ ref’d n.r.e.). Here, the private entities offer monetary “donations” in exchange for the county to prioritize those projects and expend county labor and equipment on specific public roads pursuant to a written agreement executed by both parties. Applying the “but for” rule, the private entities would not offer the same “donations” if the county did not agree to build or improve those roads in a time and manner pursuant to the written executed agreements. Nothing in Local Government Code section 81.032 authorizes such a contract with private entities.

VII. Conclusion

Waller County currently operates under the County Road Department System under subchapter D, chapter 252 of the Transportation Code. There are no express donations provisions under subchapter D as adopted by the voters of Waller County. Counties are entities of limited jurisdiction; counties operating under the County Road Department System do not have the authority to accept donations from private entities to work on specific county roads. Even if counties operating under subchapter D may accept donations, counties do not have the authority to enter into binding contracts for the performance of county functions.

Sincerely,



Charlotte Kim
Assistant District Attorney