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OPINION COMMITTEE



The Office of Vince Ryan
County Attorney

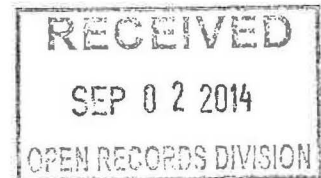
FILE # ML-47629-14

I.D. # 47629

RQ-1217-GA

August 28, 2014

Honorable Greg Abbott
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548



Re: Request for Opinion concerning METRO's participation in the I-610 Dedicated Bus Lane Only Facility and whether it violates a contract with the voters

Dear General Abbott:

Our Office has been requested by the Metropolitan Transit Authority of Harris County (METRO) to submit this request for an opinion from the Office of the Attorney General on a matter affecting the public interest.

In 2003, Harris County voters approved METRO's ballot initiative securing approval for its "METRO Solutions Transit Plan . . . , which includes bus service expansions . . . and construction of extensions and new segments of METRO's rail system known as 'METROrail,'" and which also authorized the issuance of bonds in connection with the implementation of the same. As part of that METRO Solutions Plan, METRO was to construct a 4.4 mile light rail line on Post Oak Boulevard, along the West Loop of Interstate 610 to the Northwest Transit Center. The ballot initiative also provided that the funds would be used for METRO to equip the bus and rail lines with associated vehicles. METRO believed that referendum was a contract with the voters and specifically entitled it, "METRO Agreements with the Voters."

In July 2014, METRO was asked to sign a letter (the "Letter") with representatives from the Texas Transportation Commission stating that "the I-610 Dedicated Bus Lane Facility is to be designed and built to support a dedicated bus lane. As designed, the facility will not support a rail component." As contemplated, this I-610 Dedicated Bus Lane Facility would be in the same location as a portion of the rail approved in the referendum.

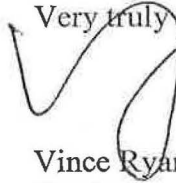
August 28, 2014

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On behalf of METRO, the Office of the Harris County Attorney therefore submits the question of whether signing the Letter would be a violation of the contract with the voters, as expressed in the 2003 referendum.

A brief prepared by METRO's counsel along with other documentation is enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Vince Ryan", written over the typed name.

Vince Ryan
Harris County Attorney

cc: Alva I. Treviño
General Counsel
Metropolitan Transit Authority of Harris County
1900 Main
P.O.Box 61429
Houston, Texas 77208-1429

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August 18, 2014

The Honorable Vince Ryan
Harris County Attorney
1019 Congress
Houston TX 77002

Dear Mr. Ryan:

As Chairman of the Board of Directors of the Metropolitan Transit Authority of Harris County (METRO), I am a strong proponent of transit services for our region. We at METRO have partnered with other agencies to improve transit services and reduce traffic congestion.

One such example of partnering is the Express Bus Service that is planned for Post Oak Boulevard. We have been working with many groups on this transit project including the Uptown Tax Increment Reinvestment Zone (TIRZ), Uptown Management District, City of Bellaire, City of Houston and the Texas Transportation Commission (TxDOT). The project includes dedicated bus lanes that will connect METRO's existing Northwest Transit Center to a new transit center near U.S. 59 at the Interstate 610 intersection. As part of the project, TxDOT and the TIRZ will be funding and constructing a flyover on the northern section within the TxDOT right-of-way.

On July 3, 2014, TxDOT, along with the Chairman of the TIRZ, signed a letter stating that "we the undersigned agree that the I-610 Dedicated Bus Lane Facility is to be designed and built to support a dedicated bus lane. As designed, the facility will not support a rail component." Attached is the letter for your review. TxDOT Commissioner Jeff Moseley has asked that I also sign this letter. Please know that I respect strongly the "will of the voters." Furthermore, it is my obligation and fiduciary duty as Chairman of METRO's Board of Directors to insure that signing such a letter agreement does not violate the will of the voters.

As background, on November 4, 2003, METRO undertook a special election to ask the voters within its jurisdiction to approve, among other things, the construction of a light rail project. As part of that light rail system, METRO was to construct a 4.4 mile light rail line on Post Oak Boulevard, along the West Loop of Interstate 610 to the Northwest Transit Center. This light rail line was to serve the Galleria and Uptown businesses on Post Oak Boulevard and was to have approximately 7 stations.

The METRO Board Resolution calling for the special election explicitly stated that "if a majority of the voters voting at the election approve the proposition, the following

agreements will be binding on METRO and will constitute contracts with the voters in accordance with their terms and may not be repealed, altered or rescinded by any succeeding Board without voter approval at a subsequent election." One of the agreements listed as a "contract with the voters" was approval by the voters of the METRO Solutions Plan that specifically included that segment of light rail on Post Oak Boulevard along the West Loop of Interstate 610 to the Northwest Transit Center.

The questions that I request that you ask of the Texas Attorney General are:

- Whether METRO has the authority to sign this letter since it is neither a participant in the design and construction of the project nor a financial contributor to the Interstate 610 Dedicated Bus Lane Facility?
- Whether METRO's signing of this letter agreement would be a violation of the contract with the voters as expressed in the 2003 referendum?

I ask that these questions be submitted to the Texas Attorney General for an opinion. Thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Garcia', written in a cursive style.

Gilbert Andrew Garcia, CFA
Chairman

Brief Regarding Contract with the Voters

Background

In 2001 the City of Houston passed a proposition amending the City Charter to require METRO voter approval before the City could give its consent to any METRO rail system project. (Exhibit 1)

In 2003, Harris County voters approved METRO's ballot initiative securing approval for its "METRO Solutions Transit Plan . . . , which includes bus service expansions . . . and construction of extensions and new segments of METRO's rail system known as 'METRO Rail,'" and which also authorized the issuance of bonds in connection with the implementation of the same. As part of that METRO Solutions Plan ("Plan"), METRO was to construct a 4.4 mile light rail line on Post Oak Boulevard, along the West Loop of Interstate 610 to the Northwest Transit Center (the "Uptown/West Loop Rail"). The Referendum also provided that the funds would be used for METRO to equip the bus and rail lines with associated vehicles. METRO specifically entitled the details of the METRO Solutions Transit Plan, "METRO Agreements with the Voters."¹ (Exhibit 2)

In July 2014, METRO was asked to sign a letter (the "Letter") with representatives from the Texas Transportation Commission stating expressly that "the I-610 Dedicated Bus Lane Facility is to be designed and built to support a dedicated bus lane. (Exhibit 3) As designed, the facility will not support a rail component." As contemplated, this I-610 Dedicated Bus Lane Facility would be in the same location as a portion of the Uptown/West Loop Rail approved in the Referendum.

Questions Presented

The question is whether signing the Letter would breach the contract with the voters that METRO entered into through the 2003 Referendum.

¹ Specifically, the resolution calling for the special election stated, "If a majority of voters voting at the election approve the proposition, the following agreements will be binding on METRO and will constitute contracts with the voters in accordance with the terms and may not be repealed, altered or rescinded by any succeeding Board without voter approval at a subsequent election." Resolution No. 2003-93.

Brief Answer

Signing the Letter with the Texas Transportation Commission would likely violate the contract METRO intentionally entered into with the voters. On its face, it contradicts the terms of the Referendum. The voters passed a Referendum approving (a) a METRO Solutions Transit Plan, and (b) funds to be used for both bus service *and* an extension of METRORail consistent with the terms of the Plan. The Letter approves building *only* a bus lane in that same location, however, specifically excluding a rail component. That is directly contrary to the Referendum.

Analysis

Section 451.072 of the Texas Transportation Code provides that “the board of an authority may call an election to determine the voters' will on any issue that the board is authorized to decide under this chapter or on the exercise of any discretionary power of the board under this chapter. At the time the board orders the election, the board shall specify whether the results of the election are binding on the authority.

In putting this referendum before the voters in 2003, METRO took a decisive step and used language in its election resolution to expressly create a “contract with the voters.” Section 14 of Resolution No. 2003-93 is clear and specific in saying “the following agreements will be binding on METRO and will **constitute contracts with the voters.**” Subsection (c) of Section 14 states “Approval of the Proposition and Election constitutes approval of the METRO Solutions Plan.” Exhibit A-4 of the Plan plainly identifies a 4.4 mile light rail lane on Post Oak Boulevard. This clearly demonstrates METRO ‘s intent to create a binding contract with voters regarding light rail on the 4.4 mile segment on Post Oak Boulevard. Texas law is clear that governments must be bound to their election contracts.

“[W]hen the voters approve a specific project, the proceeds of the tax or bond are ‘earmarked’ with the character of a trust fund which may not be diverted to another purpose or project.” *Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 269 S.W.3d 628, 634 (Tex. App.—San Antonio 2008, pet. granted, judgment vacated w.r.m.). “It is elementary that the proceeds of bonds voted by the people must be expended for the purposes for which they were voted.” *Taxpayers for Sensible Priorities v. City of Dallas*, 79 S.W.3d 670, 676 (Tex. App.—Dallas 2002, pet. denied).²

² *Ex parte City of Corpus Christi*, 427 S.W.3d 400, 404 (Tex. App.—Corpus Christi 2013, pet. denied) (“Proceeds of bonds voted by the people must be used for the purposes for which they were voted.”).

The question is “whether the City is attempting to use tax proceeds approved by the voters in a way that the voters did not approve.” *City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 552 (Tex. App.—San Antonio 2012, pet. denied). The voters must receive “substantially the benefits expected by them when they cast their votes.” *Thayer v. Greer*, 229 S.W.2d 833, 836 (Tex. Civ. App.—Amarillo 1950, writ ref’d n.r.e.). The governing body must not arbitrarily or unreasonably ignore the purpose of the funds approved by the voters. *Black v. Strength*, 246 S.W. 79, 80 (Tex. 1922); *Inverness Forest Imp. Dist. v. Hardy St. Investors*, 541 S.W.2d 454, 460 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref’d n.r.e.).³

Here, METRO entered into a contract with the voters that, first, approved the use of bonds to raise money for the project and second, specifically approved the Plan, which included both bus service and “construction of extensions and new segments of METRO’s rail system known as ‘METRORail.’”⁴ If METRO agrees to the terms of the Letter, which provides for no extension of METRORail, it will be agreeing to a plan to give the voters less than substantially the benefits they expected.

In fact, the terms of the Letter specifically contradict the Referendum. The facility proposed in the Letter will be built in exactly the location approved by the voters to support rail. Moreover, part of the money approved in the ballot initiative was meant to fund the purchase of rail cars, but rail cars will no longer be needed if the facility will not support rail. METRO would not be spending those funds on part of the benefits approved by the Referendum.

Moreover, METRO is likely bound by at least some of the details of the extension included in the exhibits to the ballot and the resolution, at least to the extent that those details included a METRORail. “It is the rule in

³ *Davis v. Duncanville Indep. Sch. Dist.*, 701 S.W.2d 15, 18 (Tex. App.—Dallas 1985, writ dism’d w.o.j.); *Devorsky v. La Vega Indep. Sch. Dist.*, 635 S.W.2d 904, 907 (Tex. App.—Waco 1982, no writ) (quoting *Hudson v. San Antonio Indep. Sch. Dist.*, 95 S.W.2d 673, 675 (Tex. 1936)). Although these cases relate to expenditure of bond proceeds as authorized by voters pursuant to an election, the Authority believes, given its express authority in Section 451.072(b), Texas Transportation Code, that there is no legal distinction between the Authority’s contract with voters on the Metro Solutions Rail Plan and a contract with voters specifying the use of bond proceeds. Consequently, the Authority believes the legal holding and rationale in the cited cases should also apply to its contract with the voters on the Metro Solutions Transit System Plan.

⁴ In Section 14, the Board stated that “[a]pproval of the Proposition at the Election constitutes approval of the METRO Solutions Plan, including the extensions and segments of METRORail and the construction of the METRORail and Commuter Line Components thereof.” Resolution No. 2003-93, Attachment 1, § 14(c).

Texas that where specific projects to be constructed from the proceeds of a proposed bond election are designated in pre-election orders, such orders become a part of the proposition voted and control more general language found in the orders or ordinances calling the election." *Blanton v. City of Houston*, 350 S.W.2d 947, 951 (Tex. Civ. App. — Houston 1961), vacated, 353 S.W.2d 412 (Tex. 1962).⁵ In fact, the contract with the voters can be quite specific—such as construction of a senior high school building at a specific site. *San Antonio Indep. Sch. Dist. v. Hudson*, 92 S.W.2d 527, 529 (Tex. Civ. App.—San Antonio 1936), *aff'd*, 95 S.W.2d 673 (Tex. 1936). The governmental entity cannot then just ignore the specified purpose by building a senior high school somewhere else, or even a junior high school at the specific site. *Id.*

Exhibit A, the METRO Solutions Plan, which included detailed information about the METRORail Component and its location, was attached to the resolution and explicitly made part of the contract with the voters. Exhibit A-4, which was also incorporated into the ballot initiative, provided that the funds would be used for light rail lines and "associated vehicles." As the court held in *Hudson*, METRO cannot agree to build a bus line to the exclusion of the METRORail that the voters specifically approved. As such, the terms of the Letter are contrary to the contract METRO made with the voters.

It does not appear that the result will be different if METRO does not expend its own funds on the project. "[T]he proceeds of bonds voted by the people *must be expended* for the purposes for which they were voted." *Lewis v. City of Fort Worth*, 126 Tex. 458, 89 S.W.2d 975, 978 (1936) (emphasis added) (cited in *Gallagher Headquarters Ranch Dev., Ltd.*, 269 S.W.3d at 634). In other words, a governmental entity cannot decline to expend the funds after they have been approved by the voters:

⁵ "That any commissioners' court in Texas is within its legal rights in annexing a condition in its pre-election orders which fixes the exact purpose for which the bond money constituting the proceeds of a bond issue submitted to a vote is to be used. . . . The result thus obtained has been referred to as having the binding effect and force of a contract." *Bd. of Sch. Trustees of Lubbock County v. Woodrow Indep. Sch. Dist.*, 90 S.W.2d 333, 337-38 (Tex. Civ. App. — Amarillo 1935, no writ); *see Thayer v. Greer*, 229 S.W.2d 833, 837 (Tex. Civ. App. — Amarillo 1950, writ *ref'd n.r.e.*); *Fletcher v. Ely*, 53 S.W.2d 817, 818 (Tex. Civ. App. — Amarillo 1932, writ *ref'd*). Although these cases relates to expenditure of bond proceeds as authorized by voters pursuant to an election, the Authority believes, given its express authority in Section 451.072(b), Texas Transportation Code, that there is no legal distinction between the Authority's contract with voters on the Metro Solutions Transit System Plan and a contract with voters specifying the use of bond proceeds. Consequently, the Authority believes the legal holding and rationale in the cited cases should also apply to its contract with the voters on the Metro Solutions Rail Plan.

The [bond election and supporting documents] had the effect of representing and pledging to the voters that the judgment and discretion of the board had already been exercised by naming these particular projects as projects to which part of the proceeds of these bonds would be appropriated. *The directors of the district cannot arbitrarily ignore or repudiate their pledge.*

Inverness Forest Imp. Dist., 541 S.W.2d at 460 (emphasis added). METRO is required to (i) use the venue tax funds for their approved purpose—construction of the facility and new segments of the METRORail, and (ii) operate the facility according to its approved use. *Gallagher Headquarters Ranch Dev., Ltd.*, 269 S.W.3d at 635. The Letter proposes a use of the I-610 Dedicated Bus Lane Facility that would do neither. Moreover, the resolution provided that the contract with the voters “may not be repealed, altered or rescinded by any succeeding Board without voter approval at a subsequent election.”⁶ METRO cannot simply ignore the contract it made with the voters to extend METRORail.

Conclusion

In sum, a governmental body can be bound by a contract with the voters; here, that contract approved the Plan and proceeds of the bonds to be spent on bus service expansions, construction of extensions and new segments of METRORail, and equipping those lines consistent with the Plan. Signing the Letter, and agreeing only to bus service on a corridor where voters had specifically authorized rail, would violate METRO’s contract with the voters.

⁶ Resolution No. 2003-93.