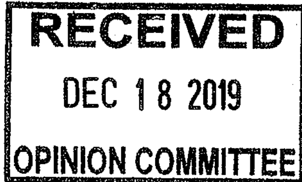

SAN ANTONIO
RIVER AUTHORITY
Leaders in Watershed Solutions

December 18, 2019

RQ-0325-KP
FILE# ML-48671-19
I.D.# 48671

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for an opinion

Dear General Paxton:

As Chairman of the Board of Directors of the San Antonio River Authority and pursuant to the requirements of Tex. Gov't Code § 402.042, I respectfully request your formal written opinion on the following questions:

May San Antonio River Authority release all or part of an inundation easement that was acquired for valuable consideration and that has been declared surplus without receiving fair market value for the value of the inundation easement?

May San Antonio River Authority release all or part of an inundation easement that was dedicated to or acquired by San Antonio River Authority without the payment of valuable consideration and that has been declared surplus without receiving fair market value for the value of the inundation easement?

Please see the attached document, which includes supporting information as well as reference to the applicable statutes. Should you need more information, please do not hesitate to contact Allison Elder, Director of Legal Services, at 210-227-1373 or aelder@sara-tx.gov.

Thank you in advance for your time and consideration of this matter.

Sincerely,

Darrell T. Brownlow
Chairman

Via email to opinion.committee@oag.texas.gov

Executive Committee

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Vice Chairman
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(210) 227-1373 ☆ (866) 345-7272 ☆ Fax (210) 227-4323

BACKGROUND

San Antonio River Authority (the "River Authority") is a conservation and reclamation district created by special act of the Texas Legislature. The River Authority is governed by a twelve-member elected Board of Directors. Six Directors are elected from Bexar County and two Directors each are elected from Wilson, Karnes and Goliad Counties.

The River Authority manages 41 flood control structures in the River Authority's four-county district. Twenty-eight of these structures are in Bexar County and 13 structures are in Karnes County. The USDA Natural Resources Conservation Service in coordination with the River Authority and other local participants, oversaw the design and construction of these dams. Thirty-seven of the dams were built on private lands through the acquisition of land rights in the form of easements. These easements include inundation easements authorizing the storage of water that may be impounded by the dams. Some of these easements were acquired for valuable consideration and others were acquired without the payment of valuable consideration for the easements. Many of these easements were acquired in the 1950's.

As development in the River Authority district has increased, landowners have requested that all or part of their private property be released from the inundation easements. The River Authority has developed a process for the review of these requests that includes the payment of fair market value for the release of the inundation easement.

In order to evaluate the requests to release easements received from landowners, the River Authority has conducted engineering analysis in order to identify portions of the property in question that exceed the areas necessary for the operation and maintenance of the dam and that are not required to be subject to an inundation easement by applicable state law. Because many of these easements are blanket easements, there are some specific circumstances where blanket easements could be reduced without adversely effecting public health and safety and without falling short of legal requirements. River Authority co-holds some of these easements with Alamo Soil and Water Conservation Service. Alamo Soil and Water Conservation Service supports the release of these surplus portions of the inundation easements. Any declaration of surplus easement will be expressly approved by the River Authority Board of Directors. In addition, River Authority has consulted with the USDA Natural Resources Conservation Service regarding this matter and they are agreeable in principal to the release. For purposes of your analysis, you may assume that any release will be found to be acceptable to the co-holders of the easement, the Texas Commission of Environmental Quality, and the USDA Natural Resources Conservation Service. If released, the dam in question will continue to meet state and federal dam safety standards.

TEXAS CONSTITUTION

Tex. Const. art. III § 52 provides in part that the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or

corporation whatsoever, or to become a stockholder in such corporation, association or company. To comply with the terms of Tex. Const. art. III § 52 the Texas Supreme Court has determined that a political subdivision should (i) structure a transaction to accomplish a public purpose, not to benefit private parties; (ii) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) receive a return benefit. *Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002).

TEX. WATER CODE § 49.226(b)

The River Authority is a district as defined by Tex. Water Code § 49.001(a)(1). Tex. Water Code 49.226(b) provides in part: "[a]ny property dedicated to or acquired by the district without expending district funds may be abandoned or released to the original grantor, the grantor's heirs, assigns, executors, or successors upon terms and conditions deemed necessary or advantageous to the district and without receiving compensation for such abandonment or release...."

The Attorney General has cautioned that any sale of land pursuant to Tex. Water Code § 49.226 should be reviewed to determine if it complies with the Texas Constitution. "In this regard, we add that the SRA may also wish to consider whether a land sale comports with the Texas Constitution. *See* Tex. Const. art. III., §§ 50-52 (limiting the legislature's and political subdivisions' authority to aid individuals and private entities). Certainly a land sale for fair market value could not be challenged as a gratuitous transaction. *Cf. Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex. App.-Austin 2002, pet. denied) ("[T]he lease entered into here was supported by valuable consideration. As such, it was not a gratuitous donation of public funds or a thing of value.") (considering challenge to municipal real property lease under article III, section 52)." Op. Tex. Att'y Gen. No. GA-0371 (2005) at footnote 4. The sale of real property at a grossly inadequate price is in effect a gift of public funds. *City of Cuero v. Tupper-Texas, Inc.*, 226 F.2d 121, 124 (5th Cir. 1955).