THE ATTORNEY GENERAL OF TEXAS

November 28, 1990

JIM MATTOX
ATTORNEY GENERAL

Honorable Lee Fernon
County Attorney
Baylor County Courthouse
Seymour, Texas 76380

LO-90-97

Dear Mr. Fernon:

You ask whether a county has any authority to maintain creeks running through private land to prevent flooding damage to landowners. We assume your question concerns only what measures the county may independently undertake to abate a threat of flooding in the county. This opinion therefore will not address the authority of the county to act in cooperation with a special district, see Agric. Code § 201.152, or another political subdivision, see Local Gov't Code §§ 401.001; 411.002; 411.003. Neither will this opinion address the authority of a county to develop water resources from either underground sources or from rivers. See Local Gov't Code ch. 412.[1]

It is well established that a commissioners court may exercise only those powers that are expressly granted by the constitution and laws of this state along with any powers necessarily implied from the powers expressly granted. Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1948). You supply no information regarding the conditions under which the commissioners court proposes to perform creek maintenance on private property. Nor have you suggested any statutory or constitutional authority under which the commissioners court might act. Your letter and the materials sent with it make it appear that the commissioners court is interested in learning what action it may immediately take to prevent

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1. This opinion also will not discuss provisions of the Local Government Code granting a commissioners court of a county with a population of over 500,000 some supervisory authority over employees of a flood control district in the county, since they have no application to Baylor County. Local Gov't Code §§ 151.902; 151.903; 157.003; 270.006.

flooding under the circumstances you describe. Consequently, this opinion will not discuss those constitutional and statutory provisions that authorize the county to take long-range action designed to prevent flooding in the county. See Tex. Const. art. III, § 52(b)(1), (2) (counties and other political subdivisions may issue bonds for the improvement of rivers, creeks, and streams for flood control, navigation, and irrigation purposes and for the construction and maintenance of improvements for purposes of irrigation, drainage, or navigation); Local Gov't Code § 411.001 (county may acquire through eminent domain real property, including easements and rights-of-way, for purposes of building canals, drains, levees, and other improvements to provide for flood control and water outlets); Water Code § 16.315 (authorizing counties and other political subdivisions to take necessary and reasonable actions to comply with the National Flood Insurance Program established under federal law).

We have found no statute placing a county under an affirmative duty to maintain creeks running through private property for flood control purposes. However, a number of statutes may authorize a county to immediately undertake certain flood control activities. Tex. Const. art. VIII, § 1-a (ad valorem tax for Farm-to-Market roads or flood control); V.T.C.S. art. 6702-1, § 4.103 (implementing legislation for art. VIII, § 1-a); Water Code § 11.097 (commissioners court may notify Water Commission of natural obstructions to navigable streams; commission must investigate within 30 days); Gov't Code ch. 418 (Texas Disaster Act of 1975); Health & Safety Code § 122.001 (commissioners court may spend general revenues for public health and sanitation purposes). The county's authority under these statutes is limited both by the terms of the statutes and by principles of constitutional law.

Since your question stipulates that the proposed creek maintenance will take place on private land, it will be appropriate for you in construing the cited statutes to consider constitutional limitations on the power of a county to spend public funds to benefit private interests. Article VIII, section 3, of the Texas Constitution provides that taxes shall be levied and collected for public purposes only. It follows from this provision that tax funds may be spent only for public purposes. See Davis v. City of Lubbock, 326 S.W.2d 699 (Tex. 1959).

Article III, section 52(a), prohibits the lending of the county's credit or the grant of public funds to private persons or corporations except as provided therein. See

also Tex. Const. art. XI, § 3. This provision has been interpreted to generally prohibit the expenditure of public funds for the benefit of private individuals unless it serves a public purpose or is accompanied by an adequate quid pro quo. See 1 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis, at 232-235 (1977) and authorities cited therein. An expenditure that incidentally benefits a private interest is not unconstitutional if it is for the direct accomplishment of a legitimate public purpose. See Barrington v. Cokinos, 338 S.W.2d 133 (Tex. 1960). Thus, a county is prohibited by article III, section 52, from performing flood control work that will solely benefit private individuals. See Attorney General Opinion O-7486 (1946) (construction of drainage ditch by a county on private property). The county's efforts under any of the programs described in the statutes cited above must conform to this constitutional inhibition. Whether a particular proposal for the expenditure of county funds for flood control is for a public purpose or is secured by an adequate quid pro quo is a legislative function that must be determined by the commissioners court in light of the facts attending the proposed expenditure. See generally Attorney General Opinion JM-1199 (1990).

Very truly yours,

Sarah Woelk

Sarah Woelk, Chief
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Rick Gilpin

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APPROVED: OPINION COMMITTEE

SW/RG/SA/mc

Ref.: RQ-1965
ID# 9126