



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 30, 1998

The Honorable Steve Holzheuser
Chair, Committee on Energy Resources
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-058

Re: Whether the City of New Braunfels must reimburse New Braunfels Utility ratepayers if it disposes of nonrevenue-producing land originally purchased, but never used, for future expansion of the utility system (RQ-976)

Dear Representative Holzheuser:

You ask about the disposal of real property owned by the City of New Braunfels and purchased for the expansion of the city's utility system, New Braunfels Utility (NBU). Your question concerns Attorney General Opinion DM-444 (1997), in which we concluded that the city ultimately controls disposal of the property, although the city may not violate any applicable bond covenants, mortgages, or V.T.C.S. article 1112.¹ You now question whether the city may divert the property to uses other than utilities without compensating utility system ratepayers, some of whom live outside the city. We conclude here that, if the city diverts the property in adherence with applicable bond obligations, mortgages, or V.T.C.S. article 1112, it need not compensate ratepayers.

Attorney General Opinion DM-444 provides background information relevant to your request. As the opinion states, the city by ordinance has vested NBU with "complete management and control" of the city's utility system.² Moreover, city ordinances direct NBU's governing board to "manage and operate the systems with the same freedom" the board of a private corporation operating similar properties enjoys and "in the same manner as" such a private corporation.³ Comal Park, the real property at issue here, was purchased in 1969 in the name of the city with NBU funds.⁴ Although the real property was purchased specifically for "future expansion of [NBU] Disposal Plant facilities," it was purchased more generally "for municipal purposes,"⁵ and we understand it in fact has never been used for the expansion of NBU facilities. Apparently, the city would like to build

¹Attorney General Opinion DM-444 (1997) at 4-5.

²See *id.* at 1.

³See *id.* at 1-2.

⁴See *id.* at 2.

⁵See *id.*

a city library on the property or sell the property for development.⁶ We assume that either of these uses would preclude future expansion of NBU disposal plant facilities on the property.

Attorney General Opinion DM-444 concludes, among other things, that the NBU board is an agent of the city,⁷ and the board therefore cannot own real property.⁸ Only the municipality that created the utility system may own the property, although, as the opinion suggests, the municipality may delegate management and control of property to its utility system.⁹ As owner, the opinion continues, the city ultimately controls use of the property.¹⁰ Significantly, though, the city may not divert the use or dispose of the property in contravention of applicable bond obligations, mortgages, or V.T.C.S. article 1112.¹¹

The city's bond ordinance, which we assume briefs submitted to this office have quoted correctly, appears to restrict the city's power to dispose of encumbered property that is part of the NBU "System"¹²:

While any of the Bonds or any interest thereon remain Outstanding, the City will not sell or encumber the Systems or any substantial part thereof; provided, that this covenant shall not be construed to prohibit the sale of . . . other properties . . . by the Board of Trustees which ha[ve] become obsolete or otherwise unsuited to the efficient operation of the System . . .¹³

⁶*See id.*

⁷*See id.*

⁸*See id.* at 4.

⁹*Id.*

¹⁰*See id.*

¹¹*See id.* at 5.

¹²A brief submitted to our office quotes the definition of *system* from the New Braunfels Utility System Bond Ordinance:

The term "System" shall mean the City's Waterworks, Sanitary Sewer and Electric Light and Power Systems, and shall be construed to mean all properties, real, personal, mixed or otherwise, now owned or hereafter acquired by the City of New Braunfels through purchase, construction or otherwise, and used in connection with said System, and in any wise appertaining thereto, whether situated within or without the limits of said City.

Letter from Jon C. Wood, Esq., Matthews & Branscomb, to The Honorable Dan Morales, Attorney General, State of Texas (July 20, 1997) (on file with the Office of Attorney General Opinion Committee).

¹³Letter from John T. Dierksen, Esq., Reagan Burrus Dierksen Lamon & Bluntzer, to The Honorable Dan Morales, Attorney General, State of Texas (July 21, 1997) (on file with Office of the Attorney General Opinion (continued...))

We assume that applicable bonds remain outstanding. Consequently, the city's authority to dispose of the property at issue is restricted by the applicable bond ordinance. Because this office ordinarily does not construe municipal ordinances, we will not further consider whether New Braunfels' ordinances in fact restrict the city's authority to dispose of the real property.¹⁴

If the city may divert the use of or sell the property without violating any bond obligations, mortgages, or V.T.C.S. article 1112, it need not reimburse NBU ratepayers, some of whom live outside the city. We know of no statute imposing such a duty upon the city in this situation. Nor do we have any evidence that the city is required by a contract with the ratepayers to refund the monies in this instance.¹⁵ Even if we assume, consistently with V.T.C.S. article 1111, that the outstanding bonds are payable out of NBU's revenues only,¹⁶ diversion of the property will not affect ratepayers because this property apparently never has been used to produce revenue for NBU.

We note, in this regard, that V.T.C.S. article 1113a permits a municipality and the trustees of its municipal utility system to transfer utility system revenues to the municipality's general fund to the extent authorized or permitted by the indenture, deed of trust, ordinances providing for any securing revenue bonds issued under articles 1111 through 1118, or other similar law.¹⁷ Nothing in the section requires the municipality to reimburse utility system ratepayers for the transfer. In addition, we do not read this section to preclude other nonreimbursed transfers of assets from the utility system to the municipality.

¹³(...continued)
Committee).

¹⁴See Letter Opinion No. 93-042 (1993) at 1 (stating that this office does not construe municipal charter, ordinance, or policy except to determine whether charter, ordinance, or policy conflicts with state or federal law); Attorney General Opinion JM-846 (1988) at 1 (same).

¹⁵Cf. *Michael v. Minden*, 704 So. 2d 409, 414 (La. App. 1997) (holding that city had no duty to pass along to ratepayers refund city received from city's electricity supplier).

¹⁶See V.T.C.S. art. 1111; *Arkansas La. Gas Co. v. City of Texarkana*, 100 F.2d 652, 654 (5th Cir. 1938); *City of El Campo v. South Tex. Nat'l Bank*, 200 S.W.2d 252, 255 (Tex. Civ. App.--San Antonio 1946, writ ref'd); 12 EUGENE MCQUILLEN, *The Law of Municipal Corporations* § 35.29 (3d ed. 1991-95).

¹⁷See also *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976). Indeed, a municipality is entitled to make a reasonable profit from its own utility system. See *id.*

S U M M A R Y

If, consistent with applicable bond ordinances, mortgages, or V.T.C.S. article 1112, the City of New Braunfels may dispose of real property that the New Braunfels Utility System has held as the city's agent, the city need not reimburse the utility system's ratepayers for the property.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge", written in a cursive style.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee