

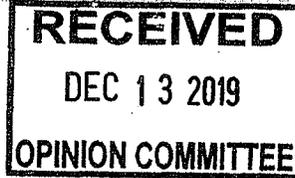
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December 13, 2019

The Honorable Ken Paxton
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

RQ-0322-KP
FILE# ML-48667-19
I.D.# 48667

Re: Request for Attorney General Opinion

Dear Attorney General Paxton,

TFC comes before you with a request for an Opinion regarding the proposed Bill of Rights Monument whose legislative authority stems from House Concurrent Resolution 111 of the 80th Legislative Session.

HISTORY

In 2007 a House Concurrent Resolution (H.C.R No. 111) was introduced and passed during the 80th Legislative Session of the Texas Legislature. H.C.R. No. 111 supported the erection of a monument to the Bill of Rights with a preference of a location near the Texas Supreme Court Building on the Capitol Complex.

The project was to be entirely privately funded by the organization MyBillofRights.org. The Resolution further required the State Preservation Board (SPB) and the Texas Facilities Commission (TFC) to integrate the monument into the existing Capitol Complex subject to the laws and rules of both agencies.

TFC Executive Director Edward Johnson submitted a formal letter on April 8, 2009, to Mr. Chris Bliss, President of MyBillofRights.org, outlining acknowledgement of H.C.R. No. 111. The letter outlined specific parameters related to the placement of the monument near the Supreme Court Plaza, or another appropriate site within the Capitol Complex if one is available.

Mr. Bliss was informed on January 9, 2009, that the tenants of the Supreme Court Building, the Supreme Court of Texas and the Court of Criminal Appeals, met and agreed on the development of the proposal. The communication specifically noted that it did not constitute an approval of the existing plan. The commission further noted that the proposal must adhere to the rules promulgated by the SPB.

Texas Facilities Commission

Physical address: 1711 San Jacinto Blvd, Austin, Texas 78701

★ *Planning and administering facilities in service to the State of Texas* ★

In July 2009, a preliminary schematic for the memorial site was presented to TFC. The preliminary schematic was not accompanied by the H.C.R. No. 111- mandated method of funding. TFC did not receive any subsequent communications from Mr. Bliss until 2017.

During this eight-year interim, SB 211 was passed in the 83rd Legislative Session. This legislation required TFC to prepare a Capitol Complex Master Plan which would include monument guidelines. TFC released the plan in 2016. TFC administers the Supreme Court Building, Therefore, the Supreme Court Building was included in the Master Plan
The Master Plan was placed on TFC's website and was accessible by the public.

In 2017, Mr. Bliss emailed TFC and stated that the organization is "**working to re-activate**" the project. This was the first communication from Mr. Bliss since 2009. No further email communication was subsequently received.

In 2018, TFC updated the Capitol Complex Master Plan in accordance with Tex. Gov't Code §2166.105(c)(2). The updated Capitol Complex Master Plan included monument size limitations and requirements to align with SPB rule, 13 Tex. Admin. Code §111.25. This rule dictates, among other things, that all monument specifications in the Capital Complex follow the Master Plan and enhance the overall planning philosophy for the Capitol complex. This rule is the guide to the processes and procedures for SPB approval of monuments in the Capitol Complex. The plan was placed on TFC's website and was accessible by the public.

In January of 2019, on the request from Mr. Bliss, TFC and SPB met with various stakeholders to discuss the Bill of Rights Monument. The Executive Directors of both agencies, various judges from the Supreme Court and Criminal Court of Appeals, as well as Mr. Bliss, were present. The meeting concluded with no affirmative action taken.

In June of 2019, Mr. Bliss was presented with an unsigned draft letter authored by TFC. This letter stated that the footprint of the proposed monument did not adhere to the size specification requirements in the Capitol Complex Master Plan. This letter also provided Mr. Bliss with constructive notice that the design did not meet SPB monument requirements. He was also informed again that TFC had no objection to MyBillotRights.Org initiating fund raising with **two** key provisions. First, the design must be described as schematic, not final, with specific landscape elements and other compatibility requirements contingent upon ongoing review. Second, the coordination for review and approval of the design with SPB Board was necessary in order to move forward. TFC was clear to Mr. Bliss that TFC was not approving the existing plan. Despite this fact, Mr. Bliss has approached TFC requesting a conditional approval of his design in order to continue to fund raise for this monument yet has failed to submit any designs to SPB for review and/or approval.

It is this course of dealing and this latest line of communication that have now brought TFC to the Office of the Attorney General with the questions at bar.

ANALYSIS

TFC has, in good faith, so far been operating under the below set of beliefs. TFC, however, defers to the opinion of the Office of the Attorney General and will conform its practices to the guidance given to it.

1. TFC Believes It Only Has Consultant Status Regarding Approval of Monuments

A proposal to construct a building, monument, or other improvement in the Capitol complex must be submitted to the State Preservation Board for its review and comment at the earliest planning stages of any such project. Tex. Gov't Code §443.0071(a). This must be done so that the State Preservation Board may (1) ensure the continued public use and enjoyment of an appropriate historical landscape for the Capitol Complex; and (2) ensure that future commemorative works, such as constructed memorials and/or monuments, are integrally incorporated into appropriately designated areas that enhance the overall planning philosophy for the Capitol complex. Tex. Admin. Code §111.25(b)(2-3).

This code section and administrative rules lead TFC to believe that TFC only plays a consultative part in the monument process. TFC is responsible for the creation and update of the Capitol Complex Master Plan. The Capitol Complex Master Plan includes monument construction specifications and areas for placement. The SPB is charged by statute with the approval of monuments and their content. The SPB has promulgated rules that require it to consult the Capitol Master Plan when approving monuments. Thus, TFC believes that it is merely a consultant in this process that provides and interprets the Master Plan.

2. TFC Believes Mr. Bliss Had Constructive Notice That the Proposed Design Was Unacceptable

The doctrine of constructive notice creates an irrebuttable presumption of actual knowledge of certain matters. *Salinas v. Gary Pools, Inc.*, 31 S.W.3d 333, 336 (Tex. App.—San Antonio 2000, no pet.). It is applied when a person knows where to find the relevant information, and had a duty to find that information, but failed to seek it out. *Id*

Texas Facilities is charged with the development of the Capitol Master Plan. See Tex. Gov't Code §2166.105(c). The first plan was required to be submitted not later than April 1, 2016. See *Id*. The plan must be updated not later than July 1 of each even numbered year thereafter. See *Id*.

The January 2009 letter to Mr. Bliss stated that TFC and the Supreme Court building tenants only agreed on the development of a proposal. The letter did not constitute an approval of an existing plan. See *Supra*. The schematics presented in July of 2009 were received, but not approved. In the subsequent 8-year lull in communication, TFC developed the initial Capitol Complex Master Plan. The plan contained monument specifications and placement locations. The plan was first placed on TFC public-facing website. TFC subsequently placed the plan on its own dedicated website with a hyperlink on TFC's web page to direct users to the new site. TFC updated the plan in 2018 as was legislatively required. That new plan was placed on TFC's main site and the satellite Capitol Complex Master Plan site. Finally, Mr. Bliss received a draft letter from TFC in June of 2019 that specifically stated that the monument did not fit the Master Plan specifications.

TFC believes that Mr. Bliss received constructive notice that his proposed schematic did not adhere to the Capitol Complex Master Plan. TFC placed the original and updated Capitol Complex Master Plan on its public website. TFC gave Mr. Bliss a letter that plainly states the monument does not fit specifications. TFC believes that Mr. Bliss had ample time in the intervening 10 years to check TFC's website and modify the monument as needed to fit required specifications.

3. Legislative Authority For the Monument Had Run Out

The State Preservation Board should review the legislative authority for a memorial and/or monument at the end of the 5-year period beginning on the date of the enactment of such authority, unless an appropriate construction permit by the office of State Preservation Board for the work has been issued within that period. See Tex. Admin. Code 111.25(c)(8)(M). The Legislature may enact statutes as it deems proper, and the courts must accept the statutes as written when there is no question of constitutionality. *Salas v. State*, 592 S.W.2d 653, 657 (Tex. Civ. App.—Austin 1979, no writ). A concurrent Resolution of the Legislature does not have the effect of a statute. *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824, 826 (Tex. Civ. App.—San Antonio 1944, no writ); Op. Tex. Att'y Gen. No. DM-197 (1993); See Op. Tex. Att'y Gen. No. LO-95-014 (1995). TFC believes the House Concurrent Resolution presented a snapshot of what the Legislature of the 80th Legislative Session supported in that specific time. TFC believes the legislative authority, if any, resides in the period of that Legislative Session and the interim year. A new Legislature brings new members. Thus, that Legislature cannot be said to be the same Legislature of the session before or session after. Because the H.C.R. power is so limited, and because the rule does not contain mandatory language, the SPB was only under a limited duty to consider the Bill of Rights schematic. TFC, as consultants to SPB, can only consider placing a monument once it is fully vetted by SPB.

Mr. Bliss did not communicate with either agency for 7 years. The H.C.R. only required TFC and SPB to consider and place the monument. It did not require either agency to proactively engage with any organization. TFC believes Mr. Bliss' 7-year absence vests TFC with the ability to use its discretion in considering whether to accept the proposal put forth by MyBillofRights.org

QUESTIONS

TFC requests the Office of the Attorney General please answer the following questions:

1. Because more than 5 years have elapsed since H.C.R. No. 111 (80R), and as no appropriate construction permit was issued during those first five years, does this failure to act on the part of an organization to submit a preliminary proposal for review and approval, as stated by State Preservation Board rule 111.25(c)(8)(M), allow both the SPB and TFC discretion in determining whether to accept a proposal from an organization if now filed?
2. As TFC serves as consultant to SPB in the review and selection of a monument site in relation to the master plan, does the significant change in the Capital Complex master plan remove any obligation by TFC to reserve a potential site, to the exclusion of other

applicants, when an organization has not properly or timely applied for monument approval through the SPB within the 5 year timeframe since legislative passage of an H.C.R.?

3. Does the Texas Facilities Commission have the authority to issue a conditional approval of a site outside the process required by the State Preservation Board for the procedures for approval of memorials/monuments in the Capitol Complex?

Signature Page Follows

Letter to Attorney General Ken Paxton

Signature Page

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Novak", written over a horizontal line.

Mike Novak, Executive Director