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OPINION COMMITTEE



COUNTY of GALVESTON

Criminal District Attorney

JACK ROADY

FILE # ML-476031-14
I.D. # 476031

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First Assistant

Johnny J. Freeze
Chief Investigator

September 5, 2014

Zonia Wiltturner-Smith
Chief Executive Officer

The Honorable Greg Abbot
Attorney General of Texas
Attn: Opinion Committee
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

Via email:
Opinion.Committee@texasattorneygeneral.gov

RQ-1218-GA

RE: Request for Opinion Concerning Matters Related to the City of Galveston and the Galveston Housing Authority

Dear General Abbott:

I write pursuant to Tex. Gov't Code § 402.042 and to request an Attorney General Opinion regarding the following issues:

- (1) Whether the City Council of the City of Galveston (City) can legally appoint an ex-officio member to the Galveston Housing Authority (GHA);
- (2) Whether the ex-officio member may legally attend executive sessions of GHA; and
- (3) Whether the City can appoint an ex-officio to GHA where the individual is a GHA Section 8 (HCV) landlord.

I have attached a supporting letter brief, prepared by counsel for GHA, which describes the background facts leading to the submission of this request and an analysis of the applicable legal authorities.

I respectfully request that your office provide an opinion resolving these issues at your earliest convenience. Thank you, in advance, for your assistance.

Respectfully,

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

Jack Roady

Attachment

Felony Section
OIE 409-766-2355

Family Law Section
409-766-2364

Grand Jury Section
409-766-2379

Worthless Check Section
409-766-2429

Felony Victim's Asst.
409-770-5124

Houston Line
281-316-8300

Fax: 409-766-2290

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August 29, 2014

Jack Roady
Galveston Co. Criminal District Attorney
722 Moody Avenue
Galveston, TX 77550

- Re: (1) Whether the City Council of the City of Galveston (City) can legally appoint an ex-officio member to the Galveston Housing Authority (GHA),
- (2) Whether the ex-officio member may legally attend executive sessions of GHA, and
- (3) Whether the City can appoint an ex-officio to GHA where the individual is a GHA Section 8 (HCV) landlord.

Dear Mr. Roady:

The Galveston Housing Authority (GHA) requests an opinion from the Texas Attorney General regarding the above questions. We are asking for your assistance in seeking this opinion.

CAN THE CITY LEGALLY APPOINT AN EX-OFFICIO TO THE BOARD OF GHA?

Housing authorities are created by State statute. Texas Local Government Code Sec. 392.011 provides that a housing authority "may not transact business or exercise its powers until the governing body declares by resolution that there is a need for the authority." The City established a resolution on March 1, 1940 finding and declaring that there existed a need for the Housing Authority of the City of Galveston. This resolution established that there would be five commissioners of GHA.

Section 392.011(b) provides that a housing authority is a separate governmental entity and a political subdivision of the State of Texas. GHA is not a board or department of the City.

Section 392.032(b) specifies that "A commissioner may not be an officer or employee of the municipality."

There is no provision in the State statutes that allows an additional board member to be added as an ex-officio. A city council member cannot be appointed as a commissioner to the GHA Board because the council member is an official of the City and precluded by Section 392.032(b). In addition, the City cannot change the number of commissioners from 5 to 6 (which would include the 5 Commissioners plus one ex-officio).

In 1999, Section 392.031 was amended to allow cities to provide for the appointment of seven, nine or eleven commissioners. This provision was later construed by the El Paso Court of Appeals as providing only a "window of opportunity" to enlarge the size of the boards of previously-existing housing authorities, and the Court of Appeals opined that the "window" has now closed.¹

The City has never expanded the number of commissioners on the GHA Board by resolution and has no authority to appoint an additional Commissioner as an ex-officio.

In May 2013, GHA obtained new legal counsel. Legal counsel immediately informed the Board that the practice of allowing a representative from the City into the executive session violated the Open Meetings Act and the attorney client privilege that is accorded these sessions. Counsel also opined that there was no such position as an ex-officio to a housing authority in Texas. This opinion was also discussed with the City Attorney. In the past, GHA had been inconsistent in allowing the ex-officio to attend executive sessions.

Recently, the City appointed a newly elected city council member as the ex-officio to the GHA Board. The new city council member was informed verbally and in writing that he was not allowed legally to participate in GHA executive sessions. Thereafter, the city council member obtained a legal opinion from the City Attorney opining that he, as an ex-officio, could be part of GHA's executive sessions. On August 25, 2014 at the city council member's first GHA meeting, he tried to force his way into the executive session (where consultation with attorney was on the agenda) but was prevented from entering. In light of these difficulties, quick guidance from the Attorney General's office would be appreciated.

There is no legal precedent for an ex-officio position to the GHA board and doing so violates State law. GHA is not a City board. GHA is a separate government. The City has no authority to contravene State statutes in making an ex-officio appointment to GHA's board.

CAN THE CITY DESIGNATE A REPRESENTATIVE FROM CITY COUNCIL TO ATTEND EXECUTIVE SESSIONS AT GHA?

GHA asserts that allowing a city council member to enter an executive session would violate the Open Meetings Act, constitute a criminal misdemeanor² and nullify the confidential nature of the attorney client privilege.

¹ Housing Authority of the city of El Paso, 141 S.W.3d 663 (Tex. App.-El Paso 2004, no pet.)

² Texas Government Code 551.144(c) holds a member of a governmental body commits a misdemeanor if a closed meeting is not permitted and the member participates in the closed meeting.

In 2013, the City Council appointed the then Mayor as the ex-officio to GHA. Legal counsel informed the Mayor that he could not attend GHA executive sessions. The Mayor honored the legal position of GHA and did not attend the executive sessions. However, the City Attorney's opinion was that the ex-officio could attend executive sessions. To support their argument the City cited Texas Attorney Gen. Op No, JM-6 (1983), and DM-160 (1992), JM-1004 (1989), JM-238 (1984), JC-0375 and JC-0506 (2002). None of these opinions support the City Attorney's position.

In JM-6, the Attorney General concluded that even though the County Clerk is the ex-officio clerk of County Commissioners' court by statute, he did not have the right to attend executive sessions of the County Commissioner court. The opinion states that only members of the governmental body have the right to convene in executive session.

In DM-160, the opinion dealt with the question of whether non-voting ex-officio members of the former Texas Board of Licensure for Nursing Home Administrations could be counted in determining a quorum of that Board. The presence of non-voting ex-officio members of that Board were provided for in the State statute establishing the Board. (These are different facts from the present situation with GHA).

In JM-1004, the issue was whether a governmental body board may exclude from its executive session a member who had sued the governmental body. (This opinion provides no support.)

In JM-238, the issues concerned the presence of officers and employees of a governmental body that were representatives or agents with respect to particular litigation and whose presence was necessary to effective communication with the attorney of the governmental body. (The City Council member in question is not a representative or agent with respect to any litigation and his presence is not necessary or requested to communicate with Board counsel.)

In JC-0375, a school district superintendent was allowed to attend the closed sessions of the school board. (A City councilmember is not an employee of GHA as is the case in this opinion.)

In JC-0506, the Smith County Commissioners Court wanted to know if the Open Meetings Act was violated if it allowed the Smith County Auditor to attend a closed executive session to consult with the County's attorney regarding litigation or related questions. The opinion states, "the commissioners court may include the county auditor in a closed discussion of litigation or settlement offers if it determines that the auditor is necessary to the discussion, that the auditor's interests are not adverse to the county's, and that the auditor's presence is consistent with the attorney-client privilege. If, however a court subsequently finds that, because of the auditor's presence, the communications are not privileged, then the commissioners court may also be found to have violated section 551.071 of the Government Code."

An exception commonly used for a closed session is Section 551.071, consultation with attorney, which includes attorney-client privileged discussions concerning litigation and settlement. The attorney-client privilege under Section 551.071 is lost if other persons besides the client are present at the closed meeting. The Attorney General has carved out further exceptions for employees or officers of the governmental body whose interests are aligned with the governmental body and whose presence at the meeting is necessary for full communication with the attorney. A governmental body may not

otherwise admit persons to a closed executive session under Sec. 551.071, since the presence of those parties would prevent privileged communications from taking place.³

The position of the newly elected city council member (the ex-officio) is that he has the right to attend all executive sessions. To allow a city council member to attend executive sessions of GHA would be akin to having a joint executive session of two governmental bodies which is a violation of the Texas Open Meetings Act.⁴ To allow a city council member to attend executive sessions where his presence is not needed, necessary or requested would violate the Texas Open Meetings Act.

THE APPOINTMENT BY THE CITY OF THE PRESENT CITY COUNCIL MEMBER VIOLATES NOT ONLY SECTION 392.032(b) BECAUSE HE IS AN OFFICIAL OF THE CITY BUT ALSO VIOLATES THE CONFLICT OF INTEREST LAWS SET OUT IN 24 CFR 982.161(a)(1).

24 CFR Section 982.161 states that the Public Housing Authority may not enter into any contract or arrangement in connection with their tenant-based programs where a present or former member or officer has any interest, direct or indirect, during tenure or for one year thereafter. In addition, this regulation prohibits contracts with any public official, member of a governing body or State or local legislator, who exercises functions or responsibilities with respect to the programs. For a board member to be a HCV landlord is a conflict of interest and a violation of HUD regulations. HUD would have to waive the conflict of interest which it has not. The particular City Council member appointed by the City has been a HCV Landlord with GHA since November 2012. In 2012 he received from GHA housing assistance payments (HAP) in the amount of \$1935. In 2013, he received HAP payments from GHA in the amount of \$27,273. To date in 2014, he has received HAP payments from GHA in the amount of \$22,405. He has a conflict of interest.

CONCLUSION

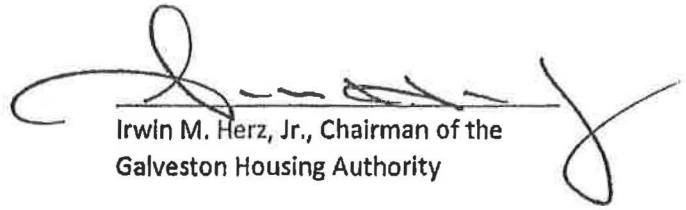
GHA believes that it is violation of the State statutes referenced above to (1) expand the number of commissioners to include an ex-officio board member and (2) to appoint an additional board member that is a city council official. Can the City legally appoint a liaison to GHA to sit at the Board council table and enter into discussions with other Board members? GHA believes there is no legal authority for a City to designate a liaison to GHA or a City ex-officio to the GHA Board of Commissioners and participate in GHA board discussions. GHA welcomes representatives from the City to be part of the public audience attending their public meetings. However, there is a big distinction between being in the public to listen to the meeting vs. sitting at the board table and participating in GHA business discussions, must less participating in executive sessions.

³ AG Opinion No. JC-0375; AG Opinion No. JM-238.

⁴ AG Opinion No. MW-417

Thank you for your assistance.

Yours very truly,



Irwin M. Herz, Jr., Chairman of the
Galveston Housing Authority

and



Carla Cotropia, Legal Counsel of the
Galveston Housing Authority