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County Attorney: Road bond vote not voidable

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“We cannot and will not weigh in on the criminal investigation – just weigh in on the action they (commissioners) did to put this (road bond) on the ballot.”

— County Attorney J D Lambright

Montgomery County Attorney J D Lambright believes that the Commissioners Court meeting Aug. 24 and vote to place a \$280 million road bond on the November ballot would be upheld in civil court. On Friday, the County Judge’s Office released a seven-page opinion issued by the County Attorney’s Office addressing the meeting and vote. It did not address the criminal investigation into whether certain members of Commissioners Court and other individuals possibly violated the Texas Open Meetings Act prior to the special meeting and vote.

“We cannot and will not weigh in on the criminal investigation – just weigh in on the action they did to put this on the ballot,” Lambright told The Courier. According to Lambright, County Judge Craig Doyal requested the opinion.

In issuing its opinion, the County Attorney’s Office addressed two issues: 1. Whether the actions of Commissioners Court Aug. 24 calling for a road bond election is voidable under the Texas Open Meetings Act; and 2. can the alleged actions of the Commissioners Court and/or others contained in the emails reviewed and released to the media invalidate the action calling for a road bond election pursuant to the provisions of TOMA.

According to case law, Lambright said, because the meeting was legally called and the vote was binding, it should not be voidable — even if some members of the court are determined to have violated the Open Meetings Act prior to the called meeting. “We are strictly on the civil side as far as the voidability,” Lambright told The Courier. “We think it’s very clear that because of the way it was handled in court ... everyone participated and weighed in, including Commissioner (Mike) Meador ... there was all that discussion in open court. It’s all that discussion which impacts the voidability and decision to put it on the ballot.”

However, Lambright said, the County Attorney’s Office opinion does not prevent individuals from taking civil action in an effort to void the bond or nullify it after the Nov. 3 vote. “It is our strongly held opinion that the action of Commissioners Court in calling the November 3 Road Bond

Election complied with TOMA and was lawfully made,” the opinion stated. “As a result, we find no basis in law or in fact (including the furnished email) that would provide for the Commissioners Court’s action setting the election to be voided or subject to either mandamus or injunction.”

Lambright stated in reaching the opinion, his office extensively reviewed TOMA, case law and Texas attorney general opinions. While TOMA states “an action taken by the governmental body in violation of this chapter is voidable, Lambright added that the section is “very specific” in that it focuses only on the action of the governmental body, not the action of the individual members of the governmental body.

“I see quotes in The Courier attributed to the special prosecutor (investigating possible TOMA violations) saying the road bond may be voidable or could be voided, Lambright told The Courier. “And, that’s not his investigation ... and that seems to be stirring up a lot of attention about the possibility of it being voided.”

Lambright said the resolution passed during the Aug. 24 meeting was “timely and properly noticed and sufficiently described on the agenda.” “Any previous discussion or meetings between one or more Commissioners Court member and/or third parties would not make the subsequent vote in open court voidable under any scenario,” Lambright stated.

On Sept. 15, 9th state District Court Judge Kelly Case appointed Houston-based criminal defense attorney Chris Downey to investigate potential criminal violations of TOMA to place the bond on the November ballot. As of Friday, Downey said he is continuing his investigation and reviewing the sequence of communication via email between certain Commissioners Court members, as well as other individuals, including the Texas Patriots PAC.

Emails obtained by The Courier through a Freedom of Information Act request to the County Attorney’s Office Aug. 24 revealed a string of emails between PAC treasurer Bill O’Sullivan, political consultant Marc Davenport, with Doyal, Precinct 2 Commissioner Charlie Riley and other members of Commissioners Court being kept apprised of ongoing negotiations to place the November 2015 road bond referendum on the ballot. Those negotiations show the framework of the bond, including project lists, project costs and even future bond elections.

On Aug. 21, Doyal’s office issued a press release, authored by Davenport, announcing a signed Memorandum of Understanding between him, Riley and the PAC. The release also announced the special session on Aug. 24 where the court, with little discussion on the actual bond, approved the placement of the referendum on the November ballot. According to Downey, a violation of the Open Meetings Act is a Class B misdemeanor and could be punishable by a fine of \$100 to \$500 and/or not less than one month or more than six months in jail.

Houston attorney Joseph Larsen, with Sedgwick LLP, who is a member of the Freedom of Information Foundation Board of Directors, also previously told The Courier that he believes there is “good and strong evidence” that certain emails involving the PAC, Davenport and county officials may have violated the Texas Open Meetings Act. “The paper trail would certainly indicate there is evidence of that,” Larsen told The Courier. “There is certainly evidence that these commissioners were meeting in numbers less than a quorum to negate the requirement of the Open Meetings Act.”

Larsen also referenced an Attorney General's Opinion from Nov. 20, 2000, stating that a person who is not a member of the court could be charged with a violation of the Texas Open Meetings Act if "the person, acting with intent, aids or assists a member or members who knowingly act to violate the Act."