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ATTORNEY GENERAL

State of Louisiana

DEPARTMENT OF JUSTICE

P.O. BOX 94005

BATON ROUGE

70804-9005

DEC 09 2015 OPINION 15-0173

172 WATER & WATER COURSES — Boats, Motorboats & Vessels

La. Const. Arts. I, Sec. 1, VII, Sec. 14, IX, Sec. 1

La. R.S. 34:843, 42:1116, 42:1120

La. Atty. Gen. Op. No. 12-0040

Hon. V.J. St. Pierre, Jr.
President, St. Charles Parish
Post Office Box 302
Hahnville, LA 70057

Bayou Des Allemands is a State-claimed sovereign, navigable waterway. Pursuant to law, a public entity may fund the salvage of sunken vessels from navigable or non-navigable waters in Louisiana. Whether such salvage actions constitute prohibited donations is a factual matter that must be determined based upon the benefits to the public for the abatement of environmental, health, and navigability hazards posed by wrecks. Whether a Parish council member's participation in the consideration of such a matter due to a potential person interest in its outcome is a question of governmental ethics to be properly presented to the Louisiana Ethics Administration.

Dear Mr. St. Pierre:

You have requested an opinion from this office regarding the legality of using public funds to raise and remove a sunken vessel from a waterway within St. Charles Parish. Specifically, you indicate that the vessel known as *Pretty Boy* is sunken in Bayou Des Allemands and that the St. Charles Parish Council has directed the Parish to and has appropriated funds for the salvage of this vessel. Your concerns with regard to this salvage operation and the bases for your opinion request are posed as the following two questions:

1. Can St. Charles Parish use public monies to raise a sunken vessel not in a navigable waterway, which will benefit three private citizens, one of whom is St. Charles Parish Councilman Paul Hogan, and not the public at large?
2. Is it a violation for Councilman Paul Hogan to vote on, or introduce legislation to raise the sunken vessel *Pretty Boy*, when the expenditure of public funds will directly benefit he and two other private citizens, and not the parish at large?

Those two questions are answered through the general discussion below. Necessarily, several other tangential matters are also discussed in the context of our answers to your specific questions.

The Navigability of Bayou Des Allemands

As an initial matter, it is crucial to clarify a point in your opinion request, as it implicates certain State claims to sovereign water bottoms. Based upon our research, the sunken vessel at issue herein, *Pretty Boy*, is located in Bayou Des Allemands. In your opinion request, you note that "...the vessel is not in a navigable waterway..."¹ Although this

¹ Attorney General Opinion Request Letter from Hon. V.J. St. Pierre, Jr., at 1 (Oct. 19, 2015).

assertion, for the reasons discussed below, is irrelevant to answer your opinion request, it is essential to the broader interests of the citizens of Louisiana that the sovereign nature of Bayou Des Allemands is not in question. Currently, the State of Louisiana has at least one active mineral lease on a portion of the Bayou² and any intimation that the Bayou is non-navigable creates unnecessary confusion. To be clear, according to the State Land Office, Bayou Des Allemands is a sovereign State-claimed navigable water bottom and nothing herein is intended to imply anything to the contrary.

Sunken Vessel Salvage

As this office noted in La. Atty. Gen. Op. No. 12-0040, the law dealing with the salvage of sunken vessels, La. R.S. 34:843,

provides the authority to various governmental entities to generally deal with objects "left unattended, stored, junked, or abandoned in any canal, coulee, drainage ditch, outfall canal, bayou, bay, lake, or any other waterway, whether navigable or not, or on the banks thereof within the state of Louisiana...."³

Thus, although your opinion request incorrectly characterizes Bayou Des Allemands as non-navigable, such an assertion is of no moment when inquiring into St. Charles Parish's authority to salvage *Pretty Boy*. The law is clear that a governmental entity such as St. Charles Parish has the authority to salvage vessels from any waterway, "whether navigable or not."⁴ In our prior opinion, we fully analyzed the authority of governmental entities such as St. Charles Parish to salvage vessels under circumstances such as those you describe.⁵ The law regarding this matter has not changed in the intervening time since the release of La. Atty. Gen. Op. No. 12-0040. In that opinion, St. Charles Parish sought guidance regarding what legal mechanisms exist for governmental entities to remove sunken vessels and to recover the costs of such removal. That opinion reviewed the broad authority in La. R.S. 34:843(A) for the removal of sunken vessels and noted that the Parish could recover the costs of such salvage under the law thusly:

Specifically to your question regarding cost recovery, in the event that the owner does not undertake the removal of the vessel following notice, La. R.S. 34:843(B) authorizes the governmental entity undertaking the actual removal of the vessel to,

...have the object removed at the owner's cost and junk, discard, or otherwise dispose of the object or sell, exchange, or otherwise transfer ownership of the object to any person,

² State Lease 348.

³ La. Atty. Gen. Op. No. 12-0040 (citing La. R.S. 34:843(A)(1)).

⁴ La. R.S. 34:843(A)(1).

⁵ Indeed, that opinion (La. Atty. Gen. Op. No. 12-0040) was also requested by St. Charles Parish and it is thus directly applicable to your current request.

corporation, or entity whatsoever for any price or consideration which the authority may deem advisable, or for no consideration, and apply the proceeds received, if any, to the cost of removing the object, and the balance, if any, shall become the property of the authority.⁶

That opinion, which is attached hereto for your reference, also reviewed the mechanisms available for the recovery of the costs of such salvage operations when the sunken vessel's owner is and is not known. Because cost recovery is not your specific question, we review those aspects of La. Atty. Gen. Op. No. 12-0040 no further here. As expressed in La. Atty. Gen. Op. No. 12-0040, it is our opinion that there is no statutory bar to St. Charles Parish's salvage of sunken vessels. Accordingly, we know of no reason that the vessel known as *Pretty Boy* cannot be salvaged by the Parish so long as such salvage adheres to the legal limitations provided in La. R.S. 34:843 and those discussed below.

The Use of Public Funds and Benefit to the Public

As you properly note, La. Const. Art. VII, Sec. 14(A) generally restricts the gratuitous donation of public things of value for the benefit of private parties. This office has consistently opined that three factors must be considered in the application of La. Const. Art. VII, Sec. 14:

1. The public purpose must be consistent with a governmental interest in which the public entity has the authority to engage.
2. The alienation of the resource must not appear gratuitous on its face.
3. The public entity must have a demonstrable, objective, and reasonable expectation of receiving equivalent value for the resource alienated.⁷

Although each of these factors are not directly analogous to scenarios involving the salvage of sunken vessels, they do provide a reasonable framework within which to analyze the Parish's proposed action in this matter. Clearly, the first part of the above test is satisfied by La. R.S. 34:843(A)(1), which provides the Parish with the authority to engage in salvage operations. The second and third portions of the above test are fact specific inquiries that the Parish must undertake with regard to this specific issue.

With the foregoing in mind, however, as we noted at length in La. Atty. Gen. Op. No. 12-0040, multiple mechanisms may exist to reimburse the Parish for any costs incurred by the salvage of *Pretty Boy*. These mechanisms include, among others, taxing the costs

⁶ La. Atty. Gen. Op. No. 12-0040 (citing La. R.S. 34:843(B)).

⁷ La. Atty. Gen. Op. No. 12-0114 (citing La. Atty. Gen. Op. Nos. 10-0171, 09-0271, 09-0259, 09-0251, 09-0146 and 07-0050A). See also La. Atty. Gen. Op. No. 12-0100 (citing La. Atty. Gen. Op. No. 08-0071).

against the vessel owner and seeking reimbursement from the resale or scrap value of the vessel if it is legally abandoned.⁸

Further, even if the Parish is not fully recompensed for the salvage costs of *Pretty Boy*, such a reality does not *ipso facto* mean that expenditures to cover the costs of the salvage are gratuitous and thus prohibited by La. Const. Art. VII, Sec. 14(A). Although you note in your opinion request that *Pretty Boy* "does not interfere with any boating traffic," you have provided no information from the regulatory entity charged with maintaining navigation (the U.S. Coast Guard) or navigability (the U.S. Army Corps of Engineers) certifying the lack of navigation hazards. Further, even if no navigation hazards exist today, there is no guarantee that a future unforeseen event, such as a tropical cyclone, could not cause a shifting or a breakup of the vessel, thus creating a hazard in the future.⁹ In addition, navigation hazards are not the only risks posed by sunken vessels. Such vessels can and do leak or otherwise slough-off materials that are hazardous to the environment and to public health.¹⁰ It is our opinion that La. R.S. 34:843 contemplates the nonstatic nature of sunken vessels and authorizes governmental entities such as St. Charles Parish to allocate funds when they see fit to remedy current or potential future navigation hazards or environmental/public health problems presented by sunken vessels.

Because the protection of the public's health and safety and the protection of the environment are among the primary governmental functions in Louisiana,¹¹ it is our further opinion that any unrecoverable expenditure of public funds to abate the hazard or nuisance of a sunken vessel such as *Pretty Boy* likely avoids running afoul of the prohibitions on the gratuitous donation of public funds. Indeed, though the vessel may be located near three individuals' private property, the potential impacts to a public waterway from leaving this vessel in place, in our estimation, outweigh any private gain to be realized by any riparian owner. Indeed, as this office has noted in the past, just because the use of public funds might benefit a private party while also benefitting the public, this does not cause such use to violate La. Const. Art. VII, Sec. 14(A).¹²

⁸ It is important to note that, pursuant to *Port of South Louisiana v. Tri-Parish Industries, Inc.*, 927 F.Supp.2d 332 (E.D. La. 2013), the Parish must follow the notice requirements of La. R.S. 34:843 prior to salvage should it intend seek reimbursement from the owner.

⁹ See Rory Quinn, *The role of scour in shipwreck site formation processes and the preservation of wreck-associated scour signatures in the sedimentary record – evidence from seabed and sub-surface data*, 33 J. ARCHAEOLOGICAL SCI. 1419, 1420 (2006). (noting that "it is important to acknowledge that wreck sites act as open systems, with the exchange of material (sediment, water, organics and inorganics) and energy (wave, tidal, storm) across system boundaries. Wrecks are therefore generally in a state of dynamic (not steady-state) equilibrium with respect to the natural environment, characterised by negative disequilibrium, ultimately leading to wreck disintegration.").

¹⁰ United States Navy, U.S. NAVY SALVAGE REPORT: HURRICANES KATRINA AND RITA, S0800-AC-RPT-010 (2007) (noting that sunken vessels often leak hazardous materials that must be abated).

¹¹ La. Const. Art. I, Sec. 1; La. Const. Art. IX, Sec. 1.

¹² La. Atty. Gen. Op. No. 10-0122 (noting that whether a prohibited donation will result from expenditures that benefit private parties is part of the factual analysis inherent in the balancing test analysis, recited *supra*, that must be conducted under *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales*, 2005-2298

Councilman Hogan's Participation

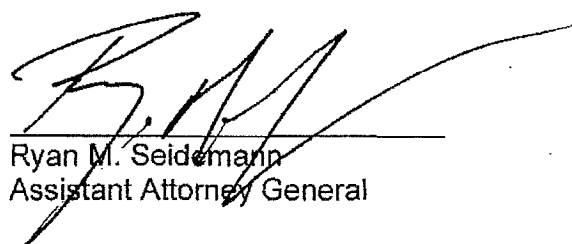
Your final question relates to whether one Parish council member may participate in the voting regarding whether to expend public funds on the salvage of *Pretty Boy*. According to your opinion request, this particular Parish Council member, Paul Hogan, owns property adjacent to the location on Bayou Des Allemands where *Pretty Boy* currently rests. The questions that you have posed relate to questions of Councilman Hogan's adherence to the Code of Governmental Ethics, as you specifically ask whether the Councilman's participation in this matter constitutes abuse of office under La. R.S. 42:1116 and whether he should recuse from voting on this matter under La. R.S. 42:1120. As we have noted in the past, this office does not make factual determinations in its legal opinions. Further, under La. R.S. 42:1134(E), the Louisiana Ethics Board is empowered to render advisory opinions regarding potential violations of the Code of Governmental Ethics. As such, we recommend that you seek a formal opinion from the Louisiana Ethics Board on this matter.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

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ATTORNEY GENERAL

By:


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