



JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
70804-9005



July 17, 2012
OPINION 12-0060

Mr. Larry Cochran
Chairman- St. Charles Parish Council
Councilman District V
P.O. Box 302
Hahnville, LA 70057

77 OFFICERS- Local & Municipal; Selection,
Qualification & Tenure; vacancies
90-A-3 GENERAL CONTRACTS - Local

La. Const. art. VII, Sec. 14(c); La. Civ. Code. art. 2053; La.
R.S. 2:131.1; La. R.S. 33:1324.
La. Atty. Gen. Op. No. 81-190; 91-516 & 09-0003.

Addresses several issues related to the 1985 Airport Expansion Agreement by the Parish of St. Charles, the City of Kenner, the City of New Orleans and the New Orleans Aviation Board.

Dear Mr. Cochran:

You have requested an Attorney General's opinion as to whether, pursuant to the Airport Expansion Agreement ("Agreement") signed by the Parish of St. Charles, the City of Kenner, the City of New Orleans and the New Orleans Aviation Board (NOAB), the St. Charles Parish Council has the right to designate by resolution its appointee to the NOAB.

Specifically, your request states that under the Agreement, St. Charles Parish is to have a permanent seat on the NOAB, and that, upon the expiration of any term or if the seat is otherwise vacated, the new appointee for St. Charles Parish is to be designated by resolution of the St. Charles Parish Council and subsequently appointed by the Mayor of the City of New Orleans.

For reasons stated in more detail below, this office is of the opinion that the Airport Expansion Agreement executed in 1985 is a valid contract among the Parish of St. Charles, the City of Kenner, the City of New Orleans and the New Orleans Aviation Board. Pursuant to the Agreement, the St. Charles Parish Council has the authority to designate and nominate by resolution its representative to the NOAB; and the Mayor of the City of New Orleans, as an administrative duty, is required to accept the appointee subject to the approval by the New Orleans City Council.

BACKGROUND

In 1983, the Louisiana legislature passed Act 25 which amended La. R.S. 2:131.1 by changing the membership of any airport board of a city located outside the parochial site of its airport and which included the following provisions:

(a) the board shall include one additional member, to be appointed by the mayor and approved by the governing authority, from a list of two names submitted by the chief executive of each parish in which the airport is located; (b) if the airport is located within a municipality, the board shall include two additional members to be appointed from a list of four names submitted by the mayor of the municipality in which any part of the airport is located; (c) if the mayor of the city which owns the airport fails to make the appointments timely upon receipt of the lists or if the governing authority fails to approve his appointments timely, the chief executives and the mayor submitting the lists shall make the appointments with approval of their respective governing authorities.

Prior to the appointment of any members under the amended Act, members of the NOAB filed suit seeking to declare the Act unconstitutional. In *Francis v. Morial*, the Louisiana Supreme Court concluded that the statute was in fact unconstitutional because: a) the Act purported to change the New Orleans home rule charter's distribution of powers and functions pertaining to the selection and appointment of aviation board members in violation of the Louisiana Constitution Article VI, Section 6, and, b) the Act did not constitute a reasonable exercise of the police power under La. Const. Article VI, Section 9(B) so as to qualify as an exception to the prohibition against state interference with home rule discretion.¹

In response to the *Francis* ruling, the Parish of St. Charles, the City of Kenner, the City of New Orleans and the New Orleans Aviation Board executed the 1985 Airport Expansion Agreement. Pursuant to the Agreement, St. Charles Parish Council nominated a resident of St. Charles Parish who was then appointed by the Mayor of New Orleans. This contractually agreed upon nomination process continued for successive terms until 2011, when the St. Charles Parish appointee died thereby creating a vacancy. The St. Charles Parish Council then passed a resolution nominating a new NOAB representative.² However, the mayor of the City of New Orleans rejected the nominee and, instead, requested from the St. Charles Parish Council the nomination of four individuals from which the mayor would choose as the St. Charles Parish appointee.³ The only reference calling for the nomination of four candidates to fill the vacancy to the NOAB is found in Act 25 of 1983, which the Supreme Court found unconstitutional in *Francis*, *supra*.⁴

¹ *Francis v. Morial*, 455 So. 2d 1168, 1169 (La. 1984), attached to Request 12-0060 as Exhibit 10.

² St. Charles Parish Resolution No. 5864, *supra* n. 7.

³ November 18, 2011 and February 1, 2012 letters, *supra* n. 8 and 9.

⁴ La. R.S. 2:131.1 in pertinent part reads as follows:

"... [I]f the airport or facility is located wholly or partially within a municipality, the governing board of such airport or facility also shall include two additional members to be appointed by the mayor of the municipality which owns and operates the airport or facility with the approval of the governing authority of such municipality from a list of four names submitted by the mayor of the municipality within which such airport or facility is located with the approval of the governing authority of such municipality."

ANALYSIS

In order to determine how the appointment of the new St. Charles member of the NOAB is to be made, several questions must first be answered. First, is the Airport Expansion Agreement a valid contract? Next, if the Agreement is valid, is the provision regarding the appointment of the St. Charles Parish member valid in light of the City of New Orleans Home Rule Charter governing NOAB appointments? Finally, was the appointment provision in the Agreement intended to apply only to the initial appointment (to fill the first seat created in 1985), or were the appointment obligations of the Agreement intended to extend to all future vacancies of the St. Charles Parish member seat? These questions will be answered individually below.

1. Did the former mayor have the authority to bind the City of New Orleans in accordance with the Airport Expansion Agreement, and if not, has the City Council nonetheless ratified the Agreement?

As a general rule, a mayor acting alone is without power to execute a contract binding on the city absent an ordinance or resolution by the governing council authorizing him to do so.⁵ Nevertheless, if the mayor is acting under authority of the council, he may have such power.⁶ A particular scenario is presented when a mayor acts without the governing council's express permission but with the council's knowledge; in that case, the city may be prevented from arguing that the mayor lacked sufficient authority.⁷

This office has previously reviewed a mayor's power, pursuant to a city charter, to execute valid contracts binding the city. We concluded that such authority depends on whether the action is incidental to an authorized undertaking, or included in the mayor's general authority as agent of the city.⁸ In *Chandler*, the Second Circuit stated:

A matter is incidental when it inseparably depends upon, pertains to, and is subordinate to a main or principal project. It is contingent when it is liable, but not certain, to be incurred, in that it depends upon something else that may or may not occur; a matter that cannot be foreseen with certainty.⁹

Whether a matter is incidental to an authorized taking requires a factual analysis that is beyond the scope of an Attorney General opinion. Nonetheless, the Agreement may still be valid if the mayor had the general authority to bind the city as its agent. Under the City of New Orleans Home Rule Charter, Section 4-206(1)(h), the mayor has the

⁵ La. Atty. Gen. Op. No. 91-516 (citing *Daspit v. City of Alexandria*, 342 So.2d 683 (La.App.3rd Cir. 1977)).

⁶ *Id.* (citing *Landis Construction Co., Inc. v. Health Education Authority*, 367 So.2d 330 (La. 1979)).

⁷ *Id.* (citing *Smith v. Town of Vinton*, 25 So.2d 237 (La. 1946)).

⁸ La. Atty. Gen. Op. No. 81-190 (citing *Chandler & Chandler v. City of Shreveport*, 162 So. 437 (La.App.2 Cir. 1935)).

⁹ *Chandler*, 162 So. 437, 438.

power to “sign contracts, bonds or other instruments requiring the assent of the City...” This provision likely authorized the mayor to sign the Agreement; however, such an action may not necessarily eliminate the requirement to obtain consent from the City Council. Even without authority to bind the city, the Agreement can still be valid if the contract was ratified by the Council.

A party with authority to contract can ratify same if that party, by some action or inaction, evidences an intent to approve and adopt as its own some previously unauthorized transaction.¹⁰ Implied ratification can also occur if a party accepts the benefit of a contract. In the instant matter, the consent of the parties to the Agreement is reflected in the New Orleans city’s resolutions,¹¹ the St. Charles Parish’ ordinance,¹² and the New Orleans Board’s resolution.¹³ Additionally, the purpose of the Agreement -to provide for the expansion of the runway of the New Orleans International Airport- was lawful because the power to engage jointly in the construction of a public project is statutorily granted to cities and municipalities,¹⁴ and likely benefited the City of New Orleans.

Finally, the fact that the former mayor and not the current mayor signed the agreement is irrelevant because the Agreement was executed on behalf of the city, and not in his personal capacity. It is well settled that the city has perpetual existence and is capable of entering into obligations exceeding the term of its officials.¹⁵ Further, municipal corporations are responsible for the acts and contracts of their duly appointed and authorized agents, acting within the scope of the authority of such agents, in the same manner that other corporations and private individuals are responsible for their promises, whether express and implied.¹⁶ In accordance with the analysis above, it is the opinion of this office that the New Orleans mayor did have the authority to execute the 1985 Airport Agreement. However, even if the mayor exceeded his authority, the New Orleans Council ratified the Agreement and confirmed the member nominated by St. Charles Parish.

2. If the Agreement is valid, does the provision regarding the appointment of the St. Charles Parish member violate the New Orleans Home Rule Charter governing NOAB appointments?

¹⁰ See *Chandler & Chandler*, *supra* n. 9 at 440.

¹¹ New Orleans Council Resolutions R-97-1022 and R-98-65. The City of New Orleans Council’s website archives go back to 1994; therefore, the Resolutions and Motions cited in this paper are only after that year.

¹² St. Charles Parish Ordinance 85-10-5, *supra* n. 4.

¹³ New Orleans Board Resolution (August 7, 1985), *supra* n. 2.

¹⁴ La. Const. art. VII, Sec. 14(C) and La. R.S. 33:1324.

¹⁵ La. Atty. Gen. Op. No. 09-0003.

¹⁶ La. Civ. L. Treatise, Business Organizations § 21.04 (2011).

As stated above, our office is of the opinion that the 1985 Airport Expansion Agreement is valid. Regarding the New Orleans Home Rule Charter we note Section 5-601, which provides that:

The New Orleans Aviation Board shall consist of nine members who shall be appointed by the Mayor with the approval of the Council for terms of five years, so arranged that the term of one or two members shall expire each year.

La. Const. art. VI, Section 6, prohibits the legislature from enacting any law which changes or affects the structure and organization or the distribution and redistribution of the powers and functions of any local government which operates under a home rule charter. Here, however, we are not in the presence of an act of the legislature, but an agreement among several municipalities giving mutual concessions concerning the expansion of the New Orleans Airport. After the court declared Act 25 of 1983 unconstitutional, the very same parties that brought the litigation signed the Agreement setting the nomination procedure of the members to the NOAB. Under La. Civ. Code. Art 3071, when the parties settle their differences with respect to past or future actions by giving mutual concessions, and memorialize said contract in writing or recited in open court, they have reached a compromise. In this case, the terms of the Agreement clarified the method to designate the members of the NOAB settling any potential dispute among the parties involved in *Francis*. The Agreement also contained mutual concessions: the St. Charles Parish was to grant the use of land for the airport improvements and withdraw its objection to the Department of Natural Resources for the NOAB's filling of forty-eight acres of wetlands; the City of Kenner would dedicate an annual appropriation percentage of the net sales and use tax monies; the NOAB would grant a right-of-way for the construction of a north/south road parallel to the St. Charles-Jefferson Parish line for an alternate traffic artery from U.S. 61 to Veterans Boulevard; and finally, the Mayor of the City of New Orleans would appoint a member of the Board representing St. Charles Parish and the City of Kenner, upon the designation by resolution of their respective councils.

In three different instances the City of New Orleans showed its approval in allowing the St. Charles Parish Council to name its representative to the Board:

The Agreement states, in pertinent part:

The Mayor of the City of New Orleans shall provide an executive agreement stipulating that the current appointee to the New Orleans Aviation Board representing the parish of St. Charles will remain as the Parish appointee until his term of office expires or is removed in accordance with the law. When the office of the current member expires, the new appointee will be designated by resolution of the St. Charles

Parish Council and then appointed by the Mayor of New Orleans.¹⁷
(Emphasis added).

Exhibit "A" of the Agreement states, in pertinent part:

City of New Orleans.

Will provide an executive agreement stipulating that the current appointee to the New Orleans Aviation Board representing the Parish of St. Charles will remain as the St. Charles Parish appointee until such time as the St. Charles Parish Council by resolution recommends the appointee be changed. When the term of office of the current member expires, the new appointee will be designated by resolution of the St. Charles Parish Council and then appointed by the Mayor of the City of New Orleans. The Mayor shall not intervene in the appointment process. (Emphasis added).

Finally, the Executive Acknowledgment executed by the then mayor states:

... when the term of the current appointee to the New Orleans Aviation Board representing the Parish of St. Charles either expires or is otherwise vacated in accordance with the law I will, as Mayor of the City of New Orleans, appoint a successor on the basis of a nomination submitted to me by resolution of the Parish Council.¹⁸ (Emphasis added).

Based on the foregoing, it is the opinion of this office, that there is no conflict between the Agreement and the Charter. Both are congruent in placing the power of appointment on the Mayor with the approval of the Council. The Mayor, however, is bound by the agreement to appoint the nominee designated by resolution of the St. Charles Council, as he has been doing it for nearly three decades.

As stated above, the New Orleans Home Rule Charter, Section 5-601, grants the mayor the power to appoint members to the NOAB, subject to the approval of the Council. The provision of the Agreement regarding the St. Charles appointee requires the mayor to appoint the St. Charles member that is nominated by the St. Charles Parish Council but is silent on whether that appointment is subject to the approval of the Council, as required by the Section 5-601 of the Home Rule Charter. The only reasonable interpretation of this provision of the Agreement and the absence of any express waiver of the Charter provision is that the Agreement is in fact subject to the provisions of the Home Rule Charter.¹⁹ Therefore, although the previous appointment of the St. Charles Parish NOAB member may have been ratified by the Council, any new appointment by

¹⁷ Airport Expansion Agreement, *supra* n. 5.

¹⁸ Executive Acknowledgement, *supra* n. 3.

¹⁹ See *Amoco Production Co. v. Texas Meridian Resources Exploration Inc.*, 180 F.3d 664 (5th Cir. 1999) (under Louisiana law, a contract provision is not ambiguous where only one of two competing interpretations is reasonable).

the mayor should be subject to the approval of the Council, as required by the Home Rule Charter.

The City of New Orleans relies on Act 25 of 1983 to support its request for the nomination of four individuals; however, as stated above, said Act was found unconstitutional by the Supreme Court. As a result, since the neither the Agreement nor the Charter call for this nomination method, it is reasonable to conclude that the request made by the City of New Orleans to select the new member from a list of four nominees is without merit. In fact, since the first appointment to the NOAB was made about 30 years ago, the nominee selected by of the St. Charles Parish has been consistently appointed by the mayor, and ratified and approved by the New Orleans Council.²⁰

3. Did the City of New Orleans satisfy its obligation under the Agreement by appointing a new appointee of the then current member or was the appointment provision in the Agreement intended to apply to all future vacancies of the St. Charles Parish board member?

It is well settled that “[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent.”²¹ The meaning and intent of the parties to a written instrument, including a compromise, is ordinarily determined from the four corners of the instrument.²²

Our analysis of the Agreement, the Exhibit “A”, and the Executive Acknowledgement finds that the language is clear and explicit. The instrument sets out the method for nominating and appointing the then current and subsequent members to the NOAB. Therefore, pursuant to the Agreement, the new appointee will be designated and nominated by resolution of the St. Charles Parish Council and then appointed by the Mayor of the City of New Orleans, subject to the New Orleans City Council approval.

CONCLUSION

In summary it is the opinion of this office as follows:

1. Pursuant to New Orleans Home Rule Charter, Section 4-206(1)(h), the mayor of New Orleans had the authority to execute the 1985 Airport Expansion Agreement and the agreement is valid. However, even if the Mayor exceeded his authority, the Council, through their ratification of the Agreement and subsequent reappointment of the member nominated by St. Charles Parish, would be prevented or estopped from arguing that the mayor lacked such authority.

²⁰ See City of New Orleans Council, Motions M-97-668 and M-02-439.

²¹ *Sharpe v. Sharpe*, 536 So.2d 434, 437 (La. App. 4th Cir. 1988); La. C.C. art. 2046.

²² *Robinson v. Robinson*, 99-3097 (La. 1/17/01), 778 So.2d 1105.

2. While the Agreement required the mayor to appoint a member nominated by the St. Charles Parish to the NOAB, Section 5-601 of the Home Rule Charter requires any such appointment be approved by the City Council.
3. The language of the Agreement is clear regarding whether the New Orleans mayor agreed only to appoint the initial member nominated by the St. Charles Parish to the NOAB or whether the parties intended this requirement extend throughout the duration of the Agreement, i.e. to all future appointments. Pursuant to the Agreement, new appointees would be designated and nominated by resolution of the St. Charles Parish Council and then appointed by the Mayor of the City of New Orleans, subject to the New Orleans City Council approval.

We trust this answers your inquiry. Please advise if we may be of further assistance to you in this matter.

Yours very truly,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By: _____


Ethel Solache Graham
Assistant Attorney General

JDC/ESG

FILED