

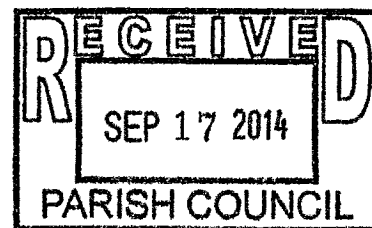


JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

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

COPY

412



SEP 12 2014
OPINION 14-0113

22-1 DRAINAGE & DRAINAGE DISTRICTS

Ms. Tiffany K. Clark
Council Secretary, St. Charles Parish
P.O. Box 302
Hahnville, LA 70057

La. Const. art. VI, § 5
La. R.S. 33:1236
La. R.S. 38:113

La. Const. art. VI, § 14
La. R.S. 39:1305

St. Charles Parish has a drainage servitude over the ditch under consideration. As such, the Parish is permitted to make necessary and reasonable improvements to the ditch provided that the proposed expenditure is included in its budget and that the benefit of doing so would accrue to the Parish and not exclusively to the private landowner.

Dear Ms. Clark:

As the Secretary of the St. Charles Parish Council ("Council"), you have requested an Attorney General's opinion as to whether the Council can pass an ordinance directing the Parish President ("President") to secure a servitude over a ditch maintained by the St. Charles Parish ("Parish") and which sits on private property. The request also questions whether the Parish is permitted to put in subsurface on this drainage under two different scenarios: (a) if the job is budgeted in the Parish's budget; and (b) if the job is not budgeted in the Parish's budget.

You have indicated that the ditch in question is used exclusively to drain rainwater as part of the general rain drainage system of the Parish. Further, you state that the ditch has been maintained by the Parish for over three decades by cutting grass and removing obstructions since there is not a drainage district in the area.

I. The Parish has a drainage servitude over the ditch.

St. Charles Parish operates under a Home Rule Charter ("Charter"), which came into existence following the enactment of Article VI, § 5 of the Louisiana Constitution (1974).¹ As such, this political subdivision is governed by its charter to the extent the provisions are consistent with state law and the state constitution.

In Louisiana, the opening, maintenance, and control of natural drains are within the police power of the state.² Specifically, La. R.S. 33:1236(13) authorizes a parish

¹ La. Const. Art. VI, § 5(E) provides that:

A home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution.

² See La. Atty. Gen. Op. No. 79-635.

governing authority to carry out certain drainage responsibilities when there is not a local drainage district authority. In relevant part, this statute provides:

The police juries and other parish governing authorities shall have the following powers:

(13) To construct and maintain drainage, drainage ditches, and drainage canals; to open any and all drains which they may deem necessary and to do and perform all work in connection therewith; to cut and open new drains, ditches and canals, to acquire lands for necessary public purposes, including rights of way, canals and ditches by expropriation, purchase, prescription or by donation... Police juries shall open all natural drains which they deem necessary in their respective parishes and shall perform all work connected therewith, which they may deem necessary to make the opening of natural drains effective.³

In addition, La. R.S. 38:113 establishes a legal servitude over one hundred feet of property adjacent to public drainage channels and canals. This statute provides:

The various levee and drainage districts shall have control over all public drainage channels or outfall canals within the limits of their districts which are selected by the district, and for a space of one hundred feet on both sides of the banks of such channels or outfall canals, and one hundred feet continuing outward from the mouth of such channels or outfall canals, whether the drainage channels or outfall canals have been improved by the levee or drainage district, or have been adopted without improvement as necessary parts of or extensions to improved drainage channels or outfall canals, and may adopt rules and regulations for preserving the efficiency of the drainage channels or outfall canals.⁴

La. R.S. 38:113 has been interpreted to also be applicable to police juries and parish governing authorities in jurisdictions where no levee districts exist.⁵

Based upon a combined reading of La. R.S. 33:1236(13) and La. R.S. 38:113, it is clear that the Parish not only has the power, but also the duty to maintain and construct drains, drainage ditches, and drainage canals. Further, it has the authority to enter onto private property for the limited purposes of maintaining, opening, and performing all work to improve the efficiency of natural drainage, even without the consent of the private property owner.⁶ To this end, the Parish is permitted to make improvements to the ditch, provided that the work is necessary and reasonable and that it does not disturb the efficiency of the general drainage system.⁷

³ La. R.S. 33:1236(13).

⁴ La. R.S. 38:113.

⁵ *Dugas v. St. Martin Parish Police Jury*, 351 So.2d 271 (La.App. 3 Cir. 1977).

⁶ See La. Atty. Gen. Op. No. 12-0185.

⁷ See *Landry v. St. James Parish Council*, 05-271 (La.App. 5 Cir. 11/29/05), 917 So.2d 1175.

Under these circumstances, we do not find necessary to evaluate the need for an ordinance to “secure” the servitude, as such servitude is created by law. As stated in La. Atty. Gen. Op. No. 08-0048, La. R.S. 38:1236(13) clearly permits parish governing authorities to perform all work to improve the efficiency of the natural drainage within their jurisdiction without requiring any specific dedication of a drainage servitude from the landowner across whose land the natural drainage runs.

II. Improvements to the ditch need to be budgeted for in the Parish’s budget.

The Louisiana Local Government Budget Act applies to all political subdivisions of the state with a general fund or a special revenue fund. In particular, La. R.S. 39:1305 establishes that a political subdivision must prepare a *comprehensive* budget presenting a *complete* financial plan for each fiscal year.⁸ Also, the budget document has to include *recommended expenditures* itemized by agency, department, function, and character, and the estimated fund balance at the end of the fiscal year.⁹ Finally, the total of proposed expenditures shall not exceed the total of estimated funds available for the ensuing fiscal year.¹⁰

In effect, pursuant to La. R.S. 39:1311, the adopted budget constitutes the authority of the chief executive or administrative officers of the political subdivision to incur liabilities and authorize expenditures from the budgeted funds during the fiscal year.¹¹

The powers and duties of the President are set forth in Article III, Section B of the Charter. Specifically, Subsection (3)(b)(iv) provides:

He [the President] shall prepare and submit an annual operating budget and capital outlay program to the Council and shall be responsible for executing the budget and capital program after adoption by the Council.

Article V of the Charter sets forth the procedure for adoption of the budget by the Council. Section D specifically authorizes the Council to amend the budget submitted by the President. However, the President retains the authority to veto, through disapproval or reduction to individual appropriation items in the budget. Article IV, Section C(4) of the Charter.

Thus, if the Council adopts a budget that includes an appropriation for the drainage work, and that expenditure is not vetoed by the President, then the funding for the improvements is considered approved.¹² In that event, the President would not be

⁸ La. R.S. 39:1305(A).

⁹ La. R.S. 39:1305(C)(2)(a).

¹⁰ La. R.S. 39:1305(E).

¹¹ La. Atty. Gen. Op. No. 14-0013.

¹² Article IV, Section A(3) of the Charter specifically requires that the appropriation of funds and adoption of a budget are enacted by ordinance.

permitted to refuse making the approved drainage work when such expense is budgeted within the fiscal year.¹³

In sum, the Parish is obligated to annually provide in its budget those monies which would be required for the improvement of the drainage system it controls before it can make any expenditure on the improvement.¹⁴

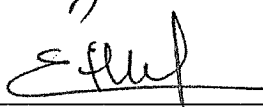
Whether the proposed subsurface drainage constitutes a proper action is a determination that the Parish should undertake, with the understanding that public funds cannot be used to make improvements located on private property unless the Parish determines that the benefit of doing so would accrue to the Parish and not exclusively to the private landowner. We call your attention to La. Atty. Gen. Op. No. 10-0247, in which this office advised the President that, pursuant to La. Const. art. VII, § 14, the Parish is prohibited from donating public funds for the engineering of subsurface drainage for the sole benefit of certain private landowners. The Parish may, however, fund these engineering costs if such expenditure will be in the best interest of the parish as a whole and not just the private landowners who may receive an indirect benefit of the engineering services.

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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

By:



Ethel Solache Graham
Assistant Attorney General

JDC: ESG

¹³ See La. Atty. Gen. Op. No. 12-0231.

¹⁴ See La. Atty. Gen. Op. No. 01-325 and 14-0013.