



To: Robin Cross and Don Norrell
Cc: Monte Akers
From: Julie Fort
Date: November 13, 2018
RE: EXECUTIVE SUMMARY: Questions on Transition Agreements

Question Presented

The following question was submitted by citizen Mike Bass:

“Will the 2007 legal agreement entered into by the Townships to continue to enforce our covenants be binding on a future city, whether it be a General Law or Home Rule City? In my mind, the current Board’s position is not relevant. The real question is whether a future city council will be bound to honor this agreement”.

Short Answer

No. The Transition Agreement should not survive after the creation of the new city because it violates the reservation of powers doctrine, meaning the new city may decide whether to enforce covenants or to adopt zoning.

Factual Background

Section 14A of the Township’s enabling legislation, as amended by S.B. 1014 in 2017, (the “Statute”) expressly authorizes legal succession of the Township’s obligations by a new city. *See Section 14A*. The Township is currently a party to a Transition Agreement, effective February 1, 2008¹ (the “Transition Agreement”). The stated purpose of the Transition Agreement in the recitals is to consolidate the functions of all parties, including covenant enforcement. *See Section V.B*.

Property within the Township is governed by covenants that are filed in the deed records and run with the land. The existing covenants (collectively, the “Covenants”) are:

1. The Woodlands Community Association Covenants (“WCA”)
2. The Woodlands Association Covenants (“TWA”)
3. The Woodlands Commercial Owners Association Covenants (“WCOA”)

¹ Amended by the First Amendment to Transition Agreement, effective October 15, 2008 and the Second Amendment to Transition Agreement effective January 28, 2009.

The Covenants do not terminate when the Transition Agreement terminates. Each of the Covenants contains a provision allowing the governing entity (WCA, TWA, or WCOA respectively) to assign its rights to a “Successor Entity”.² The term “Successor Entity” in the Covenants includes a public body, authority, district, or non-profit membership corporation.³

In addition, there is a Comprehensive Community Services Agreement (“CCSA”) that terminates under its own terms on December 31, 2019. The CCSA consolidated and/or eliminated at least nine other agreements between some or all of the parties to the CCSA.

Legal Analysis

The Transition Agreement transferred enforcement of the Covenants from WCA, TWA and WCOA to the Township, and such obligation would transfer from the Township to a new city pursuant to the Statute. Thus, a new city will automatically become a successor to the Township, and thus replace the Township as a party to the Transition Agreement. Since the Township has stepped into the shoes of WCA, TWA and WCOA pursuant to the Transition Agreement, the Township is essentially a “Successor Entity” replacing WCA, TWA and WCOA, respectively, under the Covenants. The transition from the WCA, TWA and WCOA was permissible under the Covenants because the Township is a “public body” and thus a permissible “successor entity”. The Township now has the right to transfer its rights and obligations under the Covenants to a “successor entity”. If a new city is formed that becomes a successor in interest to the Covenants as a replacement to the Township, the new city would also have the right to transfer its obligations under the Covenants to a “successor entity”, including a non-profit membership corporation such as property owners’ association. The Transition Agreement could then be terminated by mutual agreement of the parties (or for those parties that no longer exist potentially by their successor).

Alternatively, the Transition Agreement could most likely be canceled by a new city that becomes the Townships successor in interest for violating the reservation of powers doctrine. The general rule is:

No governmental entity can “by contract or otherwise, bind itself in such a way as to restrict its free exercise of ... [its] governmental powers, nor could it abdicate its governmental functions, even for a ‘reasonable time.’ “ Clear Lake City Water Auth. v. Clear Lake Utils., Co., 549 S.W.2d 385, 391 (Tex.1977) (citing City of Brenham v. Brenham Water Co., 4 S.W. 143, 149-52 (Tex.1887) (“[W]e do intend to be understood to hold that such [municipal] corporations have no power to make contracts continuous in character ... by which they will be, in effect, precluded from exercising from time to time any power, legislative in character, conferred upon them by law.”) and City of Beaumont v. Calder Place Corp., 183 S.W.2d 713, 715 (Tex.1944)).

² See WCA Section 18.03; TWA Section 19.03; and WCOA Section 16.03.

³ See WCA Section 18.03; TWA Section 1.19 and 19.03; and WCOA Section 1.42.

ECO Resources, Inc. v. City of Austin, 2001 WL 23197 (Tex. Civ. App. – Austin, 2001) at 4. Zoning, in Texas, is a police power exclusive to cities and is a governmental function. Well established precedent prohibits a contract that restricts a city’s ability to decide whether it wishes to legislatively adopt zoning or covenant enforcement. The Fifth Circuit Court of Appeals has opined that “the ultimate test concerns whether the contract at issue will, as a matter of law, ‘potentially control or embarrass the City in the exercise’ of these powers.” *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir.1998) (quoting *Cibolo Creek Mun. Auth. v. City of Universal City*, 568 S.W.2d 699, 702 (Tex. Civ. App.-San Antonio 1978, writ ref’d n.r.e.)). The Transition Agreement cannot be enforced against a city against the will of the governing body, as doing so would control the city’s exercise of its police and legislative power.

Accordingly, the Transition Agreement should not survive after the creation of the new city, either because it violates the reservation of powers doctrine or it is mutually terminated by the parties, meaning the new city may still decide either to enforce covenants or to adopt zoning.