



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 9, 1998

The Honorable Steven C. Hilbig
Bexar County Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205-3030

Letter Opinion No. 98-001

Re: Whether Tax Code section 312.402(d) precludes a commissioners court from entering into a tax abatement agreement with a corporation in which a commissioners court member owns a very small percentage of shares (ID# 39608)

Dear Mr. Hilbig:

You ask whether Tax Code section 312.402(d) precludes a commissioners court from entering into a tax abatement agreement with a corporation in which a commissioners court member owns a very small percentage of shares.¹ Because we believe that the commissioners court member is not the property owner for purposes of the statute, we conclude that the section 312.402(d) prohibition does not apply.

Subchapter C of Tax Code chapter 312 authorizes a commissioners court of a county to enter into a tax abatement agreement with the owner of taxable real property located in a reinvestment zone if the county commissioners court has designated the reinvestment zone according to certain statutory procedures. *See* Tax Code § 312.402(a). Under a tax abatement agreement, the county agrees to exempt from taxation a portion of the value of the property for a period not to exceed ten years on the condition that the owner make specific improvements or repairs to the property. *See id.* §§ 312.204, .402(a).

Section 312.402(d), the statute at issue in your request, provides as follows: "Property that is located in a reinvestment zone designated by a county under this subchapter and that is owned or leased by a member of the commissioners court may not be subject to a tax abatement agreement made under this section." You ask whether this provision precludes a commissioners court from entering into a tax abatement agreement with a corporation in which a commissioners court member

¹You state that your office reviewed chapter 171 of the Local Government and has "determined that the level of stock ownership did not trigger the provisions of that statute." *See* Local Gov't Code § 171.002(a) (defining "substantial interest" in a business entity that triggers disclosure and abstention requirements of Local Gov't Code § 171.004). For this reason, we conclude you are not seeking our opinion about situations in which a commissioners court member's interest in a corporation constitutes a "substantial interest" for purposes of chapter 171 and we do not address the relationship between that chapter and the Tax Code provision. We also note that there may be other statutes relevant to the type of situation you describe, about which you might wish to advise commissioners court members, that we do not address here. *See, e.g.*, Penal Code § 39.06 (misuse of official information).

owns a very small percentage of shares. By way of example, you state that a member of the commissioners court in your county owned “a minimal number of shares of Pepsico, Inc. Pepsico is the parent corporation of Frito Lay. Frito Lay is in the process of applying for a tax abatement” from the county. You ask, in essence, whether section 312.402(d) precludes a commissioners court from entering into a tax abatement agreement with a corporation merely because a commissioners court member owns a very small percentage of shares in the corporation or the corporation’s parent or because a commissioners court member invests in the corporation by way of a mutual fund.

You suggest that a commissioners court is precluded from entering into a tax abatement agreement with any corporation in which a commissioners court member owns shares, citing case law for the proposition that stockholders of a corporation are the equitable owners of the corporation’s assets.² While it is true that some courts have concluded that stockholders of a corporation have an equitable or beneficial interest in the assets of the corporation,³ it is also very well established that legal title to corporate property is vested in the corporation and not in the owners of the corporate stock.⁴ A shareholder may make contracts regarding corporate assets that are binding on the corporation only if he or she is the sole shareholder of the corporation or is joined in the contract by all of the corporation’s shareholders.⁵

Section 312.402(d) precludes a commissioners court from entering into a tax abatement agreement regarding property “owned or leased by a member of the commissioners court.” In addition, we note that a commissioners court enters into a tax abatement agreement with “the owner of taxable real property.” Tax Code § 312.402(a). Chapter 312 does not define the terms “owned” and “owner.” The Code Construction Act provides that “[w]ords and phrases shall be read in context

²You cite *Roadside Stations, Inc. v. 7HBF, Ltd.*, 904 S.W.2d 927, 931 (Tex. App.—Fort Worth 1995, no writ).

³See *id.* (“Stockholders of a corporation are the equitable owners of the assets of the corporation.”) (concluding that equitable owner of 50% of stock in company had standing to bring derivative suit); see also *Rapp v. Felsenthal*, 628 S.W.2d 258, 260 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.) (“[A] corporation’s shareholders are the equitable owners of its assets and may bind the corporation by a contract in which all of the shareholders join.”) (holding that sole shareholder of the corporation had made contract that was binding upon the corporation); 15 TEX. JUR. 3D § 147 (“Although the ownership of shares does not carry with it the equitable title to the corporate property, there is ample authority for the view that the shareholders have a beneficial interest in the corporate property.”)

⁴*Sun Towers v. Heckler*, 725 F.2d 315, 331 (5th Cir.), cert. denied, 469 U.S. 823 (1984) (“It is an elementary principle of corporate law that a corporation and its stockholders are separate entities and that the title to corporate property is vested in the corporation and not in the owners of the corporate stock.”); *State v. DeSantio*, 899 S.W.2d 787, 789 (Tex. App.—El Paso 1995, pet. ref’d) (“Property owned by a corporation is property of the separate corporate entity and not that of the shareholders.”); *Rapp v. Felsenthal*, 628 S.W.2d at 260 (“ownership of stock shares does not vest the shareholder with legal title to property owned by the corporation”); 15 TEX. JUR. 3D § 147 (“[O]wnership of corporate assets is vested in the corporation, not in the shareholders.”)

⁵See, e.g., *Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.—Austin 1996, writ denied) (“A sole shareholder or all shareholders acting in agreement, being all the beneficial owners of corporate property, may themselves deal with such property.”); *Rapp v. Felsenthal*, 628 S.W.2d at 260 (holding that sole shareholder of corporation had made contract that was binding upon corporation).

and construed according to the rules of grammar and common usage.” Gov’t Code § 311.011(a). The term “own” is commonly understood to mean to possess or control. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 843 (2d ed. 1990). The term “owner” is commonly understood to refer to a person who possesses or controls property. For example, *Black’s Law Dictionary* notes that the primary meaning of the term “owner” as applied to land “is one who owns the fee and who has the right to dispose of the property.” BLACK’S LAW DICTIONARY 996 (5th ed. 1990).

Based on their ordinary meaning, we believe that the terms “owned” and “owner” in chapter 312 refer to a property interest that includes at least some degree of control over the property and do not embrace a mere beneficial or equitable interest in property completely lacking such control. A person who holds legal title to property and owns the property in fee simple is clearly an owner for purposes of chapter 312. We also believe that the sole shareholder of a corporation who has the authority to dispose of corporate assets may be an owner of corporate property for purposes of the chapter.⁶ We do not believe, however, that the owner of a very small percentage of a publicly-held corporation’s shares can be said to own corporate property for purposes of chapter 312.

We acknowledge that a commissioners court member who owns stock in a corporation will have at least some pecuniary interest in transactions relating to corporate property, including tax abatement agreements. If the legislature had intended to broadly prohibit a commissioners court member from having *any* interest in a county tax abatement agreement, however, we believe it would have made this intent plain.⁷ In many, many statutes,⁸ the legislature has expressly prohibited a state or local official from having any pecuniary interest⁹ in property or a transaction. We believe it is significant that the legislature has not done so here.

In sum, Tax Code section 312.402(d) does not preclude a commissioners court from entering into a tax abatement agreement with a corporation merely because a commissioners court member owns a very small percentage of shares in the corporation or the corporation’s parent or because a

⁶See note 5 *supra*.

⁷We have not been able to locate any legislative history regarding the legislature’s intent in enacting section 312.402(d).

⁸See, e.g., Alco. Bev. Code § 5.05(a)(3) (prohibiting Alcoholic Beverage Commission member from having “a pecuniary interest in an alcoholic beverage business”); Elec. Code §§ 121.002, 122.035(d), .092 (prohibiting secretary of state and voting system examiners from having “a pecuniary interest in the manufacturing or marketing of any part of [a] voting system”); Local Gov’t Code §§ 321.027, 322.026 (prohibiting member of county or joint county board of park commissioners from acquiring “a direct or indirect pecuniary interest” in any park “improvements, concessions, equipment, or business”).

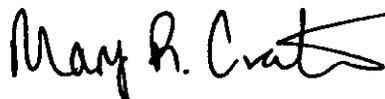
⁹In Attorney General Opinion DM-310, this office construed Alcoholic Beverage Code section 5.05 to prohibit a member of the Alcoholic Beverage Commission from investing money in any corporation that engages in the sale of alcoholic beverages, even if the member makes the investment through an investment advisory firm or even if the corporation’s sole contact with the alcoholic beverage business is through a subsidiary. Attorney General Opinion DM-310 (1994).

commissioners court member invests in the corporation by way of a mutual fund. While a shareholder may have sufficient control over corporate property to trigger section 312.402(d) in some situations,¹⁰ that does not appear to be the case in the situations you posit.¹¹

S U M M A R Y

Tax Code section 312.402(d) does not preclude a commissioners court from entering into a tax abatement agreement with a corporation merely because a commissioners court member owns a very small percentage of shares in the corporation or the corporation's parent or because a commissioners court member invests in the corporation by way of a mutual fund.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

¹⁰We believe, for example, that section 312.402(d) may prohibit a commissioners court from entering into a tax abatement agreement with a corporation in which a commissioners court member is the sole shareholder. *See supra* note 5; *see also supra* note 1.

¹¹We believe this conclusion disposes of your first three questions. Given our conclusion, we do not believe it is necessary for us to reach questions four through six.