



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 28, 1998

The Honorable Clyde Alexander
Chair, Committee on Transportation
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-081

Re: Taxing authority of the Henderson County
Rural Fire Prevention District No. 2 (RQ-1142)

Dear Representative Alexander:

You request an opinion on the authority of the Henderson County Rural Fire Prevention District No. 2 to tax persons residing in the extraterritorial jurisdiction ("ETJ") of the City of Payne Springs. You state as follows:

In November 1997, the Henderson County Rural Fire District #2 (HCRFD#2) was created by voters in the community of Enchanted Oaks and in an unincorporated area of the county. Voters in the community of Payne Springs rejected the creation of the district. HCRFD#2 is now preparing tax levies for residents in the voter-approved service area. However, some residents, who reside in the unincorporated area in the extra-territorial jurisdiction of Payne Springs, claim they should not be taxed by the district because the voters of Payne Springs did not vote for creation of the district. Payne Springs and the area in its extra-territorial jurisdiction will be served by the Payne Springs Volunteer Fire Department.

Pursuant to article III, section 48-d of the Texas Constitution, the legislature may provide for the creation of rural fire prevention districts ("districts") and may authorize a tax¹ on property in the districts, "provided that no tax shall be levied in support of said districts until approved by vote of the people residing therein." Chapter 794 of the Health and Safety Code implements article III, section 48-d of the Texas Constitution, setting out procedures for creating a district and for holding an election to confirm the district's creation and authorize the levy of a tax.²

¹The tax may not exceed three cents on the one hundred dollars valuation, except in Harris County, where it may not exceed five cents on the one hundred dollars valuation. Tex. Const. art. III, § 48-d; Health & Safety Code § 794.018(a).

²See Health & Safety Code § 794.018.

A district is created by a majority of the votes cast in the election.³ However, section 794.019(b) provides “A district may not include *territory in a municipality’s limits or extraterritorial jurisdiction unless a majority of the voters residing in that territory* who vote at the election vote in favor of creating the district and levying a tax.” (Emphasis added.)

Your question requires us to construe the emphasized language. Are the votes of persons residing in the city counted separately from those of persons residing in its ETJ to determine whether there is a majority in each territory, or are the votes of a city and its ETJ combined to determine whether the total area is in favor of the district? In addressing your question, we will look at this provision in connection with related provisions.

Section 794.014 applies to the creation of a district that contains “territory in a municipality’s limits or extraterritorial jurisdiction.” “Before a district may be created that contains territory in a municipality’s limits or extraterritorial jurisdiction, a written request to be included in the district must be presented to the municipality’s governing body.”⁴ Subject to a statutory exception, “*that territory* may not be included in the district unless the municipality’s governing body gives its written consent” within sixty days.⁵ (Emphasis added). Thus, the municipality’s governing body has the initial authority to consent to including territory in its ETJ in a rural fire prevention district. If the municipality’s governing body does not consent to including territory in the municipality or its ETJ, voters and property owners of the territory may petition the governing body to make fire protection available.⁶ The city’s failure to act within six months constitutes its consent “for the territory that is the subject of the petition to be included in the proposed district.”⁷

A petition to create a district then goes to the commissioners court for its consideration.⁸ The court must hold a hearing and make certain determinations set out in section 794.017(a) as to the feasibility and benefits of the proposed district. Separate determinations must be made pursuant to section 794.017(b) on the inclusion of territory in the city limits or ETJ of a city:

If the proposed district will include territory in the municipal limits or extraterritorial jurisdiction of one or more municipalities in the district, the commissioners court of the county in which the municipality is located must determine if the district would still meet the qualifications prescribed by

³*Id.* § 794.019(a).

⁴*Id.* § 794.014(a).

⁵*Id.*

⁶*Id.* § 794.014(b).

⁷*Id.* § 794.014(c).

⁸*Id.* § 794.015. If the commissioners court grants the petition, it orders an election to confirm the district’s creation and authorize the levy. *Id.* § 794.018.

Subsection (a) if the territory in the municipality's limits or extraterritorial jurisdiction is excluded from the district. *The commissioners court must make this finding for each municipality the territory of which will be included in the district.* [Emphasis added.]

The last sentence of this provision treats the ETJ as part of the municipality for purposes of inclusion in the district.

The immediate predecessor of section 794.017(b) clearly shows that a municipality's ETJ is deemed to be part of the municipality's territory for purposes of the commissioners court's findings. Chapter 794 of the Health and Safety Code was enacted in 1989, as part of a nonsubstantive revision of statutes relating to health and safety.⁹ It was formerly codified as article 2351a-6, V.T.C.S. Section 6 and part of section 8A of the predecessor statute became section 794.017(b) of the Government Code in the nonsubstantive revision. Another part of former section 8A was the predecessor of section 794.019(b), the provision we are seeking to construe. The first two paragraphs of section 8A read as follows:

If the area of the proposed District encompasses the territory of any incorporated city, town or village, *including the area within the extraterritorial jurisdiction* of the city, town, or village, the Commissioners Court, if such city, town or village lies within its county, in making the determinations required in Section 6 of this Act,¹⁰ shall also determine whether those findings would be the same as to the remaining portion of the proposed district, *excluding any or all of the territory of such incorporated municipalities in the event any one or more of such incorporated municipalities should fail to cast a majority vote in favor of the district and the tax.*

This finding shall be made as to each particular city, town, or village whose territory is proposed to be included within the area of the proposed district.¹¹ [Emphasis added.]

This portion of section 8A treats the combined area within a city's boundaries and its ETJ as a unit for purposes of inclusion in or exclusion from a district.

The third and fourth paragraphs of section 8A read as follows:

⁹Act of May 18, 1989, 71st Leg., R.S., ch. 678, § 1, 1989 Tex. Gen. Laws 2230, 3122.

¹⁰See Health & Safety Code § 794.017(a).

¹¹Paragraphs 1 and 2 of former section 8A, article 2351a-6, are now codified as section 794.017(b) of the Health and Safety Code.

No district hereafter created shall include *the area within the corporate or extraterritorial jurisdiction of any incorporated city, town, or village*, unless the majority of the electors residing in that area and participating in the election called by the Commissioners Court to confirm the district and levy the tax voted in favor of both the creation of the district and the levy of the tax.

Should a majority of the voters residing *in the corporate or extraterritorial jurisdiction of a municipality* and participating in the election vote against creation of the district or levy of the tax, the area shall not be included within the district, but its exclusion shall not affect the creation of the district embracing the remainder of the proposed territory if the findings of the Commissioners Courts made as required in Section 6 and in this section of this Act are favorable to the creation of the district, as thus restricted.¹²

These two paragraphs, like the first two, consider the “corporate” and the “extraterritorial” jurisdiction of a city to be part of the same municipal unit. The “area” at issue in the last two paragraphs is the combined area within both the boundaries and the ETJ of the municipality. The “remainder” of the territory proposed for the district is the territory left after the municipality and its ETJ are excluded. The quoted provision shows that the area in a municipality and its ETJ is treated as a unit for purposes of inclusion in a district, and that a majority of the voters residing within that unit of territory must vote in favor of creating the district for it to be included in the district.

The present language of section 794.019(b) resulted from a nonsubstantive revision of section 8A, article 2351a-6, V.T.C.S., and its meaning should not change from the meaning of its predecessor.¹³ Section 794.019(b) of the Health and Safety Code requires a majority vote of the voters residing in the combined territory of a city and its ETJ for the territory within the city and its ETJ to be included in a rural fire prevention district. The majority vote and inclusion in the district is also necessary for persons residing in that area to be subject to taxation by the district.

However, we cannot determine in answer to your inquiry whether the Henderson County Rural Fire Prevention District No. 2 has authority to tax persons residing in the ETJ of Payne Springs. The answer to your question depends on the result of the November 1997 election, that is, whether or not a majority of voters in the territory consisting of Payne Springs and its ETJ were in

¹²Act of May 19, 1987, 70th Leg., R.S., ch. 730, § 1, 1987 Tex. Gen. Laws 2623, 2624 (emphasis added). Paragraphs 3 and 4 of former section 8A, article 2351a-6, are now codified as section 794.019(b) of the Health and Safety Code.

¹³If a conflict exists between a former statute and a nonsubstantive revision of the statutory law, the former statute will control. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654-55 (Tex. 1989); see *City of LaPorte v. Barfield*, 898 S.W.2d 288, 294 (Tex. 1995) (where statute was recodified without substantive change, court rejects construction that would be “not only a substantive but a very significant change”).

favor of creating the Henderson County Rural Fire District #2. An attorney general opinion cannot investigate and resolve the fact questions necessary to make this determination.

S U M M A R Y

A rural fire prevention district created pursuant to article III, section 48-d of the Texas Constitution, may not include territory in a municipality's limits or extraterritorial jurisdiction unless a majority of the voters residing in the combined territory consisting of the municipality and its ETJ who vote at the election vote in favor of creating the district and levying a tax.

Yours very truly,

A handwritten signature in cursive script that reads "Susan Garrison".

Susan Garrison
Assistant Attorney General
Opinion Committee