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Opinion Committee

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Attention: Opinion Committee

Ladies and Gentlemen:

We request advice regarding the following questions:

1. Is a county authorized to amend a tax abatement agreement to delete land from an existing reinvestment zone? If a county can change the boundaries of a reinvestment zone, how does TEX. TAX. CODE ANN. §312.401 providing for the designation of a reinvestment zone for five year periods affect a county's authority to amend the boundaries of a reinvestment zone?
2. If a tax abatement agreement may be amended to delete land from a county reinvestment zone, does the amendment require a public hearing?
3. Must all property within a county reinvestment zone be contiguous? Can a portion of a building, such as a floor, be designated a county reinvestment zone or must the entire building be included within the reinvestment zone?

Please supply us with your opinion on the questions presented. A memorandum brief is enclosed.

Sincerely,

MIKE DRISCOLL
County Attorney

By MERCEDES LEAL
Senior Assistant County Attorney

Encl.

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MEMORANDUM BRIEF

I. Questions Presented

1. Is a county authorized to amend a tax abatement agreement to delete land from an existing reinvestment zone? If a county can change the boundaries of a reinvestment zone, how does TEX. TAX. CODE ANN. §312.401 providing for the designation of a reinvestment zone for five year periods affect a county's authority to amend the boundaries of a reinvestment zone?
2. If a tax abatement agreement may be amended to delete land from a county reinvestment zone, does the amendment require a public hearing?
3. Must all property in a county reinvestment zone be contiguous? Can a portion of a building, such as a floor, be designated a county reinvestment zone or must the entire building be included within the reinvestment zone?

II. Discussion

Certain companies have requested amendments to their tax abatement agreements with Harris County for the purpose of deleting real property currently located in their respective reinvestment zones. These companies are not requesting corrections due to clerical errors in the property descriptions set forth in their abatement agreements with Harris County. Instead, these companies are seeking to renegotiate the boundaries of their reinvestment zones in order to exclude real property currently located in the reinvestment zone. The reasons for their requests are not clear. In some cases, however, it appears that companies may be seeking to remove real property in order to seek another tax abatement on future improvements on that same property.

For purposes of this discussion, these companies are presumed to be in compliance with the terms of their tax abatement agreement (i.e., the facility and improvements were constructed as set forth in their tax abatement and the requisite numbers of jobs were created). We agree that if a company were seeking to delete real property from a reinvestment zone because improvements were not constructed on the property as set forth in its tax abatement agreement with the County, the County should instead take action to enforce the terms of the agreement rather than amend the existing agreement.

The County's authority to grant tax abatements is set forth in the Property Redevelopment and Tax Abatement Act, TEX. TAX CODE ANN. §§312.001 - 312.402 (Vernon 1992 & Vernon Supp. 1996). This Act authorizes the governing body of a municipality or county to designate an area as a reinvestment zone and to establish guidelines and criteria governing tax abatement agreements by the taxing unit. TEX. TAX CODE ANN. §312.002(a) - (d) (Vernon 1992 & Vernon Supp. 1996) provides:

(a) A taxing unit may not enter into a tax abatement agreement under this chapter and the governing body of a municipality or county may not designate an area as a reinvestment zone unless the governing body has established guidelines and criteria governing tax abatement agreements by the taxing unit and a resolution stating that the taxing unit elects to become eligible to participate in tax abatement. The guidelines must provide for the availability of tax abatement for both new facilities and structures and for the expansion or modernization of existing facilities and structures.

(b) The governing body of a taxing unit may not enter into a tax abatement agreement under this chapter unless it finds that the terms of the agreement and the property subject to the agreement meet the applicable guidelines and criteria adopted by the governing body under this section.

(c) The guidelines and criteria adopted under this section are effective for two years from the date adopted. During that period, the guidelines and criteria may be amended or repealed only by a vote of three-fourths of the members of the governing body.

(d) The adoption of the guidelines and criteria by the governing body of a taxing unit does not:

(1) limit the discretion of the governing body to decide whether to enter into a specific tax abatement agreement;

(2) limit the discretion of the governing body to delegate to its employees the authority to determine whether or not the governing body should consider a particular application or request for tax abatement; or

(3) create any property, contract, or other legal right in any person to have the governing body consider or grant a specific application or request for tax abatement.

TEX. TAX CODE ANN. §312.401 (Vernon 1992) further provides:

(a) The commissioners court of a county eligible to do so under Section 312.002 by order may designate as a reinvestment zone an area of the county that does not include area in the taxing jurisdiction of a municipality.

(b) The commissioners court may not designate an area as a reinvestment zone until it holds a public hearing on the designation and finds that the designation would contribute to the retention or expansion of primary

employment or would attract major investment in the zone that would be a benefit to the property to be included in the zone and would contribute to the economic development of the county. At the hearing, interested persons are entitled to speak and present evidence for or against the designation. Notice of the hearing must be given in the same manner as provided for notice of a hearing to be held by a municipality under Section 312.201.

(c) The designation of a reinvestment zone under this section expires five years after the date of the designation and may be renewed for periods not to exceed five years. The expiration of the designation does not affect existing agreements made under this section.

(d) Property may be located both in a reinvestment zone designated by a county under this subsection and in a reinvestment zone designated by a municipality under Subchapter B. (Emphasis added).

The County's authority to enter into tax abatement agreements is set forth in TEX. TAX CODE ANN. §312.402 (Vernon 1992). Section 312.402 provides:

(a) The commissioners court may execute a tax abatement agreement with the owner of taxable real property located in a reinvestment zone designated under this subchapter. **The execution, duration, and other terms of an agreement made under this section are governed by the provisions of Sections 312.204 and 312.205 applicable to a municipality. Section 312.2041 applies to an agreement made by a county under this section in the same manner as it applies to an agreement made by a municipality under section 312.204.**

(b) A tax abatement agreement made by a county has the same effect on the school districts and other taxing units in which the property subject to the agreement is located as is provided by Sections 312.206(a) and (b) for an agreement made by a municipality to abate taxes on property located in the taxing jurisdiction of the municipality.

(c) If on or after September 1, 1989, property subject to an agreement with a county under this section is annexed by a municipality during the existence of the agreement, the terms of the county agreement regarding the share of the property to be exempt in each year of the agreement apply to the taxation of the property by the municipality if before the annexation the governing body of the municipality by official action expresses an intent to enter into an agreement with owner of the property to abate taxes on the property if it is annexed or to be bound by the terms of the county agreement after annexation, even if that official action of the governing

body of the municipality expressing that intent occurs before September 1, 1989.

(d) 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.

(e) An agreement made under this section by a county or other taxing unit may be modified or terminated in the same manner and subject to the same limitations as provided by Section 312.208 for an agreement made under Subchapter B. [Section 312.201 et seq.] (Emphasis added).

As noted in Section 312.402 many of the provisions dealing with a municipality's authority to execute tax abatement agreements are also applicable to a county. *See e.g.*, TEX. TAX. CODE ANN. §§312.204, 312.205, 312.2041, 312.206, & 312.208 (Vernon 1992 & Vernon Supp. 1996).

With respect to question 1, Chapter 312 of the Tax Code does not address whether a reinvestment zone designated by the governing body of a county may later be modified or amended to delete or add real property in the reinvestment zone. However, as indicated in Section 312.402(e), a tax abatement agreement may be modified in accordance with TEX. TAX CODE ANN. §312.208 (Vernon 1992) which states:

(a) At any time before the expiration of an agreement made under this subchapter, the agreement may be modified by the parties to the agreement to include other provisions that could have been included in the original agreement or to delete provisions that were not necessary to the original agreement. The modification must be made by the same procedure by which the original agreement was approved and executed. The original agreement may not be modified to extend beyond 10 years from the date of the original agreement. (Emphasis added).

Harris County has promulgated Guidelines and Criteria for Granting Tax Abatement in a Reinvestment Zone Created in Harris County (the "Guidelines") in order to participate in the granting of tax abatements. The current guidelines are attached as exhibit A and Attachment B are the previous guidelines which were adopted by Harris County on November 16, 1993. These Guidelines govern the designation of reinvestment zones and the granting of tax abatements in Harris County. The Guidelines do not address the amendment or modification of a tax abatement agreement. It is important to note, however, that the Guidelines authorize an abatement for a maximum of ten years. Therefore, the tax abatement agreements in question all provide for a term of ten years.

Unlike TEX. TAX CODE ANN. §311.007 (Vernon 1992) (authorizing a municipality to change the boundaries of an existing reinvestment zone under the Tax Increment Financing Act),

Chapter 312 of the Tax Code does not expressly authorize a county to change the boundaries of a reinvestment zone. It is a rule of statutory construction that tax exemptions are to be strictly construed. *See* 69 TEX. JUR. 3d *Taxation* §196 (1989). Any doubt or ambiguity regarding application of a tax exemption should further be resolved in favor of the taxing power and against the exemption. *See id.* at 196. The fact that statutory exemptions are to be strictly construed against the exemption leads us to conclude that a county has no authority to change the boundaries of a reinvestment zone. Moreover, the governing body of a county should not assume that it has an implied power to change the boundaries of a reinvestment zone under Chapter 312 of the Tax Code, when express authority is given to a municipality to change the boundaries of reinvestment zones created under Chapter 311 of the Tax Increment Financing Act. Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1948) (a commissioners court can exercise only such powers as the Constitution itself or the statutes have specifically, or by necessary implication, conferred upon them).

In addition, if a company desires to delete real property from an existing reinvestment zone for the express purpose of incorporating that property into a new reinvestment zone, it appears that the prohibition set forth in Section 312.208(a) (i.e., an agreement may not be extended beyond ten years from the date of the original agreement) would be violated. In this case, a company contemplating an expansion, modernization, or new facility on real property in an existing reinvestment zone and subject to an existing tax abatement agreement would, instead, need to seek an amendment of its original agreement to include the new improvements in an abatement.

It can also be argued that a county's authority to amend a reinvestment zone is implicit since Section 312.208 permits the modification of a tax abatement agreement to include other provisions that could have been included in the original agreement or to delete provisions that were not necessary to the original agreement. This interpretation appears less plausible, however, given that Section 312.208 does not specifically address the modification of a reinvestment zone's boundaries. Section 312.401(c) which generally provides that the designation of a reinvestment zone expires five years after the date of the designation also does not authorize the amendment of a reinvestment zone.

Assuming that a county is authorized to amend a tax abatement agreement for the purpose of deleting or adding real property in a reinvestment zone, a county's authority to amend a tax abatement agreement must still conform with general contract principles (i.e., new consideration is required to amend an existing tax abatement agreement for the purpose of abating additional improvements). *See* 14 TEX. JUR. 3d *Contracts* §245 (1981). We note that the Guidelines provide that the terms of an abatement include the following: (1) the boundaries of the proposed reinvestment zone and legal description of the real property to be located in the zone; (2) the value of land and existing improvements on the real property located in the reinvestment zone; (3) the improvements to be made on the property within the reinvestment zone; and (4) the number of jobs to be created or retained as a result of construction, modernization or expansion of improvements. Thus, in consideration for the County's approval of a tax abatement agreement, the property owner is required to make certain representations and assertions of fact. Once these representations are made and the terms are accepted by the Commissioners Court as evidenced by a tax abatement agreement, these terms cannot be renegotiated or modified without new and sufficient consideration to support the modification. Otherwise, the modification has no legal effect. See Bates Grain Co. v. Cassidy, 225 S.W.2d 1018 (Tex. Civ. App. -Dallas 1949, writ ref'd n.r.e.) (if there were a prior concluded contract

entered into by the parties, a subsequent contract on the same subject matter at variance with or contradictory to a prior subsisting contract, without new consideration, is of no legal effect.). The Commissioners Court, of course, is not prohibited from correcting a clerical error in the legal description of the real property in the reinvestment zone.

If a county has the authority to amend or modify the boundaries of a reinvestment zone that is the subject of a tax abatement agreement, the expiration of the five-year period for the reinvestment zone raises another problematic issue. As noted earlier, Harris County's tax abatement agreements incorporate a company's representation regarding the real property to be included in the reinvestment zone. Reinvestment zones designated by the Harris County Commissioners Court are, pursuant to Section 312.401(c), effective for five years. We note that in one case a company has requested that real property be deleted from a reinvestment zone which has expired pursuant to Section 312.401(c). We are not aware of any cases where the County has renewed a reinvestment zone for another period of five years. In any event, as noted in Section 312.401(c), the expiration of a reinvestment zone does not affect existing tax abatement agreements (whose terms are for ten years in Harris County). Given that Section 312.401(c) is silent regarding this issue, other questions are raised regarding the interplay of Section 312.401(c) with the ability of a county to change a reinvestment zone's boundaries. For example, is a county authorized to amend a tax abatement agreement to delete real property from a reinvestment zone when the reinvestment zone has expired pursuant to Section 312.401(c)? In addition, if the reinvestment zone has expired, may a county then incorporate real property from that old reinvestment zone into a new reinvestment zone, although that property is still subject to an existing tax abatement agreement?

With respect to question 2, TEX. TAX CODE ANN. §312.402(e) (Vernon 1992) clearly requires that modification or amendment of a tax abatement agreement (i.e., adding a new product installation within the reinvestment zone), must be done in the same manner and follow the same procedure as originally followed by the Commissioners Court in its approval of the initial tax abatement agreement. If designation of a reinvestment zone was approved by the Commissioners Court at a public hearing after first providing the public with thirty (30) days notice, then consideration of an amendment to the original tax abatement agreement to change the legal description of the reinvestment zone by removing real property from the zone would arguably also need to conform with the same thirty-day notice and hearing provision. The Commissioners Court may, however, approve an amendment to a tax abatement agreement which does not involve changes to the boundaries of the reinvestment zone at a regular meeting of the Commissioners Court in conformity with the Open Meetings Act, TEX. GOV'T CODE ANN. §§551.001 - 551.146 (Vernon 1994 & Vernon Supp. 1996).

The answer to whether a reinvestment zone must only include tracts of real property which are contiguous is unclear. Chapter 312 of the Tax Code does not restrict a county from designating a reinvestment zone which includes noncontiguous tracts of real property nor does this section restrict a county from designating only certain floors of a building as a reinvestment zone. We note that this is not the case under the provisions of the Tax Increment Financing Act, TEX. TAX. CODE ANN. §§311.001 - 311.017 (Vernon 1992 & Vernon Supp. 1996), which authorizes the governing body of a municipality to designate a "contiguous geographic area" in the jurisdiction of the municipality as a reinvestment zone to promote development.

Since Chapter 312 of the Tax Code fails to specify that the area to be designated a reinvestment zone must be "contiguous," a county may exercise its discretion and opt to include noncontiguous tracts of real property in a reinvestment zone. Alternatively, given the statutory rule of construction that tax exemption statutes are to be strictly construed in favor of the taxing power and against the exemption, it could be argued that a county cannot designate a reinvestment zone involving noncontiguous tracts of real property.

In regard to whether a floor within a building may be designated a reinvestment zone, we note that the Cities of Houston and Pasadena have previously designated building floors as reinvestment zones. The Harris County Commissioners Court has approved these two tax abatement agreements involving such zones, consistent with the terms approved by these two municipalities pursuant to TEX. TAX CODE ANN. §312.206 (Vernon 1992 & Vernon Supp. 1996). While these municipalities have approved the designation of building floors as reinvestment zones, Harris County has not yet chosen to incorporate such a policy in its Guidelines. In order to properly advise Harris County regarding implementation of such a policy, we seek your opinion regarding whether a county is authorized to designate a building floor as a reinvestment zone. We do not address a municipality's authority to designate such reinvestment zones under TEX. TAX CODE ANN. §312.201 (Vernon 1992).