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ATTORNEY GENERAL OF TEXAS

September 26, 2018

The Honorable Lyle Larson
Chair, Committee on Natural Resources
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0219

Re: The authority of Texas counties to
pursue housing programs in specific
circumstances (RQ-0220-KP)

Dear Representative Larson:

You ask about the authority of Texas counties to pursue housing programs in specific circumstances.¹ Without reference to a particular housing program, you ask preliminarily whether Texas law prohibits a county “from using property taxes to directly assist a homeowner in the rehabilitation of his/her home,” or “to directly subsidize the construction of single-family or multi-family housing.” Request Letter at 1.

A county may levy ad valorem property taxes only for public purposes. *See* TEX. CONST. art. VIII, § 3 (“Taxes shall be levied and collected . . . for public purposes only.”). Moreover, a county must use revenue from ad valorem taxes for public purposes, not solely to benefit private interests. *Id.* art. III, §§ 51, 52(a); *see Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). A county may pay public funds to an individual only when it “(1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return.” *See Tex. Mun. League Intergov’tl Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002).² Thus, while a county may not gratuitously use public funds to directly benefit a homeowner or subsidize a private construction project, a county may expend public funds to accomplish a predominately public purpose of the county even though the expenditure may incidentally benefit those same private interests. For example, several decades ago, the Texas Supreme Court determined that expending public funds on housing programs to eliminate slum conditions and to provide safe and sanitary dwelling accommodations for persons of low income serves a constitutional public purpose. *Hous. Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79, 83–85 (Tex. 1940).

¹*See* Letter from Honorable Lyle Larson, Chair, House Comm. on Nat. Res., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Apr. 5, 2018), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> (“Request Letter”).

²A three-part test from *Municipal League* determines whether a governmental entity’s payment of public funds serves a constitutional public purpose, requiring the entity to (1) ensure that the payment is to “accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Mun. League*, 74 S.W.3d at 384.

While the constitutional public-purpose doctrine sets the parameters for expending public funds, counties nonetheless possess only those powers expressly conferred by or necessarily implied from the constitution and statutes. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Numerous state statutes authorize counties to participate in various community projects to provide for or improve housing. Chapter 392 of the Local Government Code authorizes a county to establish a county housing authority upon a finding of unsanitary or unsafe inhabited housing in the county or insufficient safe or sanitary housing available to persons of low income. TEX. LOC. GOV'T CODE § 392.012(a), (c), (f)(1)–(2). A county housing authority is a unit of government and a “public body corporate and politic,” separate from the county. *Id.* § 392.012(b); *see also id.* § 392.006 (stating that a housing authority is a unit of government that performs essential government functions). A county housing authority may engage in housing projects to eradicate slum conditions and provide decent, safe, and sanitary housing for low income individuals. *See generally id.* §§ 392.002(6) (defining “housing project” as including work to clear slum areas and to “provide decent, safe, and sanitary urban or rural housing for persons of low income”), 392.004 (requiring a housing authority to “set rentals at the lowest possible rates consistent with providing decent, safe, and sanitary housing”), 392.052 (authorizing a housing authority to engage in housing projects). While a county may participate in a county housing authority project, the county housing authority remains primarily responsible for financing and operating its housing projects. *See id.* §§ 392.081 (stating county housing authority bond authority), 392.051–.067 (stating county housing authority powers), 393.004 (authorizing a county to exercise its powers “[t]o aid and cooperate in the planning, undertaking, construction, or operation of a housing project”).

A county may also approve the creation of a nonprofit housing finance corporation “to provide a means to finance the cost of residential ownership and development that will provide decent, safe, and sanitary housing at affordable prices for residents of local governments.” *Id.* §§ 394.002(a), .011 (requiring a local governing body to consider for approval of applications to incorporate a housing finance corporation). A board of directors governs a housing finance corporation as a public instrumentality separate from the county, although the corporation carries out its public purposes on behalf of the general public, the county, and the State. *Id.* §§ 394.015(d), .021(a). The corporation may seek financial assistance on its own behalf or on behalf of another person from the federal government, the State, a county, or any other private or public source, and may issue bonds to defray “costs associated with the provision of decent, safe, and sanitary housing and nonhousing facilities that are an integral part of or are functionally related to an affordable housing project.” *Id.* § 394.037(a)(3). The bonds are the obligation of the corporation, not the county, although a county may purchase housing finance corporation bonds as an investment. *Id.* §§ 394.055, .057(a).

Similarly, chapter 2304 of the Government Code provides for a state fund to provide financial assistance for the repair and rehabilitation of deteriorating housing, administered by the Texas Department of Housing and Community Affairs. TEX. GOV'T CODE §§ 2304.003(2), .041, .021. The county commissioners court designates areas of the county that may qualify and approves or disapproves of loan applications by local households according to state standards. *Id.* §§ 2304.041, .064(a), .102(a).

Thus, while numerous statutes authorize a county to participate and provide an assisting role in statutory housing programs, the statutes do not expressly address whether a county may use county funds to directly assist a homeowner to make repairs, or directly subsidize single- or multi-family housing. Whether a particular expenditure serves a predominately public purpose of the county is for the commissioners court to make in the first instance, subject to judicial review. *See* Tex. Att’y Gen. Op. No. KP-0007 (2015) at 2–3 (determining that the commissioners court must determine whether a particular county expenditure would be gratuitous or would serve a predominately public purpose).

You also ask us to advise you about the “types of housing programs” that section 381.003 of the Local Government Code authorizes. Request Letter at 1. Section 381.003(a) authorizes a county commissioners court to “administer or otherwise engage in community and economic development projects authorized under Title I of the Housing and Community Development Act of 1974 [the 1974 Act] or under *any other federal law* creating community and economic development programs.” TEX. LOC. GOV’T CODE § 381.003(a) (emphasis added and footnote omitted). Section 381.003(b) provides further:

The commissioners court of a county may administer, engage in, and otherwise exercise all powers necessary for the county to fully participate in housing and community development programs authorized under the Cranston-Gonzalez National Affordable Housing Act.

Id. § 381.003(b). Thus, section 381.003 grants broad authority for counties to pursue federally-funded housing, community, and economic development programs. *Id.* § 381.003(a)–(b). A county may consult with the State Department of Housing and Community Affairs (the “Department”) to determine the federal programs appropriate to the county’s particular circumstances. TEX. GOV’T CODE § 2306.001(1)(A), (7) (requiring the Department to assist local government to provide essential public services and “to serve as a source of information to the public regarding all affordable housing resources and community support services in the state”). The Department submitted a brief to our office identifying several federally funded programs that meet the requirements of section 381.003 of the Government Code.³ For example, the 1974 Act provides federal funding for community development block grants, which may include housing projects for persons of low and moderate income in urban and rural settings. *See* Department Brief at 2; 42 U.S.C. § 5306; 24 C.F.R. pt. 570; *see also* TEX. GOV’T CODE § 401.105 (authorizing the Governor to designate one or more state agencies to administer the State’s allocation of federal funds under certain community development block grant programs under Title I of the 1974 Act). The Texas Neighborhood Stabilization Program is a federally-funded program to acquire and redevelop foreclosed, vacant, or abandoned homes. *See* Department Brief at 2 (citing to Division B, Title II of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, and section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1497). Another federal block grant program is the HOME Investment Partnerships Program for procuring affordable housing for rent or homeownership or providing direct rental assistance to

³*See* Brief from Jeffrey T. Pender, Deputy Gen. Counsel, Tex. Dep’t of Hous. & Cmty. Affairs, to Virginia K. Hoelscher, Chair, Op. Comm. (May 23, 2018) (on file with the Op. Comm.) (hereinafter “Department Brief”).

low-income individuals as authorized by the Cranston-Gonzalez National Affordable Housing Act. *See* Department Brief at 2; 42 U.S.C. § 12701–12859; *see also* TEX. GOV'T CODE § 2306.111(a) (requiring the Department to “administer all federal housing funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act or any other affordable housing program”). Thus, section 381.003 of the Local Government Code authorizes counties to engage in housing programs that qualify under federal law as community and economic development programs or housing and community development programs, generally programs that address the housing needs of persons with low and moderate income.

S U M M A R Y

Although a county may not expend public funds to solely benefit a private interest, a county may make an expenditure to assist a homeowner to make repairs or subsidize the construction of single- or multi-family housing when the expenditure serves a predominantly public purpose of the county. Whether a particular expenditure serves a predominately public purpose of the county is for the commissioners court to make in the first instance, subject to judicial review.

Section 381.003 of the Local Government Code authorizes housing programs that qualify under federal law as community and economic development programs or housing and community development programs, which generally address the housing needs of persons with low and moderate income.

Very truly yours,



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