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OPINION COMM.



Susan D. Reed
Criminal District Attorney
Bexar County, Texas

March 30, 2000

FILE # ML-41346-00

I.D. # 41346

Honorable John Cornyn
Attorney General
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0212-JC

Re: Request for opinion on the interpretation of the Property Redevelopment and Tax Abatement Act (Tax Code Chapter 312) and the Defense Economic Readjustment Zone Act (Government Code Chapter 2310).

Dear Attorney General Cornyn:

The Commissioners Court of Bexar County, Texas ("County") entered into a Tax Phase-In Agreement ("Agreement") with Boeing Aerospace Operations, Inc. ("Boeing") dated December 7, 1999.¹ We are requesting an opinion on the interpretation of the Property Redevelopment and Tax Abatement Act (Tax Code Chapter 312) and the Defense Economic Readjustment Zone Act (Government Code Chapter 2310) as they relate to the Agreement.²

Background

The Agreement provides for a tax phase-in of ninety percent for a ten year term on the condition that Boeing make specific improvements to the property. The improvements consist of the investment by Boeing in tangible personal property to be located at its leased

¹The Agreement was executed subject to the receipt of an attorney general opinion concluding that Boeing is entitled to the tax abatement.

²Tax Code §312.206(a) provides that a taxing unit may enter into a written tax abatement agreement with the owner of property in a municipality not later than the 90th day after the date the municipal agreement is executed. Because the City of San Antonio and Boeing executed a written tax abatement agreement, the Bexar County Commissioners Court was required to enter into the Agreement with Boeing prior to the receipt of an attorney general opinion on the questions raised in this opinion request in order to comply with this 90 day requirement. See Attorney General Opinion No. DM-90 (February 7, 1992).

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facility at Kelly Air Force Base in San Antonio. Kelly Air Force Base is being realigned by the United States Department of Defense and will officially close on July 13, 2001. The City Council of the City of San Antonio adopted an Ordinance establishing the San Antonio Defense Economic Readjustment Zone, pursuant to Government Code Chapter 2310 (the "Zone"), and adopted an Ordinance nominating Boeing as a Defense Readjustment Project. Kelly Air Force Base is located in the Zone. Boeing leases its facility from the Greater Kelly Development Authority ("GKDA"), the administrative authority for the Zone. The property is owned by the United States Government, but has been conveyed to GKDA pursuant to an economic development conveyance agreement (the transfer of title is subject to the completion of environmental remediation). Government Code §2310.407 provides that the designation of an area as a readjustment zone is also designation of the area as a reinvestment zone for tax abatement under Tax Code Chapter 312.

Legal Issues

It is unclear whether the requirements of Tax Code §312.204(a), pertaining to municipal tax abatement agreements, apply to tax abatement agreements entered into by a *county* for property within the jurisdiction of a municipality. Such agreements are governed by Tax Code §312.206, which was amended to provide that, as of September 1, 1999, county tax abatement agreements may contain different terms than municipal tax abatement agreements. Tax Code §312.206(a) requires that the specific terms of such tax abatement agreements comply with Tax Code §312.205, but there is no requirement that they comply with the additional requirements of Tax Code §312.204. In contrast, Tax Code §312.402, pertaining to county tax abatement agreements covering taxable real property *outside* the jurisdiction of a municipality, requires that such agreements comply with the provisions of Tax Code §312.204 as well as §312.205.

If Tax Code §312.204 applies to tax abatement agreements entered into by a county for property within the jurisdiction of a municipality, then we are requesting an opinion on whether Boeing may be considered an "owner of taxable real property." The question is prompted by Tax Code §312.204(a), which provides as follows:

The governing body of a municipality eligible to enter into tax abatement agreements under Section 312.002 may agree in writing with the *owner of taxable real property* that is located in a reinvestment zone, that is not an improvement project financed by tax increment bonds, to exempt from taxation a portion of the value of the real property or of tangible personal property located on the real property, or both, for a period not to exceed 10 years, subject to the rights of holders of outstanding bonds of the municipality,

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on the condition that the owner of the property make specific improvements or repairs to the property. (Emphasis added).

As discussed above, Boeing owns a leasehold interest in the real property. Although Tax Code §312.204(a) authorizes the governing body of a taxing unit to exempt from taxation tangible personal property, it is unclear whether ownership of taxable real property is a prerequisite for eligibility for a tax abatement³. We believe that Attorney General Letter Opinion No. 98-001 (January 9, 1998) provides some guidance on the ownership issue. That letter opinion discussed whether Tax Code §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. On the issue of ownership, the author of that letter opinion wrote:

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.

Although the letter opinion addressed another section of the Property Redevelopment and Tax Abatement Act, it relies on the ordinary meaning of the term “ownership” and implies that it could mean some “level of control over property” other than legal title in fee simple.

This view is consistent with the definition of “real property” found elsewhere in the Tax

³In comparison, Tax Code §312.204(e), which authorizes a taxing unit to exempt from taxation tangible personal property owned by certificated air carriers, provides that the taxing unit may enter into the agreement with the owner *or lessee* of real property located in a reinvestment zone.

Code. Tax Code §1.04(2) defines “real property” as follows:

- (A) land;
- (B) an improvement;
- (C) a mine or quarry;
- (D) a mineral in place;
- (E) standing timber; or
- (F) an estate *or interest*, other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation, *in a property* enumerated in Paragraphs (A) through (E) of this subdivision. (Emphasis added.)

Accordingly, ownership of a leasehold interest in real property may constitute ownership of real property under the statute because it constitutes a level of control over the property. If this is the case, we believe Boeing may qualify as an owner of real property as contemplated by the statute even though it does not own a fee interest.⁴

In addition to the issue of real property ownership, Tax Code §312.204(a) appears to require that the property be *taxable* real property. But Government Code §2310.101(a)(4) requires that at least 50 percent of the area in a defense economic readjustment zone consist of an existing or former United States Defense Department facility.⁵ Kelly Air Force Base is presently owned by the United States Government, and therefore the real property at issue

⁴We are aware of case law which holds that, at common law, a leasehold estate is personal property. Robertson v. Scott, 172 S.W.2d 478 (Tex. 1943). However, the issue in Robertson involved the meaning of the term “real estate” in a statute that used that term without providing a definition. As discussed above, the Tax Code defines the term “real property” to include an interest in land, which could include a leasehold or possessory interest.

⁵Government Code §2310.101(a) provides:

To be designated as a readjustment zone an area must:

- (1) have a continuous boundary;
- (2) be at least one square mile but not larger than 20 square miles, excluding lakes, waterways, and transportation arteries, of the municipality, county, or combination of municipalities or counties nominating the area as a readjustment zone;
- (3) be located in an adversely affected defense-dependent community;
- (4) have at least 50 percent of its area located in an existing or former United States Department of Defense facility; and
- (5) be nominated as a readjustment zone by an ordinance or order adopted by the nominating body.

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is tax exempt. Indeed, the real property will continue to remain tax exempt under Local Government Code §378.011(a) even after the final conveyance of title to GKDA.⁶ However, the Texas Legislature clearly intended for property in a defense economic readjustment zone to be eligible for incentives such as tax abatement, as evidenced by the enactment of Government Code §2310.407.⁷ We are unable to reconcile Tax Code §312.204(a), which appears to require that a taxing unit enter into a tax abatement agreement with the owner of *taxable* real property, with Government Code §2310.101(a)(4), which requires that at least half of the property in a defense economic readjustment zone consist of property which is or could be *tax exempt*.

Moreover, leasehold interests are *taxable* under Tax Code §25.07(a), even if they involve possessory interests in otherwise exempt property.⁸ Boeing's leasehold interest is "grandfathered" and is not taxable under the Development Corporation Act of 1979 (Revised Civil Statutes Article 5190.6(k)).⁹ However, any future leasehold interest executed

⁶Government Code §378.011(a) provides:

An authority's property, income, and operations are exempt from taxes imposed by the state or a political subdivision of the state.

⁷Government Code §2310.407 provides:

Designation of an area as a readjustment zone is also designation of the area as a reinvestment zone for:

- (1) tax increment financing under Chapter 311, Tax Code; and
- (2) tax abatement under Chapter 312, Tax Code.

⁸Tax Code §25.07(a) provides:

Except as provided by Subsection (b) of this section, a leasehold or other possessory interest in real property that is exempt from taxation to the owner of the estate or interest encumbered by the possessory interest shall be listed in the name of the owner of the possessory interest if the duration of the interest may be at least one year.

⁹Texas Revised Civil Statutes Article 5190.6(k) provides:

The legislature finds for all constitutional and statutory purposes that projects of the types added to the definition of that term by Subsection (a) of this section are owned, used, and held for public purposes for and on behalf of the eligible city incorporating the corporation, and except as otherwise provided by this subsection, Section 23(b) of this Act and Section 25.07(a), Tax Code, are not applicable to leasehold or other possessory interests granted by the corporation during the period projects are owned by the corporation on behalf of the eligible city. Projects are exempt from taxation under Section 11.11, Tax Code, for that period. For a corporation governed by this section in which the voters of the eligible city that created the corporation have not authorized the levy of a sales and use tax for the

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with GKDA at Kelly Air Force Base will be taxable to the lessee under Local Government Code §378.011(b)¹⁰. Whether a taxable leasehold interest qualifies as taxable real property under Tax Code §312.204(a) is unknown.

Finally, Tax Code §312.206 provides that “if property taxes on property in the taxing jurisdiction of a municipality are abated under an agreement under Section 312.204 or 312.211,” a county may, within 90 days, enter into a tax phase-in agreement with the owner of the property. Accordingly, it could be argued that a county may rely solely on a city’s abatement agreement as authority to enter into its own agreement with the property owner, so long as the agreement complies with the other requirements of Tax Code §312.206.

Summary

We think the Texas Legislature clearly intended to encourage the economic development of defense economic readjustment zones, and, to that end, believe that the Property Redevelopment and Tax Abatement Act (Tax Code Chapter 312) should be construed consistent with that intent. Boeing has created in excess of 1,000 jobs since locating in the Zone, and is contributing to the economic development of the Zone and the enhancement of the tax base of the County. A determination that Boeing’s proposed investment in tangible personal property is not eligible for tax phase-in will have serious consequences to the economic development of the Zone and this community, not to mention the other communities in Texas facing realignment and closure of defense facilities. Accordingly, we respectfully request that you give careful consideration to the important issues raised herein.

⁹(...continued)

benefit of the corporation under Subsection (d) of this section, an ownership, leasehold, or other possessory interest of a person other than the corporation in real property constituting a project of the corporation described by this subsection is subject to ad valorem taxation under Section 25.07(a), Tax Code, except that an ownership, leasehold, or other possessory interest of a person other than the corporation in real property described by this subsection that is created under an agreement entered into by the corporation before September 1, 1999, is covered by the provisions of this subsection governing ad valorem taxation of the ownership, leasehold, or other possessory interest that were in effect on the date on which the agreement was executed.

¹⁰Government Code §378.011(b) provides:

Section 25.07(a), Tax Code, applies to a leasehold or other possessory interest in real property granted by an authority for a project designated under Section 378.009(a) in the same manner as it applies to a leasehold or other possessory interest in real property constituting a project described by Section 4B(k), Development Corporation Act of 1979 (Article 5190.6, Vernon’s Texas Civil Statutes).

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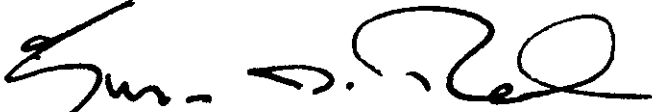
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Our specific legal questions are as follows:

1. Is a tax phase-in agreement entered into by a county under authority of Tax Code §312.206 required to comply with Tax Code §312.204 relating to municipalities?
2. If so, may Boeing be considered an "owner of taxable real property" under Tax Code §312.204(a) by virtue of it owning and controlling a leasehold interest in tax-exempt real property owned by the United States Government, and conveyed to the Greater Kelly Development Authority, located within the San Antonio Defense Economic Readjustment Zone that has been established at Kelly Air Force Base?
3. May a county, pursuant to Tax Code §312.206, rely on a city's agreement to abate taxes on property located in its jurisdiction as the county's sole authority to enter into an agreement with the same property owner?

Please feel free to contact to me if your office needs anything further on these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan D. Reed". The signature is fluid and cursive, with a large loop at the end.

SUSAN D. REED

cc: Paul Roberson, Greater Kelly Development Authority