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RECEIVED

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OPINION COMMITTEE

May 3, 2000

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78701-2548

RQ-0230-JC
FILE # ML-4444-00
I.D. # 41414

Re: Request for Attorney General Opinion

Dear General Cornyn:

This letter is a request for your opinion concerning the proper interpretation and application of the County Development District Act.

LEGISLATIVE HISTORY

The County Development District Act (the "Act") was created in 1995 by the Texas Legislature under the provisions of both the Texas Tax Code and the Texas Local Government Code. In 1997, the Texas Tax Code version of the Act was renumbered and placed into the Texas Local Government Code Chapter 383. In 1999, an amendment was proposed to the legislature to expand the terms under the Act. The proposed amendment included defining the term "visitor", allowing county development districts to impose an ad valorem tax, and broadening the Act's purpose to include the promotion of "public improvement". However, this amendment was not passed by the legislature. A copy of the proposed amendment is attached and marked Exhibit "A".

BACKGROUND

The Kaufman County Development District Number One (the "District") was created on July 23, 1996 under the Act pursuant to the Texas Tax Code Chapter 312, Subchapter D. A copy of the petition is attached and marked Exhibit "B". This District is just east of the city of Forney in Kaufman County. The District consists of 5,050 acres of land. The Kaufman County Commissioners approved the creation of the District to promote tourism and to attract visitors to this area of the County. A copy of the resolution is attached and marked Exhibit "C". This follows the purpose of the Act by allowing counties to establish county development districts to promote tourism and attract visitors. In November of 1997, Siepiela Interests, Inc. purchased property inside the District. Later, Siepiela created Lemman Developers, Ltd. to be the owner and developer of Windmill Farms. Windmill Farms is a residential subdivision that is located within the District. Windmill Farms Subdivision was approved by the Kaufman County Commissioners' Court in November of 1998. Lemman Developers' plan is to build their property in phases. The first phase consists of the Windmill Farms residential subdivision. The other phases include creating a golf course and building retail and business space. These remaining phases are to be finished within twenty years.

PRIOR AUTHORITY AND CASE LAW

There is no Texas case law or Texas Attorney General Opinions' that addresses directly either of these two issues.

QUESTIONS PRESENTED

1. May a county development district created under the County Development District Act be able to levy ad valorem taxes?
2. Does the construction of an infrastructure in a new residential subdivision fall within the stated legislative intent of the County Development District Act to attract visitors and promote tourism?

DISCUSSION

1. A county development district may not levy ad valorem taxes because that power is not provided for under the Act described in either the Texas Tax Code Chapter 312, Subchapter D or in the Texas Local Government Code Chapter 383. The powers of a county development district are provided for in the Texas Tax Code Section 312.628 and the Texas Local Government Code Section 383.061. A county development district “has the power to provide for general promotion and tourists advertising of the district and its vicinity and to conduct a marketing program to attract visitors, any of which may be conducted by the district pursuant to contracts for professional services with persons or organizations selected by the district.” Texas Local Government Code §383.061(c); Texas Tax Code §312.628(b). Also, a county development district “may acquire and dispose of projects and has all of the other powers, authority, rights and duties that will permit accomplishment of the purposes for which the district was created.” Texas Local Government Code §383.061(a); Texas Tax Code §312.628(a). The ability to levy ad valorem taxes fails to further the purpose for which the district was created. Neither of these powers give a county development district the ability to levy ad valorem taxes.

Also, the county development district has the same powers as a municipal management district under Chapter 375 of the Texas Local Government Code. *See* Texas Local Government Code §381.061(b); Texas Tax Code §312.628(c). A county development district has the same powers of a municipal management district provided it does not conflict with the Act itself. *See id.* The municipal management district powers are located in the Texas Local Government Code §§375.091, 375.092, 375.095, and 375.096. There are three municipal management district powers that are pertinent to a county development district. First, Section 375.092(a) of the Texas Local Government Code provides that “[a] district has the powers necessary or convenient to carry out and effect the purpose and provisions of this chapter, including the powers granted in this section.” Second, Section 375.092(o) of the Texas Local Government Code states that “[a] district may do anything necessary, convenient, or desirable to carry out the powers expressly granted or implied by this chapter.” Third, a municipal management district may levy ad valorem taxes to provide for mass transit systems. *See* Texas Local Government Code §375.091(c). This third power is not relevant to the present fact situation, because there is no issue involving mass transit systems. Again, the municipal management district’s powers do not expressly state the authority to levy ad valorem taxes. Even if the municipal management district’s powers gave that authority to levy ad valorem taxes, this power would conflict with the Act’s original purpose. A county development district does not have the authority to levy an ad valorem tax under the guise of the municipal management district.

Both the Texas Tax Code and the Texas Local Government Code provides for certain specific powers. The Act specifically gives county development districts the power to levy a sales and use tax. *See* Texas Local Government Code §383.101; Texas Tax Code §312.637. The revenues from the sales and use tax “may be used only for the purposes for which the district was created.” Texas Local Government Code §383.105; Texas Tax Code §312.637(g). An ad valorem tax is defined as a “[a] tax imposed on the value of property.” *Black’s Law Dictionary* 51 (6th ed. 1990). A sales and use tax is a “tax on the retail sale of specified property or services.” *Black’s Law Dictionary* 1339 (6th ed. 1990). A sales and use tax is not the same as an ad valorem tax. Therefore, a county development district has proper authority to levy a sales and use tax, but not to levy an ad valorem tax.

A county development district has the authority to levy another type of tax. Under the Texas Tax Code Section 352.107, a county development district may levy a hotel tax. The revenues from this hotel tax must be used for the promotion of tourism and to attract visitors. *See* Texas Tax Code §352.107. The hotel tax is not an ad valorem tax, but a tax imposed on hotels located within the county development district. The Texas Attorney General’s Office has addressed a similar issue before in regards to municipal hotel occupancy taxes. The Attorney General’s Office Opinions addressed whether or not the proposed use of the funds provided by the municipal hotel occupancy tax is within the purpose to attract visitors. *See* Op. Tex. Att’y Gen. JM-690 (1987); Tex. Att’y Gen. No. 92-051 (1992); Tex. Att’y Gen. No. 92-16 (1992). These Attorney General’s Opinions stated that the revenue provided by this tax must be within the purpose of the Chapter that allows for the

issuance of that tax. *See* Op. Tex. Att’y Gen. JM-690 (1987); Tex. Att’y Gen. No. 92-051 (1992); Tex. Att’y Gen. No. 92-16 (1992). The municipal hotel occupancy tax is similar to the hotel tax that may be levied by the county development district. Both taxes serve the same purpose which is to attract visitors and promote tourism.

A county development district does have the authority to issue bonds. The Act allows for a county development district to issue bonds. *See* Texas Local Government Code §383.081; Texas Tax Code §312.634. A copy of the notice and election to support lease purchase contracts is attached and marked as Exhibit “D”. The bonds may be paid with the revenues received from both the hotel tax and the sales and use tax. *See* Texas Local Government Code §383.082; Texas Tax Code §312.635. However, there is no mention of an ad valorem tax to repay bonds in either section under the Texas Tax Code or the Texas Local Government Code.

A county development district does not have the authority to levy an ad valorem tax on property in the district. The county development district has a broad range of powers, which do not address the authority to levy ad valorem taxes. However, the legislature has made it clear what types of taxes a county development district may levy. If the legislature had intended the county development district to levy ad valorem taxes, they would have specifically mentioned that type of tax in the Act. The Act states that a county development district may levy a hotel tax and a sales and use tax. The Act provides for the conditions in which these taxes may be levied as well as the ability to repay county development district bonds. The Act does not grant the county development district the authority to levy ad valorem taxes. The Act was created to promote tourism and attract visitors. If ad valorem

taxes were allowed to be levied, they would not promote tourism and attract visitors. Ad valorem taxes have no effect on tourism or visitors, but only on residents and property owners. Therefore, the county development district may not levy ad valorem taxes.

2. A residential subdivision does not fit into the legislative intent for creating the Act. The legislature specifically stated its purpose for creating the Act in the subsections of the statute. *See* Texas Local Government Code §383.002; Texas Tax Code §312.603. The legislative intent for the Act was to provide “incentives for the location and development of projects in certain counties to attract visitors and tourists.” *See id.* The legislature even went one step further and explained why it was necessary to create this Act. *See* Texas Local Government Code §383.003; Texas Tax Code §312.603. The purpose of the incentive was for small and medium counties to attract non-residents, i.e. visitors and tourists, to their counties.

Throughout the Act in both the Texas Tax Code and the Texas Local Government Code, the legislative intent is expressed in several of the subsections. For example, the county development district powers focus on promotion of tourism and attracting visitors. *See* Texas Local Government Code §383.061; Texas Tax Code §312.628. Another example where the legislative intent can be found is in the authority to levy a sales and use tax. *See* Texas Local Government Code §383.105; Texas Tax Code §312.637. The revenues from these taxes must be used to promote the purpose of the Act. *See id.* If the legislature believed that the promotion of

tourism and attracting visitors was not an issue, the legislative intent would not have been expressed many times throughout the Act.

The hotel tax that may be imposed by the county development districts enforces the legislative purpose in creating this Act. A county development district may impose a hotel tax. *See* Texas Tax Code §352.107. The hotel tax is directly related to attracting visitors and promoting tourism. Tourists and visitors rather than county residents stay in hotels. Therefore, the hotel tax is directly related to the promotion of tourism and attraction of visitors.

The issue of what the legislation intended when they enacted a statute has been considered by the courts as well as the Texas Attorney General's Office. The legislative intent must be kept in mind while reading the Act in its entirety. *See* Op. Tex. Att'y Gen. JM-690 (1987). In order to determine the context of a statute, the legislative intent must be considered. *See id.* In *ABC Interstate Theatres, Inc. v. Martin Theatres of Texas, Inc.*, 557 S.W.2d 337 (Tex. App.-Austin 1977, rehearing denied), the Court of Civil Appeals discussed what the legislature intended when they enacted the Texas Limited Sales, Excise and Use Tax. The court held that the legislative intent was expressed in the statute itself and there was no reason to look outside the statute. *See id.* at 340.

In *Lumbermen's Underwriters v. State Board of Insurance et. al.*, 502 S.W.2d 217 (Tex. App. -Austin 1973, rehearing denied), the court discussed the issue of legislative intent when enacting a statute. Again, the Court held that if the legislative intent is expressly stated in the statute, one may not look outside the statute nor interpret the law to determine the legislative intent. *See id.* at 219.

In addition, the Supreme Court of Texas has addressed the issue of legislative intent. The Court discussed how to determine legislative intent of a statute in *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997). The Court stated that the first step in interpreting a statute is to look at the legislative intent. *See id.* at 438. In addition, one must look at the actual language the legislature used in enacting the statute in question. *See id.*

According to the actual language of the Act, there is no question what the legislature intended when they enacted this statute. Since the legislative intent is expressly provided for in the Act, there is no reason to look to outside sources for the legislative intent. In following with the holdings of *ABC Interstate Theatres*, *Mitchell Energy Corp.*, and *Lumbermen's Underwriters*, the legislative intent is clearly expressed in the Act.

The legislative intent of the Act was to promote tourism and attract visitors. If the legislature had intended the Act to include residential subdivisions, it would have been stated in the Act. However, the Act does not state residential subdivisions, but visitors and tourism. A residential subdivision is not for visitors or tourists, but for people wanting to reside in that county permanently or for any lengthy amount of time. The legislature enacted the Act out of concern on how to draw people to these small and medium counties as visitors and tourists not residents. By broadening the Act to include residential subdivisions, the legislative intent of the Act is disregarded.

CONCLUSIONS

A county development district may not impose an ad valorem tax. The county development district is given several general powers to ensure the promotion of tourism and to attract visitors. An ad valorem tax does not promote this purpose. In addition, the Act specifically provides for a county development district to levy a sales and use tax and a hotel tax. If the legislature meant for the county development district to impose an ad valorem tax, they would have specifically given powers to levy this type of tax.

The purpose of the county development district is to promote tourism and attract visitors. A residential subdivision fails to encourage tourism and visitors. A residential subdivision merely encourages residents to move to the county rather than to visit. The Act is clear on what the legislature intended by enacting this statute by specifically stating their intentions. A residential subdivision does not fall under the purpose of the County Development District Act.

Please advise if additional information is required in rendering your opinion. If you have any questions or need additional information, please contact my office.

Respectfully submitted,



Louis W. Conradt, Jr.
Kaufman County Criminal District Attorney