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February 11, 2019

**RQ-0273-KP**

The Honorable Ken Paxton  
Attorney General of Texas  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

CMRRR  
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Re: Statutory Authority regarding the powers of a Texas Municipal Development District to govern its operations, application of specific definitions vs. general definitions and ambiguity as they relate to the City of Childress Charter vs. the Texas Statute on Nepotism.

Dear Attorney General Paxton:

As Mayor of the City of Childress Texas, I request an Attorney General's ruling as to the questions noted above. I present the facts which will need to be considered and will request your ruling as to how to proceed.

Municipal Development Districts:

In 2005, the Texas Legislature passed legislation enabling all cities to establish Municipal Development Districts, which are governed by Chapter 377 of the Local Government Code. Prior to 2005 only cities which were located in two neighboring counties could take advantage of Chapter 377. To create a district, a city must call an election authorizing the creation of the Municipal Development District, describing the boundaries of the district, and the imposition of a MDD sales and use tax at the rate of one-eighth, one-fourth, three-eighths, or one-half of one cent for the purpose of financing development projects beneficial to the district. Chapter 323 of the Tax Code generally governs the specifics of assessing and administering the tax.

The voters of Childress approved the creation of the Childress Municipal Development District with a sales and use tax rate of one-half of one cent pursuant to a ballot initiative in conjunction with the May 2018 Mayor and City Council election.

The MDD ballot initiative was timely certified with the Texas Comptroller's office and the Childress Municipal Development sales and use tax is currently being collected.

Rights and Powers of the District and the Board (A separate entity from the city that created it):

**Sec. 377.022. POLITICAL SUBDIVISION; OPEN MEETINGS.** (a) A district is a political subdivision of this state and of the municipality that created the district.

(b) A district is subject to Chapter 551, Government Code.

**Sec. 377.051. COMPOSITION AND APPOINTMENT OF BOARD.** (a) A district is governed by a board of at least four directors.

(b) The board is appointed by the governing body of the municipality that created the district.

(c) Directors serve staggered two-year terms. A director may be removed by the appointing municipality at any time without cause. Successor directors are appointed in the same manner as the original appointees.

(d) To qualify to serve as a director, a person must reside in the municipality that created the district or in that municipality's extraterritorial jurisdiction. An employee, officer, or member of the governing body of the municipality may serve as a director, but may not have a personal interest in a contract executed by the District other than as an employee, officer, or member of the governing body of the municipality.

**Sec. 377.052. COMPENSATION.** A board member is not entitled to compensation, but is entitled to reimbursement for actual necessary expenses.

**Sec. 377.053. MEETINGS.** The board shall conduct its meetings in the municipality that created the district.

**Sec. 377.054. OFFICERS.** The board shall designate from the members of the board a presiding officer, a secretary, and other officers the board considers necessary.

**Sec. 377.071. GENERAL POWERS OF DISTRICT.** (a) A district may:

(1) perform any act necessary to the full exercise of the district's powers;

(2) accept a grant or loan from a:

(A) department or agency of the United States;

(B) department, agency, or political subdivision of this state; or

(C) public or private person;

(3) acquire, sell, lease, convey, or otherwise dispose of property or an interest in property, including a development project, under terms and conditions determined by the district;

(4) employ necessary personnel; and

(5) adopt rules to govern the operation of the district and its employees and property.

(b) A district may contract with a public or private person to:

(1) plan, acquire, establish, develop, construct, or renovate a development project; or

(2) perform any other act the district is authorized to perform under this chapter.

(c) A district may not levy an ad valorem tax.

**Sec. 377.072. DEVELOPMENT PROJECT FUND.** (a) A district shall establish by resolution a fund known as the development project fund. The district may establish separate accounts within the fund.

(b) The district shall deposit into the development project fund:

(1) the proceeds from any sales and use tax imposed by the district;

(2) all revenue from the sale of bonds or other obligations by the district; and

(3) any other money required by law to be deposited in the fund.

(c) Except as provided by Subsections (d) and (e), the district may use money in the development project fund only to:

(1) pay the costs of planning, acquiring, establishing, developing, constructing, or renovating one or more development projects in the district;

(2) pay the principal of, interest on, and other costs relating to bonds or other obligations issued by the district or to refund bonds or other obligations; or

(3) pay the costs of operating or maintaining one or more development projects during the planning, acquisition, establishment, development, construction, or renovation or while bonds or other obligations for the planning, acquisition, establishment, development, construction, or renovation are outstanding.

**Sec. 377.073. BONDS AND OTHER OBLIGATIONS.** (a) A district may issue bonds, including revenue bonds and refunding bonds, or other obligations to pay the costs of a development project.

(b) The bonds or other obligations and the proceedings authorizing the bonds or other obligations shall be submitted to the attorney general for review and approval as required by Chapter 1202, Government Code.

(c) The bonds or other obligations must be payable from and secured by the revenues of the district.

(d) The bonds or other obligations may mature serially or otherwise not more than 30 years from their date of issuance.

(e) The bonds or other obligations are not a debt of and do not create a claim for payment against the revenue or property of the district other than a development project for which the bonds are issued.

**Sec. 377.074. PUBLIC PURPOSE OF PROJECT.** (a) The legislature finds for all constitutional and statutory purposes that a development project is owned, used, and held for public purposes by the district.

(b) Section 25.07 (a), Tax Code, does not apply to a leasehold or other possessory interest granted by the district while the district owns the development project.

(c) The development project is exempt from taxation under Section 11.11, Tax Code, while the district owns the project.

**Sec. 377.104. REPEAL OR RATE CHANGE.** (a) A district that has adopted a sales and use tax under this subchapter may by order and subject to Section 377.101(c), change the rate of the tax or repeal the tax if the change or repeal is approved by a majority of the registered voters of that district voting at an election called and held for that purpose.

**Sec. 377.107. COLLECTION OF TAX TO PAY BOND OR OTHER OBLIGATIONS.**

(a) If the district votes to repeal the sales and use tax under Section 377.104, and the district had issued bonds or incurred other obligations secured by the tax before the date of the election, the district shall continue to collect the tax until the bonds or other obligations are paid.

(b) The district shall immediately notify the comptroller when the bonds or other obligations have been paid.

(c) The repeal of the tax takes effect on the first day of the first calendar quarter occurring after the expiration of the first complete quarter occurring after the date on which the comptroller receives the notice under Subsection (b).

**From the above statutory language, it appears the creating city appoints the MDD Board of Directors but does not have the right to exercise any other control or influence over the MDD or its operations.**

Facts relative to the City of Childress and the Childress Municipal Development District:

Pursuant to May 2018 City of Childress election, Cary Preston was elected the new Mayor and John Preston was elected a new Alderman. The Childress City Council is comprised of five Aldermen in addition to a City Manager and a Mayor.

After being sworn in, the five Aldermen appointed five new Board members to the Childress Municipal Development District. Four members of the new MDD Board were selected from businessmen in Childress. In compliance with section 377.051(d) above the fifth MDD Board member was selected from the City Council. Each Alderman was asked if they would serve on the MDD board. Only John Preston agreed to be appointed to the MDD Board.

With the power granted by section 377.071(a)4, the MDD board decided to hire an Executive Director to perform the day to day operations of the Childress Municipal Development District. The board advertised the position in the local newspaper, The Red River Sun, posted the job description on the Texas Municipal League internet job board, advertised the position on the LinkedIn.com and Indeed.com job boards and with other economic development agencies. After reviewing resumes, the board decided on Dorrance K. Smith for the new Executive Director of the CMDD.

**Sec. 573.002. DEGREES OF RELATIONSHIP.** Except as provided by Section 573.043, this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.

**Sec. 573.041. PROHIBITION APPLICABLE TO PUBLIC OFFICIAL.** A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within a degree described by Section 573.002; or

(2) The public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

Mr. Smith is not related to anyone in Childress by consanguinity (blood). Mr. Smith's wife, Suzanne Preston Smith, is related to John and Cary Preston through a common great-grandparent that came to Childress in 1892. This relationship by affinity is a third degree which is outside the state nepotism rules of

section 573.002. Mr. Smith was hired as Executive Director by the CMDD board on July 20, 2018, as an "at will" employee of the CMDD with no benefits.

Effective January 1, 2019, Mr. Smith's employment by the CMDD was converted to that of an independent contractor functioning as the Executive Director of the CMDD.

Childress Texas is a home rule city. It has a City Charter written in November 1917 or 101 years ago with very few amendments, the last being in 1988 per the Texas Municipal League. The Childress City Charter provides a nepotism section, written in 1917 and never amended:

Section 29 Nepotism.

"No Person related within the 4<sup>th</sup> degree by Affinity or Consanguinity to the mayor or to either of the Alderman shall be appointed to any office, position, clerkship or service of the city."

In 1917 it was not anticipated that future legislatures would allow a city manager or other individuals to be the hiring authority or that a city could create commissions or boards or separate legal entities such as a Municipal Development District.

As regards to Nepotism - A contention has been made that the City Charter Section 29 Nepotism should be controlling as to CMDD Board Members (also ignoring the State exceptions for non paid Board positions), applying the 4<sup>th</sup> degree by affinity and consanguinity not only to all city employees and hiring managers but also those individuals hired to committees, boards and entities created by the City of Childress such as the Municipal Development District.

**Questions:**

Given the Statutory Authority regarding the powers of a Municipal Developmental District (a Political Subdivision of the State of Texas) to govern its own operations, do the federal and state statutes control the CMDD's operations, related hiring

authority decisions and Nepotism considerations or does the 1917 Childress City Charter Section 29 Nepotism govern the CMDD's operations, related to hiring authority decisions and Nepotism considerations?

Is the Childress City Charter Section 29 Nepotism language required to be specific to include boards, committees and entities created by the city **or** are boards, committees and entities created by the city and voted on by the citizens such as the CMDD, automatically included in the restrictive language unless specifically excluded?

The City of Childress 1917 City Charter is silent as to independent contractors. Depending on the answer to the questions above, is Mr. Smith's current status as an independent contractor functioning as Executive Director of the CMDD governed by the State Nepotism statutes or by the City of Childress 1917 City Charter Section 29?

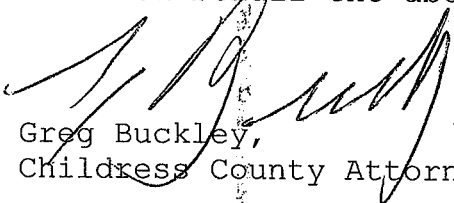
If you desire further information, please let me know and I will be happy to provide the same to you.

Very Truly Yours,



Cary Preston  
Mayor, City of Childress, Texas

Filed on behalf the above:



Greg Buckley,  
Childress County Attorney