



Office of the Attorney General  
State of Texas

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November 22, 1994

Dr. James Corbin  
Chair  
Texas Antiquities Committee  
P.O. Box 12276  
Austin, Texas 78711-2276

Letter Opinion No. 94-076

Re: Whether planned unit developments are "political subdivisions" for purposes of the Antiquities Code of Texas, Nat. Res. Code ch. 191, and related questions (ID# 25125)

Dear Dr. Corbin:

You ask about "political subdivisions" under the Antiquities Code of Texas, Nat. Res. Code ch. 191 (the "Antiquities Code"). Your specific questions are as follows:

1. Are Planned Unit Developments (PUDs), and Taxing Districts political subdivisions of the State of Texas?
2. If the answer to one is yes, then at what point does a PUD, or Taxing District become a political subdivision?
3. To what extent may the [Texas Antiquities] Committee statutorily subject PUD, Taxing District, and Municipal Utility District properties to its jurisdiction and what portion of their land and/or their development activities would fall under the jurisdiction of the Antiquities Code of Texas?

The Texas Antiquities Committee (the "committee") is established and governed by the Antiquities Code. The committee's powers and duties are set forth in sections 191.051 through 191.059. Section 191.053 authorizes the committee to contract with other state agencies or political subdivisions and with qualified private entities for the discovery and scientific investigation of sunken ships or wrecks in the sea and archeological deposits imbedded in the earth. Section 191.054 authorizes the committee to issue a permit to other state agencies or political subdivisions or to qualified private entities for the survey, discovery, excavation, demolition, or restoration of landmarks, or for the discovery of landmarks on public land if it is the opinion of the committee that the permit is in the best interest of the state. Operations under sections 191.053 and 191.054 must be carried out under the general supervision of the committee, in accordance with reasonable rules adopted by the committee, and in a manner that maximizes the recovery of historical information. *Id.* § 191.055.

Sections 191.091 through 191.098 govern state archeological landmarks. Section 191.092 describes the sites, objects, and buildings located on lands "belonging to the State

of Texas or to any county, city, or political subdivision of the state" that are eligible for designation as state archaeological landmarks by the committee. Landmarks under sections 191.091 and 191.092 are the sole property of the State of Texas and may not be removed or altered without a contract or permit from the committee. *Id.* § 191.093.

First, we consider whether "planned unit developments" are political subdivisions under chapter 191. Section 191.003 defines the term "political subdivision" for purposes of chapter 191 to mean

a local governmental entity created and operating under the laws of this state, *including* a city, county, school district, or special district created under Article III, Section 52(b)(1) or (2), or Article XVI, Section 59, of the Texas Constitution.<sup>1</sup> [Emphasis added, footnote added.]

*Id.* § 191.003(4). The term "including" is one of enlargement, not of limitation, and its use does not create a presumption that entities that are not set forth in the definition are excluded. *See* Gov't Code § 312.011(19). Thus, the meaning of the term "political subdivision" is not limited to those entities specifically enumerated. Under section 191.003(4), any local governmental entity created and operating under the laws of this state is a "political subdivision." Therefore, we consider whether "planned unit developments" are local governmental entities created and operating under the laws of this state.

Both the Tax Code and the Local Government Code use the term "planned unit development." We assume that you refer to "planned unit development districts" as that term is used in sections 42.046 and 42.047 of the Local Government Code.<sup>2</sup> These

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<sup>1</sup>Subsections (b)(1) and (b)(2) of section 52, article III of the Texas Constitution authorize the creation of special districts to improve rivers, creeks, and streams and to construct reservoirs and waterways for irrigation, drainage and navigation. Article XVI, section 59 authorizes the creation of conservation and reclamation districts.

<sup>2</sup>Section 25.09 of the Tax Code provides as follows:

(a) A separately owned apartment or unit in a condominium as defined in the Condominium Act shall be listed in the name of the owner of each particular apartment or unit. The value of each apartment or unit shall include the value of its fractional share in the common elements of the condominium.

(b) Property owned by a planned unit development association may be listed and taxes imposed proportionately against each member of the association [under certain circumstances.]

(c) If property is listed and taxes imposed proportionately as authorized by Subsection (b) of this section, the amount of tax to be imposed on the association's property shall be divided by the number of parcels of real property in the development. . . .

provisions permit the governing body of a municipality that has disannexed territory previously annexed for limited purposes to "designate an area within its extraterritorial jurisdiction as a planned unit development district by written agreement with the owner of the land." Local Gov't Code § 42.046(a). "An agreement governing the creation, development, and existence of a planned unit development . . . shall be between the governing body of the municipality and the owner of the land subject to the agreement." *Id.* § 42.046(b). The parties "*may agree*" to the following terms:

(1) to guarantee continuation of the extraterritorial status of the planned unit development district and its immunity from annexation by the municipality for a period not to exceed 15 years after the effective date of the agreement;

(2) to authorize certain land uses and development within the planned unit development;

(3) to authorize enforcement by the municipality of certain municipal land use and development regulations within the planned unit development district, in the same manner such regulations are enforced within the municipality's boundaries, as may be agreed by the landowner and the municipality;

(4) to vary any watershed protection regulations;

(5) to authorize or restrict the creation of political subdivisions within the planned unit development district; and

(6) *to such other terms and considerations the parties consider appropriate.*

*Id.* (emphasis added). The italicized language suggests that the parties have wide latitude to define the terms of the agreement. *See id.*

Under section 42.046, a "planned unit development district" is land which is subject to a written agreement between the landowner (or landowners) and the governing body of a municipality. While the creation of a planned unit development district may be authorized by section 42.046, the operation of a planned unit development district does not appear to be governed by state law. The written agreement between the governing

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(footnote continued)

(d) For purposes of this section, "planned unit development association" means an association that owns and maintains property in a real property development project for the benefit of its members, who are owners of individual parcels of real property in the development and are members of the association because of that ownership.

Clearly, the "planned unit development" described in this provision is merely an association of private property owners.

body of the municipality and the landowner governs the "creation, development, and existence" of a planned unit development district, but does not itself constitute "laws of this state" as that term is used in section 191.003(4) of the Natural Resources Code. Furthermore, a planned unit development district does not exercise any governmental authority by virtue of state law, such as the power to levy taxes or to regulate land use. Cf. Attorney General Opinion JM-137 (1984) ("political subdivision" contemplates geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit) (citing cases).

Because a planned unit development district does not exercise any governmental authority by virtue of state law, and its operations are not governed by state law, we conclude that a planned unit development district is not a "political subdivision" for purposes of the Antiquities Code.<sup>3</sup> We note, however, that under section 42.047 of the Local Government Code, the governing body of a municipality which refuses to designate a planned unit development district may be deemed to have consented to the incorporation of a proposed municipality. Should a planned unit development district become a municipality by operation of section 42.047 or any other applicable statute, it would be a "political subdivision" for purposes of the Antiquities Code as of the date of its incorporation.<sup>4</sup>

You also ask, "To what extent may the Committee statutorily subject PUD . . . and Municipal Utility District properties to its jurisdiction and what portion of their land and/or their development activities would fall under the jurisdiction of the Antiquities Code of Texas?" Because we conclude that planned unit development districts are not political subdivisions, we do not address them here.<sup>5</sup> We understand that you have two concerns with respect to municipal utility districts. First, you ask at what point in time a municipal utility district becomes a "political subdivision" under the Antiquities Code. Second, you ask which portion of the land of a municipal utility district is subject to the Antiquities Code as public land.

The Antiquities Code generally distinguishes between public land, *i.e.*, land belonging to a state agency or political subdivision as defined by the code, and private

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<sup>3</sup>Our conclusion is also supported by subsection (b)(5) of section 42.046 which states that the parties to the written agreement may agree "to authorize or restrict the creation of political subdivisions within the planned unit development district." This provision suggests that a planned unit development district itself is not a political subdivision.

<sup>4</sup>Next you ask whether, and at what point, "taxing districts" are political subdivisions under chapter 191. We have not been able to locate such entities in the state statutes, nor has your office responded to our requests for further clarification. Therefore, we are unable to address this question at this time.

<sup>5</sup>You also ask the same question about "taxing districts," a question which we do not reach. See *supra* note 4. We assume for purposes of this opinion that a municipal utility district is a political subdivision within the meaning of the Antiquities Code.

land. Most of the Antiquities Code's provisions apply only to public land. *See, e.g.*, Nat. Res. Code §§ 191.091 (treasure imbedded under the surface of land belonging to the State of Texas eligible for designation as state archeological landmarks), .092 (sites of archeological interest that are located on surface of any land belonging to the State of Texas or to any county, city, or political subdivision of the state eligible for designation as state archeological landmarks). Only a few provisions apply to private land. Unlike public land, private land may be designated as a state archeological landmark, and subject to the Antiquities Code's restrictions, only with the written consent of the landowner or landowners. *See* Nat. Res. Code §§ 191.094, .095.

We have been told that the committee would like to treat land which will belong to a municipal utility district after the municipal utility district is created as public land, on the theory that land destined to become public land is public land under the Antiquities Code. Although we can appreciate the committee's desire to treat as such land as public, we do not believe that the Antiquities Code permits this. There is currently no provision in the Antiquities Code for treating nonpublic land as public land, or for taking into account the fact that such land may become public land in the future. Thus, we conclude that land which will belong to a municipal utility district after the municipal utility district is created becomes subject to the Antiquities Code as public land only at the time the municipal utility district is created.

The creation of a municipal utility district is governed by subchapter B of chapter 54 of the Water Code. The creation of a municipal utility district begins with a petition by the landholders to the Texas Natural Resource Conservation Commission, but is not complete until a confirmation election has been held to determine whether the proposed district shall be established. *See* Water Code §§ 54.025 - .029. Section 54.029(b) provides that "[i]f a majority of the votes cast in the election favor the creation of the district, then the temporary board shall declare that the district is created and enter the result on its minutes." We believe that this is the point in time at which a municipal utility district is created, and that this is the point in time at which land belonging to the municipal utility district becomes subject to the Antiquities Code as public land.

Finally, you have also asked us to consider which land in a municipal utility district is subject to the Antiquities Code as public land. We understand that you are primarily concerned about land dedicated to streets and utility lines. For the reasons stated above, we conclude that the only public land in a municipal utility district is that land belonging to the district (or the state or some other political subdivision). Therefore, land dedicated to streets and utility lines is subject to the Antiquities Code as public land only if it belongs to the municipal utility district.

**S U M M A R Y**

A "planned unit development district," as that term is used in sections 42.046 and 42.047 of the Local Government Code, is not a "political subdivision" for purposes of the Antiquities Code, Nat. Res. Code ch. 191.

Land which will belong to a municipal utility district after the municipal utility district is created is not land belonging to a political subdivision for purposes of the Antiquities Code. A municipal utility district is created after a confirmation election has been held determining that the proposed district shall be established, *see* Water Code §§ 54.025 - .029, and becomes a political subdivision for purposes of the Antiquities Code at that point. Only the land in a municipal utility district that belongs to the municipal utility district (or the state or some other political subdivision) is subject to the Antiquities Code as public land.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee