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ATTORNEY GENERAL OF TEXAS

April 5, 2021

The Honorable Charles Perry
Chair, Committee on Water and Rural Affairs
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0365

Re: Ector County's compliance with chapter 387 of the Local Government Code, regarding creation of a county assistance district (RQ-0382-KP)

Dear Senator Perry:

You ask five questions about Ector County's compliance with chapter 387 of the Local Government Code in its creation of a county assistance district.¹

Background

County assistance districts are political subdivisions created to generate revenue for specified uses including economic development, law enforcement, road and highway projects, and other services that benefit the public health or welfare. *See* TEX. LOC. GOV'T CODE §§ 387.001–.013. A county assistance district may impose a sales and use tax and use the tax revenue for the general purposes specified by chapter 387. *See id.* § 387.007.

You tell us that in June of 2018 the Ector County Commissioners Court ("County") called for a November election to approve the creation of a county assistance district ("District"). *See* Request Letter at 1. You also tell us that chapter 387 required the County to include in the area of the proposed district all of the "unincorporated area of the County, which includes the area of extraterritorial jurisdiction ("ETJ") of the City, located in Ector County, an area in which the combined local sales tax would not exceed the maximum local sales tax rate at the time of the adoption of the [o]rder." *Id.* at 2. You state that the ballot's language described the territory of the District as "all portions of the territory situated in Ector County, Texas, *excluding all territory within the municipal limits of . . . Odessa and Goldsmith.*" *Id.* at 1. You assert that the County

¹*See* Letter from the Honorable Charles Perry, Chair, Senate Comm. on Water & Rural Affairs, to the Honorable Ken Paxton, Tex. Att'y Gen. at 1, 4–5 (Oct. 7, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0382KP.pdf> ("Request Letter").

did not notify the City of Odessa (“City” or “Odessa”) as required by chapter 387.² *See id.* at 2 (citing subsection 387.003(b-1) of the Local Government Code). You inform us the County claims it did not have to “because the District excluded the City from . . . the proposed district.” *Id.*

The City initiated annexation proceedings on August 18, 2018, after the County’s order calling for the November election concerning the District’s creation. *See id.* The City adopted its annexation ordinance on November 27, 2018, with the annexation to be effective on January 1, 2019. *See id.* Thus, you state that “[w]hile the annexation was moving forward, on November 6, 2018, the creation of the [District] was approved by voters.” *Id.*

Lastly, with respect to the actions of the Comptroller of Public Accounts (“Comptroller”), you tell us that the City submitted its annexation ordinance to the Comptroller on December 20, 2018, and the Comptroller postponed the collection of the tax in the annexed area until April 1, 2019. *Id.* You also tell us that the County submitted its November 7, 2018 canvass order regarding the District election to the Comptroller such that the proposed new tax would take effect on April 1, 2019. *See id.*

Your questions implicate the overlapping territory caused by the parallel moves of Odessa and the County described above. The District includes territory formerly located within Odessa’s ETJ. But Odessa annexed portions of this same territory on November 27, 2018, bringing that territory into the incorporated limits of Odessa (the “Overlapping Territory”). In the Overlapping Territory, the District imposes a 1.25 percent tax rate and Odessa imposes a 2 percent tax rate.³ Thus, the parallel moves resulted in a combined tax rate of 3.25 percent in the Overlapping Territory. *See* Comptroller Brief at 3. In administering the tax in this Overlapping Territory, the Comptroller states that it did each of the following: (i) identified it as a “combined area,” (ii) reduced the tax rate to the maximum allowed rate of 2 percent, and (iii) provided 1.25 percent to the District and the remainder to Odessa. *See id.* You characterize the Comptroller’s action as “an express administrative determination that the District boundaries and the authorizing election exceeded the County’s limited power to create the District.” Request Letter at 3. You ask about the legality of the various actions of the District, the City, and the Comptroller. *See id.* at 4–5.

Ector County’s Compliance with Chapter 387 of the Local Government Code

Your first two questions inquire whether the County complied with chapter 387 with respect to territory and notice. *See id.* at 4. Subsection 387.003(b) requires the commissioners court seeking to create a county assistance district to:

define the boundaries of the district to include any portion of the county in which the combined tax rate of all local sales and use taxes imposed, including the rate to be imposed by the district if approved

²You do not ask about the County’s compliance with subsection 387.003(b-1), which requires notice to the board of directors of a development corporation that has been created by the municipality, and we do not address it.

³*See* Memorandum from Glenn Hegar, Tex. Comptroller of Pub. Accts., to the Op. Comm. at 3 (Oct. 30, 2020) (hereinafter “Comptroller Brief”) (on file with the Op. Comm.).

at the election, would not exceed the maximum combined rate of sales and use taxes imposed by political subdivisions of this state that is prescribed by Sections 321.101 and 323.101, Tax Code.

TEX. LOC. GOV'T CODE § 387.003(b). We find no judicial opinion construing the meaning of “any” for purposes of subsection 387.003(b). But judicial opinions have construed the term “any” consistently in other contexts to mean “[s]ome; one out of many; . . . and is given the full force of ‘every.’”⁴ Thus, the “any portion” language cited above requires that a proposed district encompass every portion of the county territory not otherwise at the combined maximum rate. From a plain reading of the above statute, if Odessa did not impose a sales and use tax in its ETJ when the County called the election for the creation of the District, then that ETJ is territory of the County in which the maximum tax rate would not have at the time the election was called exceeded the statutory maximum. As such, a court would likely conclude that subsection 387.003(b) required the County to include Odessa’s ETJ in the District’s proposed boundaries.

Subsection 387.003(b-1) provides that “[i]f the proposed district includes any territory of a municipality, the commissioners court shall send notice . . . to the governing body of the municipality of the commissioners court’s intent to create the district.”⁵ TEX. LOC. GOV'T CODE § 387.003(b-1). To determine the applicability of subsection 387.003(b-1) we must ascertain the meaning of the phrase “territory of the municipality.” Chapter 387 does not provide a definition, but for purposes of sales and use taxes, the term “municipality” means “any *incorporated* city, town, or village.” TEX. TAX CODE § 321.002(2) (emphasis added). The incorporated limits of a municipality exclude its ETJ. *See generally* 34 TEX. ADMIN. CODE § 3.334(a)(2), (8) (defining for purposes of the Comptroller’s administration of local sales and use taxes the term “city” to mean “[a]n incorporated city, municipality, town, or village” and defining “extraterritorial jurisdiction” to mean “[a]n unincorporated area that is contiguous to the corporate boundaries of a city”).

By its own terms, extraterritorial jurisdiction is outside the territory of the jurisdiction. *See* NEW OXFORD AM. DICTIONARY 614 (defining “extraterritorial” as “(of a law or decree) valid outside a county’s territory” or “situated outside a country’s territory”). Construing subsection 387.003(b-1) to require notice to a city only when a proposed district includes the incorporated territory of the city, the County’s express exclusion of Odessa’s municipal limits in its ballot language means that no territory of a municipality was included in the proposed district. Accordingly, a court would likely conclude that subsection 387.003(b-1) required no notice to the City of Odessa.

⁴*Beck v. Craven*, 360 S.W.2d 827, 830 (Tex. App.—Houston [1st Dist.] 1962, no writ) (citations omitted); *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. Civ. App.—Waco 1954, writ ref’d n.r.e.) (recognizing that the “word ‘any’ has been judicially construed to mean: ‘each’ or ‘every’ or ‘all’; and particularly in construing statutes, the word ‘any’ is equivalent to and has the force of ‘every’ and ‘all’” (citations omitted)).

⁵You do not ask about, and we offer no opinion on, the impact of the election on the territory of the City of Goldsmith, which is also located in Ector County. *See* Request Letter at 1–5.

Impact of Future Annexations on the District's Boundaries

Your third question asks whether the District's ballot proposition excluding the territory of Odessa also excludes "future land annexed" by Odessa. *See* Request Letter at 5. This question presumes that future annexations by Odessa of territory within both its ETJ and the District's territory will cause the District's boundaries to recede. Nothing in either chapter 387 of the Local Government Code or chapter 321 of the Tax Code provides for a such a result. The District's boundary does not change because of Odessa's annexation: A county assistance district changes its boundaries only pursuant to action of the county commissioners court to either order an election or respond to a landowner's petition to add territory to the district, or to exclude territory from the district by order. *See generally* TEX. LOC. GOV'T CODE § 387.003(f) (authorizing commissioners court to call election to determine whether additional county territory should be included in a district); *id.* § 387.003(i) (providing for inclusion of additional territory in district upon receipt of landowner petition); *id.* § 387.003(j) (authoring the commissioners court to exclude territory in certain circumstances).

If Odessa was to annex territory in its ETJ that is also within the boundaries of the District resulting in a tax rate in excess of the 2 percent maximum, subsections 321.102(e) and (f) of the Tax Code direct certain actions to keep the tax rate from exceeding the maximum tax rate. *See* TEX. TAX CODE § 321.102(e), (f). They provide as follows:

(e) If as a result of the imposition or increase in a sales and use tax by a municipality in which there is located all or part of a local governmental entity that has adopted a sales and use tax or as a result of the annexation by a municipality of all or part of the territory in a local governmental entity that has adopted a sales and use tax the overlapping local sales and use taxes in the area will exceed two percent, the entity's sales and use tax is automatically reduced in that area to a rate that when added to the combined rate of local sales and use taxes will equal two percent.

(f) If an entity's rate is reduced in accordance with Subsection (e), the comptroller shall withhold from the municipality's monthly sales and use tax allocation an amount equal to the amount that would have been collected by the entity had the municipality not imposed or increased its sales and use tax or annexed the area in the entity less amounts that the entity collects following the municipality's levy of or increase in its sales and use tax or annexation of the area in the entity. The comptroller shall withhold and pay the amount withheld to the entity under policies or procedures that the comptroller considers reasonable.

Id. § 321.102(e)–(f). These subsections provide that if a municipality expands into territory of another political subdivision and causes the combined tax rate to exceed the maximum, the other political subdivision's tax rate is reduced by an amount sufficient to bring the combined rate back in line with the maximum. But these subsections direct the Comptroller to take the dollar amount

equal to the other political subdivision's rate reduction from the city and give it to the other political subdivision, thereby leaving the other political subdivision's tax revenue unchanged. As stated above, nothing in Local Government Code chapter 387 provides for a change in the District's boundaries based on the future actions of Odessa. And Tax Code subsections 321.102(e) and (f) expressly provide for the allocation of taxes imposed by two political subdivisions in overlapping territory such as happened here. Accordingly, a court would likely not have a basis from these provisions to conclude that the District's boundary recedes to exclude future annexations by Odessa.

Meaning of the District's Election Proposition

Your fourth question is whether the District's ballot "represents an enforceable contract with the voters that cannot be disregarded or impaired by the administrative application of Section 321.10[2] of the Tax Code[.]"⁶ Request Letter at 5. You assert that the putative contract with the voters was that the District would exclude all the territory of Odessa (now and in the future) and that this condition attaches to all future expansions of Odessa, essentially precluding the Comptroller from applying section 321.102 of the Tax Code. *See id.* at 3–4.

The "contract with the voters" doctrine stems from article I, section 16 of the Texas Constitution, which prohibits laws that impair the obligation of contracts. TEX. CONST. art. I, § 16, Interpretive Commentary; *see San Saba Cnty. v. McCraw*, 108 S.W.2d 200, 202–04 (Tex. 1937) (orig. proceeding). Generally, the express terms of an order submitting a proposition for a tax or bond election that identify the purposes for which the proceeds are to be used becomes a contract with the voters. *Id.* (concerning a tax election); *Black v. Strength*, 246 S.W. 79, 80–81 (Tex. 1922) (concerning a bond election). Thus, tax revenues approved by voters "may only be expended for the purpose for which they were approved." Tex. Att'y Gen. LO-98-060, at 2.

Courts considering the question look to the relevant documents comprising the "contract with the voters" to ascertain the governmental body's intent regarding the proceeds. *City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 551 (Tex. App.—San Antonio 2012, pet. denied). The County's order calling for the election identified the measure as follows:

Shall the Ector County Assistance District (with boundaries being all portions of the territory situated in Ector County, Texas excluding all territory within the municipal limits of the Cities of Odessa and Goldsmith) be created and a sales and use tax at the rate of 1.25 percent be imposed for the purpose of financing the operations of the District?

⁶Though your literal question is about section 321.101, section 321.102 provides for the Comptroller's action in the circumstances you describe. *See* TEX. TAX CODE § 321.102; *see also* Request Letter at 5.

Election Order § 1.⁷ The County's election order also identified the boundaries of the proposed district to be "all portions of the territory of Ector County, Texas excluding all territory within the municipal limits of the cities of Odessa and Goldsmith." *Id.* § 2. The ballot language is as follows:

Authorizing the creation of the Ector County Assistance District and the imposition of a sales and use tax at the rate of 1.25 percent for the purpose of financing the operations of the District.

Id. § 5. These election materials carve out of the proposed district the territory of the two municipalities, but the dispositive issue is whether the voters viewed this exclusion as operating to create either a static district boundary as of the date of the election or instead a fluid district boundary that changes as the excluded municipalities annex territory in the future.

General property law principles in Texas recognize that real property boundaries are static and attach to a specific portion of the property. *See generally Severance v. Patterson*, 370 S.W.3d 705, 722 (Tex. 2012).⁸ Furthermore, the election order contains no express recitation that the proposed district's boundaries would be everchanging based on potential future activity by one of the listed municipalities. *See* Election Order §§ 1–9. The recitations in the election order about the combined tax rate not exceeding the maximum rate more likely refer to the existing statutory requirement in chapter 387 and not as an unstated, perpetual condition imposed on the proposed district's boundaries. To construe the election order to designate a boundary that is fluid and changing with every municipal annexation would require us to add language to the election order, which a court would likely decline to do. *Cf., Williams v. Tex. State Bd. of Orthotics & Prosthetics*, 150 S.W.3d 563, 573 (Tex. App.—Austin 2004, no pet.) (recognizing that courts will not read into an act a provision that is not there). Accordingly, a court would likely conclude that the voters in Ector County voted on the creation of a proposed district with a static boundary defined as of the date of the election. With a static district boundary, the Comptroller's actions pursuant to Tax Code section 321.102 do not disregard or impair the contract with the voters.

Comptroller's Tax Rate Reduction

Your last question is "whether the effect of the Comptroller's stated administrative interpretation to include the City's 2018 annexed area resulted in the Comptroller effectively imposing for the first time sales taxes in a District's boundaries where the maximum combined sales tax rate was greater than two percent in violation of subsection 387.003(b-1)."⁹ Request

⁷See Request Letter attachments (on file with the Op. Comm.).

⁸While specific instances allow for fluid real property boundaries, such instances typically involve boundaries established by bodies of water that change due to natural forces that affect shorelines or river banks. *Severance*, 370 S.W.3d at 722; *see also Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (discussing erosion, accretion, and avulsion doctrines affecting property boundaries). Absent such a body of water in Ector County that would regularly impact property boundaries, Ector County voters likely would not imbue that fluid nature to the boundary of the proposed district.

⁹Though your literal question is about subsection 387.003(b-1), section 387.007 is the provision prohibiting a district from imposing a tax that would result in a combined rate that exceeds the statutory maximum. TEX. LOC. GOV'T CODE § 387.007; *see also* Request Letter at 5.

Letter at 5. Tax Code subsection 321.102(e) reduces the tax rate to 2 percent, and subsection 321.102(f) reallocates the amount collected as between the annexing municipality and the existing local entity. TEX. TAX CODE § 321.102(e), (f). The Comptroller informs us he acted as directed by these provisions because the creation of the District and the imposition of its taxes preceded Odessa's annexation. Comptroller Brief at 1. The Comptroller's view of the order of actions by the District and Odessa comports with the conclusion that the District's boundary is a static one, which excludes Odessa's municipal territory only as such municipal territory existed on the date of the election. Thus, the tax rates are reduced by operation of law such that the rate in the overlapping territory does not exceed the maximum.

S U M M A R Y

Chapter 387 of the Local Government Code provides for county assistance districts, and subsection 387.003(b) establishes the boundaries for those districts. A court would likely conclude that subsection 387.003(b) required Ector County to include the City of Odessa's extraterritorial jurisdiction in the Ector County's county assistance district's proposed boundaries.

Construing subsection 387.003(b-1) to require notice to a city only when a proposed district includes the incorporated territory of the city, the County's express exclusion of Odessa's municipal limits in its ballot language means that no territory of a municipality was included in the proposed district. Accordingly, a court would likely conclude that subsection 387.003(b-1) required no notice.

Neither statute nor equitable principles of law such as the contract with the voters or administrative action by the Texas Comptroller provide a basis to conclude that the District's boundaries should exclude future land annexations by Odessa.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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