



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 13, 2021

The Honorable Dee Hobbs  
Williamson County Attorney  
405 M.L.K. Street #7  
Georgetown, Texas 78626

**Opinion No. KP-0366**

Re: Whether public improvement district assessments may be used in specific circumstances (RQ-0384-KP)

Dear Mr. Hobbs:

On behalf of the City of Hutto (the “City”), you ask about the use of public improvement district assessments.<sup>1</sup> In particular, you ask whether loan debt service and bond issuance costs in certain circumstances specified in your request letter constitute improvement costs for which a city may levy an assessment under chapter 372 of the Local Government Code. *See* Request Letter at 1. You question whether subsection 372.023(h) of the Local Government Code authorizes assessments to include such costs of issuing bonds when the bond issuer is from out of state. *See id.* at 1, 4–5. Your question requires a construction of the various contracts and the application of facts to those contracts, both of which are tasks outside the purview of an Attorney General opinion. *See* Tex. Att’y Gen. Op. Nos. GA-0302 (2005) at 2 (“[T]his office does not review or construe contracts.”), KP-0178 (2018) at 3 (“[T]his office does not resolve questions of fact in the opinion process.”). Thus, we do not opine on the ultimate propriety of the transactions and the use of the assessments that you describe. Instead, we advise you only generally regarding chapter 372 of the Local Government Code.

**Background**

You tell us that the City (i) created a particular public improvement district (the “District”), (ii) approved an assessment plan that identified the initial authorized improvements for the District, (iii) set the initial budgeted cost for such improvements at \$17,400,000, and (iv) established the amount of assessments on the benefitted property based on the budgeted amount. *See* Request

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<sup>1</sup>*See* Letter from Honorable Dee Hobbs, Williamson Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Oct. 14, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0384KP.pdf> (“Request Letter”). Because of our longstanding policy to refrain from opining on matters in litigation, we do not address your second question. *See* Letter from Virginia K. Hoelscher, Chair, Op. Comm. to Honorable Dee Hobbs, Williamson Cnty. Att’y at 1 (Oct. 22, 2020) (on file with the Op. Comm.).

Letter at 2. The City levied the assessments against the property in the District to be paid in annual installments over a thirty-five-year period with interest. *See id.*

Specifically, you tell us the City created a local government corporation (the “Corporation”) under the Transportation Code, which obtained a loan from an out-of-state unit of government (the “Out-of-State Authority”) to construct the improvements through a construction contract with a developer. *See id.* Through an interlocal contract (the “Interlocal Agreement”), structured as an installment sales contract as allowed in subsection 372.023(d)(1), the City agreed to purchase the improvements from the Corporation using the levied assessments as payment. *See id.* The Out-of-State Authority funded its loan to the Corporation by issuing bonds.<sup>2</sup> *See id.* You indicate that “[t]he purchase price to be paid by the City is the sum of all payments specified on a schedule which mirrors the debt service schedule” of the promissory note (the “Note”) associated with the Corporation’s loan from the Out-of-State Authority. *Id.* at 2–3. And you state that the Interlocal Agreement expressly states that the proceeds from the Out-of-State Authority’s bonds are to be used to (i) finance the loan to pay the construction manager’s actual costs of the public improvements to be constructed in the District; (ii) fund capitalized interest; (iii) fund an extraordinary expense fund, debt service fund, and other funds under the agreement securing the bonds; and (iv) pay certain costs of issuing the bonds. *See id.* at 3.

Under the provisions of the three primary contracts<sup>3</sup> between the City, the Corporation, and the Out-of-State Authority, the transaction you describe in your request letter involves \$17,400,000 being levied in assessments. These assessments are then used to secure a \$17,400,000 loan from the Out-of-State Authority, which loan amount includes all costs related to the issuance of the bonds by the Out-of-State Authority. *See id.* at 2–3. Thus, the amount of levied assessments appears to include the bond issuance costs.

### **Local Government Code, Chapter 372 - Public Improvement Districts**

Local Government Code chapter 372 provides for public improvement districts.<sup>4</sup> *See* TEX. LOC. GOV’T CODE §§ 372.001–.152. An improvement district is a defined geographic area to provide specific types of improvements within the area, such as streets, sidewalks, and water, wastewater, or drainage facilities, which improvements are financed by assessments on the property. *Id.* § 372.003.

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<sup>2</sup>The Out-of-State Authority did not seek approval of the Attorney General Public Finance Division before funding its loan to the Corporation by issuing bonds.

<sup>3</sup>Though you describe several agreements and contracts, the underlying transaction involves the contracts between the City, the Corporation, and the Out-of-State Authority. *See* Request Letter at 2–3.

<sup>4</sup>Section 372.017 authorizes the levy of an assessment on property in a public improvement district. TEX. LOC. GOV’T CODE § 372.017. Prior to the levy, an advisory body prepares an annual service plan, which defines the annual indebtedness and costs for the improvements and includes an assessment plan. *See id.* §§ 372.008, .013(a)–(b), .014(a). The governing body determines the assessment, and the plan apportions the assessment to property on the basis of the special benefits accruing to the property. *Id.* § 372.015(a). The governing body then levies the assessment as a special assessment and may provide that the assessment “be paid in periodic installments, at an interest rate and for a period approved by the governing body.” *Id.* § 372.017(b).

Section 372.023 governs the payment of improvement costs and provides in subsection (d) that where a special assessment is payable in installments, the costs of improvements

may be paid by any combination of the following methods:

- (1) under an installment sales contract or a reimbursement agreement between the municipality . . . and the person who acquires, installs, or constructs the improvements;
- (2) as provided by a temporary note or time warrant issued by the municipality . . . and payable to the person who acquires, installs, or constructs the improvements; or
- (3) by the issuance and sale of bonds under Section 372.024.

*Id.* § 372.023(d).

Subsection 372.023(h) specifies that “[t]he costs of any improvement include interest payable on a temporary note or time warrant and all costs incurred in connection with the issuance of bonds under Section 372.024 and may be included in the assessments against the property in the improvement district as provided by this subchapter.” *Id.* § 372.023(h). But under the facts you describe, the City itself did not issue a temporary note, a time warrant, or bonds. *See* Request Letter at 2–3. Instead, the City utilized a complex financial transaction involving multiple entities, which makes the application of subsection 372.023(h) less clear. *See id.*

### **Authority for the Transaction**

Chapter 372 contemplates the use of bonds as part of the financing mechanism for projects authorized by the chapter. As noted previously, subsection 372.023(h) provides that the “costs of any improvement include . . . all costs incurred in connection with the issuance of bonds under Section 372.024 and may be included in the assessment against the property in the improvement district as provided by this subchapter.” TEX. LOC. GOV’T CODE § 372.023(h). Subsection 372.024 requires that general obligation bonds issued “to pay costs under Section 372.023(d) must be issued under the provisions of Subtitles A and C, Title 9, Government Code.” *Id.* § 372.024. Title 9 of the Government Code governs public securities. TEX. GOV’T CODE §§ 1201.001–1510.002. Section 1201.002, within subtitle A, defines “issuer” to mean an “agency, authority, board, body politic, department, district, instrumentality, municipal corporation, political subdivision, public corporation, or subdivision *of this state*.” *Id.* § 1201.002(1)(A) (emphasis added); *see also id.* § 1202.001(2) (defining “issuer” similarly). Thus, the Out-of-State Authority is not an “issuer” under subtitle A, Title 9, Government Code. Accordingly, bonds issued by an out-of-state issuer are not issued as allowed by section 372.024, and therefore such bond issuance costs are not costs of any improvements under subsection 372.023(h).

As an alternative to the section you put forward in your request letter, the Out-of-State Authority suggested in its brief to this office that subsection 372.026(f) applies.<sup>5</sup> Generally, section 372.026 governs the pledging of monetary resources toward certain financial obligations. TEX. LOC. GOV'T CODE § 372.026. Subsection 372.026(f) specifies that

[t]he governing body may enter into an agreement with a corporation created by the municipality . . . that provides for payment of amounts pledged under this section to the corporation to secure indebtedness issued by the corporation to finance an improvement project, including indebtedness to pay capitalized interest and a reserve fund permitted by this subchapter for revenue or general obligation bonds issued under this subchapter and *indebtedness issued to pay the corporation's costs of issuance.*

*Id.* § 372.026(f) (emphasis added). The Out-of-State Authority emphasizes the last phrase of subsection (f) because of the language concerning the “costs of issuance.” Orrick Brief at 2. It argues that the Corporation “issued indebtedness to finance the construction of certain public improvements within the . . . District in the form of” the Note associated with its loan from the Out-of-State Authority and that, therefore, the pledged assessments can be used for the costs related to that Note. *Id.*

We consider the scope of this phrase within section 372.026 to determine if the phrase can include a promissory note. Subsection (a) defines an “obligation” to include an “installment sale contract.” See TEX. LOC. GOV'T CODE § 372.026(a). Subsection (b) then grants authority to governing bodies to enter into agreements that pledge the assessments received from the improvement district for the payment of “obligations.” *Id.* § 372.026(b). In contrast, subsection (f) does not use the term “obligation” and instead uses a different term, “indebtedness.” *Id.* § 372.026(f). Neither section 372.026 nor chapter 372 define indebtedness. We must presume the Legislature used “indebtedness” in subsection (f) purposefully and intended it to mean something other than “obligation.” *In re D.S.*, 602 S.W.3d 504, 514 (Tex. 2020) (“In construing a statute, [courts] assume the Legislature chose statutory language with care, included each chosen word for a purpose, and purposefully omitted all other words.”). The ordinary meaning of “indebtedness” is “the condition of being indebted . . . something (as a sum of money) that is owed.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1147 (3d ed. 2002). The Texas Uniform Commercial Code defines a “promissory note,” in part, as an “instrument that evidences a promise to pay a monetary obligation.” TEX. BUS. & COM. CODE § 9.102(66). In the simplest analysis, a promise to pay constitutes the condition of being indebted.

Yet, it is clear from the phrase “indebtedness issued to pay the corporation's costs of issuance” in subsection (f) that the indebtedness must be “issued.” See TEX. LOC. GOV'T CODE § 372.026(f). Again, neither section 372.026 nor chapter 372 define the term “issued.” The term has numerous ordinary meanings, but relevant ones in this context are “the act of offering securities for sale to investors” and “the first delivery of a negotiable instrument complete in form (as a bill

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<sup>5</sup>See Letter & Attachment from Marcus W. Deitz, Counsel for Pub. Fin. Auth., Orrick, Herrington & Sutcliffe, LLP, to Honorable Ken Paxton, Tex. Att'y Gen. at 2–3 (Nov. 20, 2020) (“Orrick Brief”) (on file with the Op. Comm.).

or note) to a person who takes it as a holder.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1201 (3d ed. 2002). Additionally, to the extent a court would look to subtitle A, Title 9 of the Government Code, it defines the term “issuance” to mean “the initial delivery by an issuer of evidence of an obligation of a public security issued by the issuer to the initial purchaser in exchange for the purchase price of the public security.” TEX. GOV’T CODE § 1202.001(1); *see also* TEX. LOC. GOV’T CODE § 372.024. And to the extent these definitions of “issuance” point to a public security, a public security can include a “note.” TEX. GOV’T CODE §§ 1201.002(2) (defining “public security” to include a note), 1202.001(3) (same). Relevant here, a local government corporation created under chapter 431 of the Transportation Code is expressly authorized to “issue bonds and notes” to carry out its purposes. TEX. TRANSP. CODE § 431.070(a); *but see id.* § 431.071(a) (requiring the corporation to submit a bond or note authorized under section 431.070 to the Attorney General for examination). Under these definitions of some of the key terms, a court would have a basis by which to decide that subsection 372.026(f) could include a promissory note and thus constitute a “cost of issuance” for which improvement district assessments may be pledged by a city. Accordingly, subsection 372.026(f)’s phrase “indebtedness issued to pay a corporation’s costs of issuance” generally could be construed to include a promissory note that is issued, but as we noted previously, we do not offer an opinion on whether this particular set of transactions complies with chapter 372.

S U M M A R Y

Local Government Code chapter 372 governs public improvement districts and provides for special assessments to be levied against property benefiting from improvements made under the chapter. The question regarding the use of public improvement district assessments in particular circumstances requires a construction of numerous contracts and the application of facts to those contracts, which tasks are outside the purview of an Attorney General opinion.

Subsection 372.023(h) authorizes the inclusion of issuance costs of general obligation bonds to pay improvement costs in a public improvement district. Yet, pursuant to section 372.024 and its reference to subtitle A, Title 9 of the Government Code, the issuer of such bonds must be an issuer from within the State.

Subsection 372.026(f)'s phrase "indebtedness issued to pay a corporation's costs of issuance" generally could be construed to include a promissory note that is issued.

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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