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Opinion Committee

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July 20, 1999

RQ-0089-JC

The Honorable John Cornyn, Attorney General
Attention: Opinion Committee
Office of the Attorney General of Texas
PO Box 12548
Austin, Texas 78711-2548

Re: Tax Increment Finance District –
Applicability of District Boundaries to Proposed
Project Following Termination of the District

Dear General Cornyn and Committee Members:

This letter requests an opinion, pursuant to TEX. GOV'T CODE ANN. § 402.042 (West Supp. 1998), regarding the applicability of the boundaries of that portion of the central business district of the City of El Paso known as either "Tax Increment District Number One" or "Reinvestment Zone Number One" (and hereinafter sometimes referred to as "the TIF District" or "the Reinvestment Zone") to the location of a project authorized during the existence of the TIF District, but still not built following termination of the TIF District.

I. Creation of the TIF District

On December 30, 1980, the City Council of the City of El Paso adopted Ordinance No. 7094, designating the central business district of the City (within defined boundaries) as "Tax Incremental District No. 1" pursuant to the provisions of TEX. REV. CIV. STAT. ANN. art. 1066d (Vernon 1979) [subsequently repealed]. Ordinance No. 7094 also created the Board of Directors for the district, designating the City Council as such board.

In 1981 the Tax Increment Financing Act was adopted as TEX. REV. CIV. STAT. ANN. art. 1066e (Vernon 1981) [now TEX. TAX CODE ANN. §§ 311.001, *et seq.* (West Supp. 1998)]. An enabling amendment to the Texas Constitution authorized the legislature to permit an incorporated city or town to issue bonds or notes to finance the development of blighted areas

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and to pledge increases in ad valorem tax revenues to repayment of those bonds or notes. TEX. CONST. ANN. art. VIII, § 1-g(b).

On August 10, 1982, Ordinance No. 7548 was adopted by the City Council. The Ordinance approved the Tax Increment Financing Act Contract as signed by the City, the County of El Paso ("the County") and the other taxing units, confirming the TIF District as a "Reinvestment Zone" and providing for a 13-member Board of Directors for the zone.

Following the filing of a declaratory judgment action by the City, the constitutionality of the Tax Increment Financing Act ("the Act"), and thus of the City's ordinance and contract, was upheld by the Texas Supreme Court in *City of El Paso v. El Paso Community College District*, 729 S.W.2d 296 (Tex. 1986). In reversing the court of appeals, the Supreme Court held that school districts are "taxing units" and "political subdivisions" intended to be covered by the Act.

On February 17, 1987, the City, the County, and the other taxing units executed the First Amendment to the Tax Increment Financing Act Contract in connection with the entry of a Consent Judgment in the litigation described above. The First Amendment was ratified by the Attorney General. The stated purpose of the Project and Financing Plan under the First Amendment was "to significantly increase the value of all the taxable real property in the Zone for the mutual benefit of all Taxing Units." The Project and Financing Plan was subsequently amended on several occasions by the Board of Directors of the Reinvestment Zone ("the TIF Board").

II. Commission Agreement for the XII Travelers Project

Among the projects approved by the TIF Board was a series of monuments to be known as the XII Travelers Memorial. Pursuant to the November 24, 1992, "Commission Agreement for the Construction and Installation of the XII Travelers Memorial," the City and artist John Houser agreed to the terms under which work on two monuments would commence as part of a project described as follows:

A series of twelve (12) historically integrated monuments to be erected within the boundaries of Tax Increment District No. 1 in the City of El Paso, Texas, depicting various individuals of historical significance to the El Paso area as approved by the Review Committee and commonly known as the XII Travelers Memorial.

"Tax Increment District No. 1," in turn, was described as follows:

An area of land located in downtown El Paso containing approximately one hundred seventy-four (174) acres of land bounded on the north by Interstate 10, on the east by Virginia Street and St. Vrain Street, on the west by the west side of the Union Depot and on the south by Paisano Street, as more particularly

described in Ordinance No. 7094, adopted by the City Council on December 30, 1980, sometimes also called the "TIF District."

Section 5.02 of the Commission Agreement provided that the selection of sites for the monuments would be made by the City:

5.02 Site Selection and Acquisition. As soon as practicable after the execution of this Agreement, the City shall designate the site or sites within the TIF District where the Work is to be erected. The site selection and acquisition shall be the sole responsibility and discretion of the City.

Ownership of the monuments created pursuant to the Commission Agreement will be in the City. Work has been completed on the first of the two monuments contemplated by the Agreement. The selection of a site for the second monument has not yet been finalized. It is the selection of such second site that is the subject of this request for an opinion of the Office of the Attorney General.

III. Applicable Statutory Provisions

Section 311.002 of the Act includes the following definitions:

(1) "Project costs" means the expenditures made or estimated to be made and monetary obligations incurred or estimated to be incurred by the municipality establishing a reinvestment zone that are listed in the project plan as costs of public works or public improvements in the zone, plus other costs incidental to those expenditures and obligations. . . .

(2) "Project plan" means the project plan for the development or redevelopment of a reinvestment zone approved under this chapter, including all amendments of the plan approved as provided by this chapter.

* * * * *

Powers of a municipality with respect to a reinvestment zone are identified in Section 311.008 of the Act as follows:

(a) A municipality may exercise any power necessary and convenient to carry out this chapter, including the power to:

(1) cause project plans to be prepared, approve and implement the plans, and otherwise achieve the purposes of the plan;

(2) *acquire real property by purchase, condemnation, or other means to implement project plans and sell that property on the terms and conditions and in the manner it considers advisable;*

(3) enter into agreements, including agreements with bondholders, determined by the governing body of the municipality to be necessary or convenient to implement project plans and achieve their purposes, which agreements may include conditions, restrictions, or covenants that run with the land or that by other means regulate or restrict the use of land; and

(4) consistent with the project plan for the zone:

(A) acquire blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed real property or other property in a blighted area or in a federally assisted new community in the zone for the preservation or restoration of historic sites, beautification or conservation, the provision of public works or public facilities, or other public purposes; or

(B) *acquire, construct, reconstruct, or install public works, facilities, or sites or other public improvements, including utilities, streets, street lights, water and sewer facilities, pedestrian malls and walkways, parks, flood and drainage facilities, educational facilities, or parking facilities.*

(b) *The powers authorized by Subsection (a)(2) prevail over any law or municipal charter to the contrary.*

(c) A municipality may make available to the public on request financial information regarding the acquisition by the municipality of land in the zone when the municipality acquires the land. [Emphasis added.]

Certain powers of a municipality are also identified in Section 311.010, describing powers and duties of the board of directors of a reinvestment zone:

(a) The board of directors of a reinvestment zone shall make recommendations to the governing body of the municipality that created the zone concerning the administration of this chapter in the zone. In addition to the powers granted to the board under this chapter, *the governing body of the municipality by ordinance may delegate to the board any powers and duties relating to the implementation of the project plan for the zone that the governing body considers advisable.*

(b) The board of directors of a reinvestment zone may enter into agreements as the board considers necessary or convenient to implement the project plan and reinvestment zone financing plan and achieve their purposes. An agreement may provide for the regulation or restriction of the use of land by imposing conditions, restrictions, or covenants that run with the land. *An agreement may dedicate revenue from the tax increment fund to pay the costs of replacing housing or areas of public assembly in or out of the zone. . . .* [Emphasis added.]

IV. Termination of the TIF District

On June 9, 1998, the City and the other taxing units executed the Agreement to Terminate the Tax Increment Finance District. The Agreement to Terminate provided that the City would have responsibility for completing all or parts of identified projects (including the XII Travelers) and for defeasing the outstanding bonds of indebtedness secured by TIF District revenues. In assuming such responsibilities, the City was deemed to have satisfied all obligations to the other parties with respect to funds remaining in the TIF District account. Paragraph 1 of the Agreement to Terminate described the rights of the City in the following terms:

1. The City of El Paso upon termination of the District will have sole responsibility for completing all or parts of the projects above-identified and to do so shall have sole use of funds remaining on hand for such purpose and shall have *any and all rights with respect to such funds that previously could have been exercised by the City of El Paso and/or the parties acting individually or through the Board of Directors of the Tax Increment Finance District.* [Emphasis added.]

The TIF District was terminated on August 18, 1998, when the City Council approved Ordinance No. 13770, authorizing the defeasance of certain certificates of obligation and approving an escrow agreement.

V. Issues for Determination

It appears from the provisions of the Act that the City has broad powers with respect to implementation of the project plan for the TIF District. According to the Termination Agreement, these powers are intended to continue following termination of the TIF District. Although it is clear that the intent of the parties during the existence of the District was to have approved projects such as the XII Travelers monuments located within the boundaries of the District, there is no express prohibition, following the termination of the District, against locating part of an approved project outside those boundaries. Because El Paso County has an interest in assuring its residents that funds set aside by the County and other taxing units to cover improvements for the benefit of the TIF District are appropriately spent by the City, the opinion of the Office of the Attorney General is sought on the following issues:

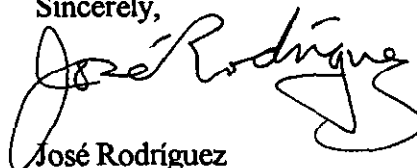
1. May a public improvement project approved for location within a Tax Increment Finance District during the existence of the District be placed at a location outside the District's geographic boundary following termination of such District?

2. May the costs of a project so situated outside a former Tax Increment Finance District's boundary be considered "project costs" as that term is defined in TEX. TAX CODE ANN. § 311.002(1) (West Supp. 1998)?

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Your prompt review of and response to this request will be appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "José Rodríguez". The signature is fluid and cursive, with a large, stylized initial "J" and "R".

José Rodríguez
County Attorney

cc: Mayor Carlos M. Ramírez, P.E.
Charlie McNabb, City Attorney