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OPINION COMMITTEE

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February 19, 2004

The Hon. Greg Abbott,
Attorney General of Texas
c/o Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0187-GA

Re: Request for Opinion

Dear General Abbott:

Our office has been asked to request an Attorney General's Opinion with regard to the following question:

Are liens assessed by a public improvement district against property that was *not* subject to the constitutional and statutory homestead exemption at the time of the assessment enforceable by forced sale, even though the property may have become a homestead between the date of the assessment and the date of the enforcement action?

In 2001 the 77th State Legislature passed HB 3172 which amended Chapter 372 of the Local Government Code to authorize counties to establish public improvement districts ("PIDs"). As a result of this new authority granted to counties and in my capacity as County Attorney, I undertook an evaluation of the legal requirements associated with the creation and operation of PIDs as they relate to counties.

In the course of my research, I encountered an opinion issued by the Attorney General's Office in 2001, Opinion No. JC-386 ("JC-386"), that addresses the collection of payments assessed by a PID. JC-386 concludes that PID assessments are not "taxes" under the Texas Constitution and that under Texas law a homestead is not subject to forced sale for the nonpayment of a PID assessment. However, JC-386 does not address the issue of the enforceability of a PID assessment lien ordered *before* a homestead exemption is established, as distinct from property that is already a homestead at the time of assessment.

I also encountered a line of court decisions in Texas case law which hold that assessment liens are collectable by forced sale if they are assessed *before* the existence of the homestead. *Hufstедler v. Glenn*, 82 S.W.2d 733, 734 (Tex.Civ.App.-Austin 1935); *L.E. Whitman & Co. v. Stout*, 41 S.W.2d 317 (Tex.Civ.App.-Fort Worth 1931); *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987).

My question arises with respect to the appropriate way to reconcile the conclusion reached by JC-386 and the holdings in the line of cases cited in the previous paragraph. Given the existence of these cases, does the conclusion reached in JC-386 also apply when a PID assessment lien was ordered prior to the creation of the homestead exemption? It is my opinion that it does not.

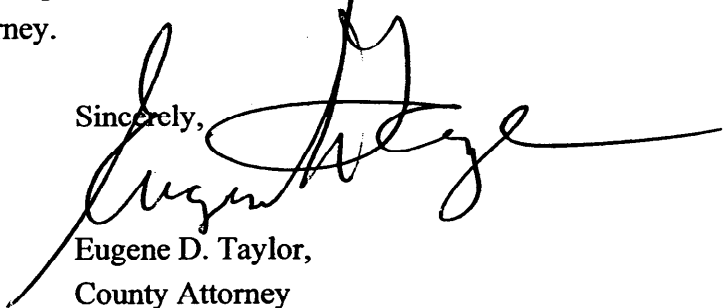
Public improvement districts are, obviously, created for the purpose of financing and constructing public improvements. The Legislature contemplated their use for building improvements such as water and wastewater lines in residential or mixed-use developments, where infrastructure must be in place before any residents move in. The district and the developer who owns the unimproved land are already contractually obligated to pay the lenders the full amount of the assessment before any homesteads are created in the district. That debt is secured by the statutory assessment lien against all the property in the district.

The sale of lots by the developer cannot constitutionally impair the obligation of those contracts or alienate the lender's security. At the time the homeowners establish their homestead, the liens guaranteeing repayment are already in place and the owners expressly acquire title *subject to the liens*. Assumption of the debt represents a part of the purchase price for the lot, and secures payment for valuable improvements just as much as a mechanic's or materialman's lien.

No rational lender would ever buy bonds or otherwise finance these improvements unless the district could guarantee repayment. Clearly, no district composed in substantial part of residential property could ever repay the debt unless it could require homeowners within the district to pay their pro-rata share of the assessment in a timely manner. So, unless the liens against the real property that existed prior to its becoming homesteads remain valid and enforceable by forced sale, the PID legislation was ineffective to accomplish any of its purposes. Surely that is not the case.

If you have any questions concerning this request, please feel free to call me or my assistant Dale A. Rye, Of Counsel to the County Attorney.

Sincerely,



Eugene D. Taylor,
County Attorney