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OPINION COMMITTEE

January 7, 2010

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The Honorable Gregg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

RQ-0851-GA

Re: Request for Opinion

Dear General Abbott:

Pursuant to Tex. Gov't Code §402.043, this is to request your opinion concerning Tax Code §23.23. Specifically, the Legislature passed Act of June 19, 2009, 81st Leg., R.S. Ch. 359 (2009) which in part amended Tax Code §23.23(f).

This is to request your opinion concerning application of the newly amended Tax Code §23.23 to the appraisal of homesteads which had been damaged by Hurricane Ike.

Background

In September 2008 Hurricane Ike struck Galveston County causing considerable damage or total destruction to homesteads throughout the county. As of January 1, 2009, most structures remained damaged or destroyed. Pursuant to Tax Code §23.01, the Galveston Central Appraisal District issued appraisal notices that reflected decreased market values of these homesteads as of their January 1, 2009 value.

Since January 1, 2009 many homesteads have been renovated to prestorm conditions or better.

This inquiry relates to the application of the homestead cap and valuation of homesteads renovated since January 1, 2009. The CAD could increase the valuation of these homesteads as of January 1, 2010.

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For purposes of this discussion, we assume that the homestead status has remained in effect pursuant to Tax Code §11.135.

Under Tax Code 23.23 there is a limited amount a homestead's taxable value may increase from one year to the next; that statute provides...

(a) Notwithstanding the requirements of Section 25.18 and regardless of whether the appraisal office has appraised the property and determined the market value of the property for the tax year, an appraisal office may increase the appraised value of a residence homestead for a tax year to an amount not to exceed the lesser of:

(1) the market value of the property for the most recent tax year that the market value was determined by the appraisal office; or

(2) the sum of:

(A) 10 percent of the appraised value of the property for the preceding tax year;

(B) the appraised value of the property for the preceding tax year; and

(C) the market value of all new improvements to the property.

Tex. Tax Code Ann. § 23.23(a) (Vernon 2001).

Due to recent legislative changes we have concluded that:

- 1) The valuation of storm damaged homesteads which have been renovated are subject to the 10% cap on valuations; therefore, the valuation of a homestead which had been repaired may not be increased more than 110% of its January 2009 value.
- 2) Homesteads totally destroyed by the storm, and renovated to their pre storm condition may not be valued in excess of 110% of the value as of January 1, 2009.
- 3) It is our opinion in the instance homesteads destroyed by the storm and rebuilt with new improvements as defined by the Code require fact specific inquiry; there is no formula that can predict a maximum value which can be set effective January 1, 2010.

We would appreciate your opinion whether our conclusions are correct.

Analysis

The determination of the value of homesteads following catastrophic events has been a vexing issue for years. Following Tropical Storm Allison in 2002, the Honorable Mike Stafford sought your

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opinion regarding the valuation of repairs made to residential homesteads damaged by flooding. In Atty. Gen'l. Opin. No. GA-0091 (2003) you concluded that, inter alia, repairs made to structures damaged by a Tropical Storm constituted new improvements for the purpose of valuation, and were to be added in for the purposes of valuation.

When GA-0091 was written, you noted that ... Section 23.23(a) limits a residence homestead's appraised value:

The appraised value of a residence homestead for a tax year may not exceed the lesser of:

(1) the market value of the property; or

(2) the sum of:

(A) 10 percent of the appraised value of the property for the last year in which the property was appraised for taxation times the number of years since the property was last appraised;

(B) the appraised value of the property for the last year in which the property was appraised; and

(C) the market value of all new improvements to the property.

Tex. Tax Code Ann. § 23.23(a) (Vernon 2001).

Several changes in the law have caused us to conclude that GA-0091 has been legislatively eclipsed. Through enactment of the Act of June 19, 2009, 81st Leg., R.S. Ch. 359 (2009), the Legislature dealt with issue of the "new improvement" resulting from storm damage with provisions codified in Tax Code Ann. §23.23(e) & (f) as follows:

(e) In this section, "new improvement" means an improvement to a residence homestead made after the most recent appraisal of the property that increases the market value of the property and the value of which is not included in the appraised value of the property for the preceding tax year. The term does not include repairs to or ordinary maintenance of an existing structure or the grounds or another feature of the property. (Emphasis added)

(f) Notwithstanding Subsections (a) and (e) and except as provided by Subdivision (2), an improvement to property that would otherwise constitute a new improvement is not treated as a new improvement if the improvement is a replacement structure for a structure that was rendered uninhabitable or unusable by a casualty or by wind or water damage. For purposes of appraising the property under Subsection (a) in the tax year in which the structure would have constituted a new improvement:

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(1) the appraised value the property would have had in the preceding tax year if the casualty or damage had not occurred is considered to be the appraised value of the property for that year, regardless of whether that appraised value exceeds the actual appraised value of the property for that year as limited by Subsection (a) ; and

(2) the replacement structure is considered to be a new improvement only if:

(A) the square footage of the replacement structure exceeds that of the replaced structure as that structure existed before the casualty or damage occurred; or

(B) the exterior of the replacement structure is of higher quality construction and composition than that of the replaced structure.

Our opinion is that the application of these amendments would result in one of the three following outcomes:

Scenario 1.

A homestead has an appraised value of \$300,000 on January 1, 2008. The homestead is partially damaged by Hurricane Ike in September 2008. As a result, the homestead's value on January 1, 2009 is appraised by the CAD at \$150,000. During 2009, renovations restore the homestead to its pre Hurricane Ike status. The maximum value for this homestead as of January 1, 2010 will be \$165,000

In enacting Tax Code §23.23(e), the Legislature made it clear the "new improvements... does not include repairs to or ordinary maintenance of an existing structure"; and therefore are not to be included in determining the appraised value of the homestead under §23.23(a)(2)(C)

Because the values of those repairs may not be included in determining value, the appraised value of this homestead as of January 1, 2010 would be calculated as set forth in §23.23 (a)(2)(A)&(B) so as not to exceed 110% of the appraised value as of January 1, 2009.

Therefore this repaired homestead with a valuation of \$150,000 on January 1, 2009 could not have an appraised value in excess of \$165,000 on January 1, 2010

Scenario 2.

A homestead has an appraised value of \$300,000 on January 1, 2008. The homestead is extensively damaged by Hurricane Ike in September 2008 and is uninhabitable. As a result, the homestead's value on January 1, 2009 is appraised by the CAD at \$100,000. The homestead is

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restored to its pre Ike condition in 2009. The maximum appraised for this homestead as of January 1, 2010 cannot exceed \$110,000.

Again, Tax Code §23.23(e) provides that repairs to damaged homes do not constitute new improvements under §23.23(a)(2)(C) since §23.23(f) provides that an "improvement to property that would otherwise constitute a new improvement is not treated as a new improvement if the improvement is a replacement structure for a structure that was rendered uninhabitable or unusable by a casualty or by wind or water damage".

In this scenario, because of the Legislative changes, if the restoration of the property went beyond mere repairs to replacement of portions of the structure, those repairs or replacement are not new improvements; the value of those repairs or replacements may not be factored into the appraised value of the homestead under §23.23(a)(2)(C). As a result, the appraised value of this homestead as of January 1, 2010 would be calculated not to exceed 110% of the appraised value effective January 1, 2009 under Tex. Tax Code §23.23 (a) (2) (A) & (B). For our example of even an extensively repaired homestead with an appraised value of \$100,000 January 1, 2009; and could not have an appraised value in excess of \$110,000 on January 1, 2010

But this result differs in our third scenario.

Scenario 3.

A homestead has an appraised value of \$300,000 on January 1, 2008. The homestead is extensively damaged by Hurricane Ike in September 2008 and is uninhabitable. As a result, the homestead's value on January 1, 2009 is appraised by the CAD at \$100,000. The homestead is renovated; but in making the renovations, the owner changes the exterior of the structure or increases the square footage of the homestead larger. The maximum value for this homestead as of January 1, 2010 cannot be determined by a formulaic approach but rather must be determined on a case by case basis.

Our conclusion in this scenario is that the appraised value as of January 1, 2010 would be the product of the appraised value as of January 1, 2008, plus the value of the new improvements to the

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structure. The 10% limitation on the increase in appraised value would be inapplicable. This result would occur infrequently due to the restricted definition of "now improvements:"

Under Tax Code §23.23(f) (2) (A) & (B), "new improvements" exist only in two narrow instances, where:

(A) the square footage of the replacement structure exceeds that of the replaced structure as that structure existed before the casualty or damage occurred; or

(B) the exterior of the replacement structure is of higher quality construction and composition than that of the replaced structure

In this limited instance, Tax Code §23.23(f) (1) states that the appraised value shall be calculated by using... "the appraised value the property would have had in the preceding tax year if the casualty or damage had not occurred is considered to be the appraised value of the property for that year, regardless

of whether that appraised value exceeds the actual appraised value of the property for that year as limited by Subsection (a)." Simply stated, where Tax Code §23.23(f) applies, the limitation on the increase of market value normally set forth in Tax Code 23.23(a) (2) (A) is inapplicable.

To determine the value in scenario 3, the first step requires use of the value assigned on January 1, 2008 and adding the value of any improvements made prior to the arrival of Hurricane Ike. The resulting figure would be "the appraised value the property would have had in the preceding tax year if the casualty or damage had not occurred" and would be the value as of January 1, 2009.

The second step would require the CAD to value the homestead with its "new improvements". The valuation would result in a figure which would be determined without regard to the 10% limitation on the increase of appraised value using the approach contained in Tax Code §23.23(a):

(a) The appraised value of a residence homestead for a tax year may not exceed the lesser of:

(1) the market value of the property; or

(2) the sum of:

(A) 10 percent of the appraised value of the property for the preceding tax year;

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(B) the appraised value of the property for the preceding tax year; and

(C) the market value of all new improvements to the property.

Under Tax Code 23.23(f), the value of this structure on January 1, 2010 would be: (1) the appraised value the property would have had in the preceding tax year (2009) if the casualty or damage had not occurred, (2) plus the value of new improvements and 3) without regard to the 10% limitation on the increase of appraised value.

Again, this result would only occur in those instances where a structure has been so badly damaged as to be uninhabitable, and where in making repairs the owner has changed the exterior of the homestead or has increased the square footage.

Last we would observe that the exclusion of the 10% limitation on increase of appraised value only occurs in the years in which new improvements are made; and after that year the 10% limitation is again in effect. Tax Code Ann. §23.23(f)

Thus it is our opinion in this instance that because of the many contingencies which require fact-specific inquiry; there is no formula that can predict a maximum value which can be set on January 1, 2010. Rather, the appraised value of the structure in Scenario 3 can be determined only after the Central Appraisal District performs a rigorous, fact specific appraisal.

We would very much appreciate your opinion as to whether our conclusions are correct; we will be happy to provide any further assistance or research at your request.

Very truly yours,


Hon. Kurt Sistrunk
Galveston County Criminal District Attorney

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