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CHARLES PERRY
TEXAS STATE SENATOR
DISTRICT 28

October 7, 2020

The Honorable Ken Paxton
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Paxton,

Please accept this letter as a formal request for an Attorney General opinion over the position of whether Ector County ("County") was required to provide notice to both the City of Odessa ("City") and the Odessa Development Corporation ("ODC") of its intent to establish a county assistance district ("CAD") prior to the County's adoption of the election order ("Order") to authorize the establishment of a proposed county assistance district under Chapter 387 of the Texas Local Government Code.

As Chairman of the Senate Committee on Water and Rural Affairs, I oversee water resources in Texas, as well as a vast array of issues arising in our rural communities. I appreciate the opportunity to receive insight and clarity on the above issue.

On June 10, 2018, the Ector County Commissioners Court authorized an Order for an election to be held on November 6, 2018, to approve the creation of a County Assistance District. Section 1 of the Order provided for an election on the following measure:

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? (Emphasis added)

Section 5 of the Order provided, in part, that:

Ballots shall be prepared in accordance with the Texas Election Code, and permit electors to vote “FOR” or “AGAINST” the aforesaid measure which shall appear on the ballot substantially as follows:

ECTOR COUNTY ASSISTANCE PROPOSITION A
“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”

According to Section 387.003(b-1) of the Local Government Code, prior to an election the County must provide notice of its intent to any municipality that has territory included in the proposed district, and also provide notice to the board of directors of any development corporation under Chapter 504 created by the municipality. However, Ector County did not provide notice of the boundaries to the City or to the Board of Directors of the Odessa Development Corporation, which is the Chapter 504 development corporation established by the City. Pursuant to Chapter 387, the County was required 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 Order.

Ector County asserts that they were not obligated to provide notice, because the District excluded the City from the boundaries of the proposed district and accordingly, Section 387.003 (b-1) did not require the County to give notice to the City.

On August 18, 2018, the City Council initiated annexation proceedings in the ETJ of the City in response to requests for voluntary annexation submitted by property owners under the terms of existing industrial district contracts. On November 27, 2018, the City Council enacted Ordinance 2018-46 which annexed various tracts in the City’s ETJ effective as of January 1, 2019, except for one tract with an effective date of May 1, 2019. The City Secretary submitted a copy of the annexation ordinance to the Comptroller on December 20, 2018. The Comptroller, in a letter to interim City Attorney Gary Landers, postponed the imposition of the sales tax in the annexed area until April 1, 2019.¹ While the annexation was moving forward, on November 6, 2018, the creation of the CAD was approved by voters. The County then submitted a copy of the canvass order to the Comptroller of Public Accounts.² By operation of law, the proposed tax would not take effect until April 1, 2019, coincidentally the same day that the Comptroller’s office allowed the annexation to take effect.

On April 1, 2019, the Comptroller posted the following description of the District sales tax without providing notice to the City or the ODC:

¹ Attachment A.

² Attachment B.

The boundaries of the Ector County Assistance District are the same boundaries as Ector County, which has a County-wide hospital district that imposes a special purpose district sale and use tax. The district excludes the cities of Goldsmith and Odessa except for areas in the city of Odessa annexed on or after Nov. 27, 2018. This annexation created the unique area known as the Odessa/Ector County Assistance District Combined Area (6068606). Sales in this unique area must be reported using the local area code of 6068606. Please see information on Combined Area City Sales and Use Tax. Contact the district representative at 432-498-4100 for additional boundary information.

It is the City's assertion that the Comptroller was likely acting under the provisions of Section 321.101(e) and (f) of the Tax Code, which provides for an allocation of sales taxes by a process of reduction and withholding of portions of the local sales taxes.³ The Comptroller's application of Section 321.101(e) and Section 321.101(f) represents an express administrative determination that the District boundaries and the authorizing election exceeded the County's limited power to create the District. The effect of the stated administrative interpretation to include the City's 2018 annexed area resulted in the Comptroller effectively imposing sales taxes in the District's boundaries where the maximum combined sales tax rate was greater than two percent, resulting in a violation of Section 387.003 (b-1) of the Local Government Code. In addition, Section 321.101 (e) and (f) of the Tax Code cannot be used to allocate sales taxes in a district that cannot be created if it can include more than 2%. The only power to impose sales taxes granted to the Comptroller was to observe the statutory limitation on the County to define boundaries for the District so that the District's maximum combined sales tax did not exceed two percent.

As a result, the City and the ODC have not received the amount of money they would have received from the annexed area if the annexed area has been excluded from the District, nor the full amount of sales tax being imposed and remitted to the City and the ODC. In annexing areas, the City provides those areas with basic services. However, in order to pay for those services, the City collects sales and use tax and ad valorem taxes. Without the City's ability to collect sales and use taxes, the City would effectively be unable to grow in the future.

The voted proposition submitted to the CAD electorate therefore was the creation of a CAD that would exclude "all of the territory of the City of Odessa". On the basis of this express and public condition imposed on the proposition submitted to the CAD voters that the City would be excluded from the CAD, the proposition creating the CAD received a majority of the votes cast in the election.

Under Texas case law, where there is a conditional statement of public policy included in a voted proposition to be effective upon approval of the proposition that is submitted to the voters, the policy becomes an enforceable contract upon its approval.^{4 5 6} Further, under Texas law, the

³ Section 321.101(e)-(f), Tax Code.

⁴ *Royalty v. Nicholson*, 411 S.W.2d 565, 571 (Tex. Civ. App. 1967), writ refused NRE (Apr. 26, 1967)

⁵ *Black v. Strength* (112 Tex. 188), 246 S.W. 79 (1922)

⁶ *Moore v. Coffman*, 109 Tex. 93, 95-96, 200 S.W. 374 (1918)

County is required to comply with the contractual commitment it made with the voters in the CAD proposition to exclude any territory of the City of Odessa from the CAD. The County chose to propose to its voters the unconditional exclusion of the territory of the City of Odessa from the proposed CAD, as part of the proposition that also defined the boundaries of the CAD. This broad, unqualified exclusion of the City also recognized the power of the City to expand its territory, and for the CAD thereby to be reduced in area so as to comply with its contractual commitment to voters that if approved, the CAD would not thereafter include the City of Odessa.

Following the canvass of the CAD election, the CAD, as defined in the voted proposition, was created. But that creation was always subject to the condition and limitation that the Commissioners Court had chosen to place on its boundaries that it would exclude the City of Odessa. The County is limited under Texas law to the exercise of powers expressly granted by the Legislature. The limits of County authority were described by the Texas Supreme Court as follows:

The Constitution does not confer on the commissioners courts 'general authority over the County business' and such courts can exercise only such powers as the Constitution itself or the statutes have 'specifically conferred upon them'. See *Mills County v. Lampasas County*, 90 Tex. 603, 606, 40 S.W. 403, 404; *Anderson v. Wood*, 137 Tex. 201, 203, 152 S.W.2d 1084, 1085. While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by any such court must be ultimately found in the Constitution or the statute. *Canales v. Laughlin*, 147 Tex. 169, 173, 214 S.W.2d 451, 453 (1948)

The County could only exclude territory from the CAD under the conditions included in Section 387.003(j) which were met in this case, in that there were no outstanding CAD bonds or obligations, and therefore the exclusion was permitted.

However, it is the City's assertion that it also meant that any portion of the CAD that thereafter included the City of Odessa was also excluded, because the exclusion under this section is permanent. The County therefore excluded from the CAD all future expansions of the City by annexation, by using its specific authority to exclude an area under Section 387.003(j) to define its boundaries. As expressed in the CAD proposition, this condition is a fixed condition for its creation. The condition permanently excluded any City territory from the CAD that could form the basis on which the CAD could thereafter pledge its sales tax derived from any City area to the payment of CAD bonds and contractual obligations.

Therefore, based on the above facts and specified law, I would like to request an Attorney General opinion on the following issues:

- Whether Ector County failed to follow the required procedure for the creation of the District through its failure to provide notice to the City and the ODC required by Section 387.003(b-1) of the Local Government Code?
- Whether the Ector County 2019 County Assistance District proposition should exclude all territory of the City of Odessa including its extraterritorial jurisdiction?

- Whether the Ector County 2019 County Assistance District proposition should exclude all territory of the City of Odessa as an entity, including future land annexed by the City of Odessa?
- Whether the Ector County 2019 County Assistance District proposition represents an enforceable contract with the voters that cannot be disregarded or impaired by the administrative application of Section 321.101 of the Tax Code?
- 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 Section 387.003 b-1?

Thank you for the opportunity to discuss this issue. As always, I'm committed to advocating for and finding common sense solutions for issues arising in our rural communities.

Thank you,

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

Charles Perry
Chair, Senate Committee on Water and Rural Affairs

CC: Office of the Attorney General: Opinion Committee