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RQ-0081-jc

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June 28, 1999

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JUN 29 1999

OPEN RECORDS DIVISION

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Honorable John Cornyn  
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Post Office Box 12548  
Austin, Texas 78711-2548

FILE # ML-40891-99  
I.D. # 40891

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JUN 30 1999

Opinion Committee

Attention: Opinion Committee

Re: Reinvestment zones pursuant to TEXAS TAX CODE ANN. §§ 311.005(a)(1)-(4),  
311.006 or the Texas Constitution. C.A. File No. 84,900

Ladies and Gentlemen:

We request advice regarding the following question:

May a municipality designate an area as a reinvestment zone under TEX. TAX CODE ANN. § 311.005(a)(5), if the area is not blighted or does not satisfy the criteria set forth in TEX. TAX CODE ANN. §§ 311.005(a)(1)-(4), 311.006 or TEX. CONST. art. VIII, § 1-g.

Our memorandum brief is attached. Thank you for your consideration of this request.

Sincerely,

MICHAEL P. FLEMING  
County Attorney

By NICHOLAS J. LYKOS  
Assistant County Attorney

Enclosure

## MEMORANDUM BRIEF

### I. QUESTION PRESENTED

Whether a municipality may designate an area as a reinvestment zone under TEX. TAX CODE ANN. § 311.005(a)(5), if the area is not blighted or does not satisfy the criteria set forth in TEX. TAX CODE ANN. §§ 311.005(a)(1)-(4), 311.006 or TEX. CONST. art. VIII, § 1-g.

### II. DISCUSSION

In 1981 the voters amended the Texas Constitution and permitted the legislature to enact laws authorizing certain taxing jurisdictions to grant tax relief on property located in reinvestment zones for the purpose of encouraging development or redevelopment and improvement of the property. TEX. CONST. art. VIII, § 1-g(b) states, in relevant part, as follows:

(b) The legislature by general law may authorize an incorporated city or town to issue bonds or notes to finance the development or redevelopment of an *unproductive, underdeveloped, or blighted area within the city or town* and to pledge for repayment of those bonds or notes increases in ad valorem tax revenues imposed on property in the area by the city or town and other political subdivisions. [Emphasis added.]

The constitutionality of the Tax Increment Financing Act of 1981 (the "Act"), codified as chapter 311 in the TEXAS TAX CODE, was upheld by the Texas Supreme Court in *City of El Paso v. El Paso Community College District*, 729 S.W.2d 296 (Tex. 1987). In discussing the purpose of the Act, the court commented, "*Tax increment financing is designed to aid cities and towns in financing public improvements in blighted or underdeveloped areas.*" The improvements to the zone are ordinarily financed by revenue bonds or notes and repaid by annual contributions of the tax increment, the amount of property taxes levied by the taxing unit on the captured appraised value of real property located in the zone.

TEX. TAX CODE ANN. § 311.005(a) (Vernon 1992) sets forth various criteria for a reinvestment zone ("TIRZ") and states as follows:

(a) To be designated as a reinvestment zone, an area must:

(1) *substantially arrest or impair the sound growth of the municipality creating the zone*, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use *because of the presence of:*

(A) a substantial number of substandard, slum, deteriorated, or deteriorating structures;

(B) the predominance of defective or inadequate sidewalk or street layout;

(C) faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

- (D) unsanitary or unsafe conditions;
  - (E) the deterioration of site or other improvements;
  - (F) tax or special assessment delinquency exceeding the fair value of the land;
  - (G) defective or unusual conditions of title; or
  - (H) conditions that endanger life or property by fire or other cause;
- (2) be predominantly open and, because of obsolete platting, deterioration of structures or site improvements, or other factors, substantially impair or arrest the sound growth of the municipality; or
- (3) be in a federally assisted new community located in the municipality or in an area immediately adjacent to a federally assisted new community;
- (4) Deleted by Acts 1989, 71<sup>st</sup> Leg., ch. 1106, § 27; or
- (5) be an area described in a petition requesting that the area be designated as a reinvestment zone, if the petition is submitted to the governing body of the municipality by the owners of property constituting at least 50 percent of the appraised value of the property in the area according to the most recent certified appraisal roll for the county in which the area is located. [Emphasis added.]

The Texas Code Construction Act defines the word "must" used in §311.005(a) in TEX. GOV'T CODE ANN. §311.016(3) (Vernon 1998). The word "must" *creates or recognizes a condition precedent*. In order for a TIRZ to be created, the area must meet one or more of the conditions in §311.005(a)(1), (a)(2), (a)(3) or (a)(5).

Furthermore, Section 311.006 of the Act sets forth restrictions on the composition of the TIRZ and states as follows:

- (a) A municipality may not create a reinvestment zone if:***
- (1) more than 10 percent of the property in the proposed zone, excluding property that is publicly owned, is used for residential purposes; or***
  - (2) the total appraised value of taxable real property in the proposed zone and in existing reinvestment zones exceeds 15 percent of the total appraised value of taxable real property in the municipality and in the industrial districts created by the municipality.***
- (b) A municipality may not change the boundaries of an existing reinvestment zone to include property more than 10 percent of which, excluding property dedicated to public use, is used for residential purposes or to include more than 15 percent of the total appraised value of taxable real property in the municipality and in the industrial districts created by the municipality.**
- (c) A municipality may not create a reinvestment zone or change the boundaries of an existing reinvestment zone if the proposed zone or proposed boundaries**

of the zone contain more than 15 percent of the total appraised value of real property taxable by a county or school district.

- (d) For purposes of this section, property is used for residential purposes if it is occupied by a house having fewer than five living units, and the appraised value is determined according to the most recent appraisal rolls of the municipality.
- (e) ***Subsection (a)(1) does not apply to a reinvestment zone designated under Section 311.005(a)(5).*** [Emphasis added.]

However, as § 311.006(e) clearly states, the § 311.006(a)(1) residential restriction does not apply if the TIRZ is a petition zone. The purpose is to allow residents to petition a municipality to have their *blighted neighborhoods* designated a TIRZ. Furthermore, this section does not except the criteria set forth in § 311.005(a) of the Act.

Although the Texas Tax Code does not define “blighted”, the Legislature has defined it in other similar statutes and made specific findings. The Texas Urban Renewal Law, codified as TEX. LOC. GOV'T CODE ANN. § 374.001 *et seq.* (Vernon 1999), defines “blighted area” in § 374.003(3).

- (3) “Blighted area” means *an area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.* The term includes an area certified as a disaster area as provided by Section 374.903. [Emphasis added.]

Furthermore, in TEX. LOC. GOV'T CODE ANN. § 374.002, the Legislature made the following findings relative to “slum and blighted areas”:

- (a) The legislature finds that slum and blighted areas exist in municipalities in this state and that those areas:
  - (1) are a serious and growing menace that is injurious and inimical to the public health, safety, morals, and welfare of the residents of this state;
  - (2) contribute substantially and increasingly to the spread of disease and crime, requiring excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, and for crime prevention, correctional facilities, prosecution and punishment, treatment of juvenile delinquency, and the maintenance of adequate police, fire, and accident protection and other public services and facilities; and
  - (3) constitute an economic and social liability, substantially impair the sound growth of affected municipalities, and retard the provision of housing accommodations.

(b) *For these reasons, prevention and elimination of slum and blighted areas are matters of state policy and concern that may be best addressed by the combined action of private enterprise, municipal regulation, and other public action through approved urban renewal plans. The legislature further finds that the repair and rehabilitation of buildings and other improvements in affected areas, public acquisition of real property, demolition of buildings and other improvements as necessary to eliminate slum or blight conditions or to prevent the spread of those conditions, the disposition of property acquired in affected areas and incidental to the purposes stated by this subsection, and other public assistance to eliminate those conditions are public purposes for which public money may be spent and the power of eminent domain exercised.*

(c) It is the intent of the legislature that private enterprise be encouraged to participate in accomplishing the objectives of urban renewal to the extent of its capacity and with governmental assistance as provided by this chapter. [Emphasis added.]

In addition, the Texas Department of Housing and Community Affairs chapter in the Texas Government Code defines "economically depressed or blighted area". TEX. GOV'T CODE ANN. §2306.004(6) (Vernon Supp. 1999).

(6) *Economically depressed or blighted area means an area:*

(A) that is a qualified census tract as defined by Section 143(j), Internal Revenue Code of 1986 (26 U.S.C. Section 143(j)) or has been determined by the housing finance division to be an area of chronic economic distress under Section 143, Internal Revenue Code of 1986 (26 U.S.C. Section 143);

(B) established in a municipality that has a substantial number of substandard, slum, deteriorated, or deteriorating structures and that suffers from a high relative rate of unemployment; or

(C) *that has been designated as a reinvestment zone under Chapter 311, Tax Code.* [emphasis added]

Therefore, it appears that the legislature intended to ratify or approve any reinvestment zone designated by a municipality under the Act as an economically depressed or blighted area.

Statutes authorizing the creation of a TIRZ, while a recent phenomenon in Texas, trace their origins to statutes of the 1930s and 1940s which authorized urban redevelopment and slum clearance. While the original purpose of these statutes was to eliminate slums and blighted areas and to provide housing for the urban poor, the courts have demonstrated a willingness to uphold redevelopment statutes against constitutional attack. The inadequacy of streets running through a proposed redevelopment area is considered a factor in determining that an area is "blighted". In *Redevelopment Agency of San Francisco v. Hayes*, 266 P.2d 105 (Cal. Dist. Ct. App.), *cert. denied*, 348 U.S. 897, 75 S. Ct. 214 (1954) the court upheld the determination of the community development agency and noted there was wasteful street design, unsuited and unadapted to the topography of the area, and that streets of usable grade were connected with streets too steep in

grade. However, in *Bristol Redevelopment & Housing Authority v. Denton*, 93 S.E.2d 288 (1956), the court held that the redevelopment authority improperly classified a proposed redevelopment area as blighted noting that while a few residences were dilapidated, it is the condition of the area as a whole and not that of isolated structures that is controlling. In *Housing Authority of City of Dallas v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940), the court considered whether slum clearance and low rent housing are public uses to invoke the power of eminent domain. While the court held that the power of eminent domain to provide housing projects served a public purpose, the question of what is "public use" is a question of law and not a question of fact. The court, quoting *Dallas Cotton Mills v. Industrial Corp.*, 296 S.W. 503, (Tex. Com. App. 1927) stated, "Mere fiat, whether pronounced by the Legislature or by a subordinate agency, does not make that a public use which is not such in fact, and the question (always present) as to the true nature of the use is one of law." See also *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 475 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)

Recently, the Texas Supreme Court considering an unrelated issue under the Texas Tax Code, in *Fleming Foods of Texas, Inc. v. Rylander, et al.*, No. 97-1044 (Tex. June 10, 1999) reiterated, "It is a cardinal rule of statutory construction that we are to give effect to the intent of the Legislature." See *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). The court stated,

We must be able to accept and to rely upon the words written by the Legislature if they are clear and unambiguous, their meaning is plain when the code in which they appear is read in its entirety, and they do not lead to absurd results.

Furthermore, TEX. GOV'T CODE ANN. §§ 311.021(3)(5) (Vernon 1998) states in relevant part as follows: "In enacting a statute, it is presumed that: (3) a just and reasonable result is intended; (5) public interest is favored over any private interest."

The Act provides a mechanism for municipalities to obtain funding from other taxing jurisdictions for infrastructure improvements within a reinvestment zone. However, unlike the Texas Urban Renewal Law, the Act does not require a public vote of the people in order to establish a reinvestment zone under chapter 311 of the Texas Tax Code. Although a definition of "blighted area" is conspicuously absent from this chapter, TEX. GOV'T CODE ANN. § 311.011(a) states, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Although it appears that the legislature intended to grant a municipality broad discretion in making that determination based upon the criteria set forth in TEX. GOV'T CODE ANN. § 2306.004(6)(C) (Vernon Supp. 1999), the genesis of chapter 311 of the Texas Tax Code is TEX. CONST. art. VIII, § 1-g(b), *the development or redevelopment of an unproductive, underdeveloped, or blighted area within the city or town*. Therefore, it appears that the legislature did not intend to abrogate the criteria for designation of a zone under TEX. TAX CODE ANN. § 311.005(a)(5) as that construction of the statute would be contrary to the Texas Constitution.

# COMMITTEE ON FINANCIAL INSTITUTIONS

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Opinion Committee

FILE # RQ-0081-jc

I.D. # 40983

September 9, 1999

Honorable John Cornyn  
Attorney General of Texas  
Supreme Court Building  
Post Office Box 12548  
Austin, Texas 78711-2548

RQ-0081-jc

Attention: Opinion Committee

Re: Tax Increment Reinvestment Zones created under Tex. Tax Code Ann. §311.005 and Tex. Const. art. VIII, §1-g, Tex. Gov't Code §403.302(d), (e) and Tex. Const. art. VII, §1

Ladies and Gentlemen:

The House Committee on Financial Institutions formally requests an advisory opinion by the Office of the Attorney General on the following three matters:

1. May a municipality lawfully designate an area as a reinvestment zone under Tex. Tax Code Ann. §311.005, if that area is not in fact "unproductive, underdeveloped, or blighted," within the meaning of Tex. Const. art. VIII, §1-g? See *City of El Paso v. El Paso Community College District*, 729 S.W.2d 296 (Tex. 1987).
2. Can the meaning of the terms "unproductive, underdeveloped, or blighted" in Tex. Const. art. VIII, §1-g fairly be construed to apply to a commercial area that already has a substantial appraised value, has experienced and continues to experience substantial continued commercial development, and that is not "blighted," within the meaning attributed to that term under relevant Texas statutes - simply because a municipality contemplates that greater future development would occur in that area if a tax increment reinvestment zone were created than if it were not created?
3. Are the provisions of Tex. Gov't Code §403.302(d),(e) - which provide that the taxable value of property within a school district for purposes of calculating benefits due the district under existing state school finance formulas shall not include the appraised value of property within a reinvestment zone existing on September 1, 1999, apparently even if a school district

retains financial benefits from incremental taxes generated within the zone - constitutional in light of the provisions of Tex. Const. art. VII, §1? See Edgewood Independent School District v. Meno, 893 S.W.2d 450 (Tex.1995).

This request may coincide with a similar request recently made by Michael Flemings, Harris County Attorney. Thank you for your prompt consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Kip Averitt", with a long, sweeping horizontal stroke extending to the right.

Kip Averitt