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OPINION COMMITTEE

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January 13, 2009

Re: *Request for Opinion*

Dear Mr. Abbott,

RQ-0777-GA

FILE # HL-45969-09
I.D. # 45969

Please accept this letter as a request for your opinion regarding certain issues that have arisen concerning a city councilman's ownership and subsequent transfer of ownership with a reservation of property included in a Tax Increment Reinvestment Zone in Huntsville.

Pursuant to Texas Government Code 402.043, I have attached a brief that includes a detailed listing of facts, the proposed questions and my research on the subject.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

David P. Weeks
Criminal District Attorney
1036 11th St.
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936-435-2441

STATEMENT OF FACTS

By Ordinance No. 2004-16, the City of Huntsville created a Tax Increment Reinvestment Zone (hereinafter referred to as "zone") as contemplated by Chapter 311 of the Texas Tax Code. By an interlocal agreement dated August 3, 2004, with the City of Huntsville, Walker County agreed to participate in the zone.

During the relevant time Walter M. Woodward (hereinafter "Councilman") was, and currently is, a member of the City Council of Huntsville. The Councilman did not deliberate nor vote on the zone because he owned a 4.3729% undivided interest in certain real property located within the zone. The Councilman also owned an interest in M.R. Woodward Family Limited Partnership, which at a later date acquired an 8.7458% undivided interest in the same real property.

On July 21, 2008, the zone board tabled an action on two proposals for hotel development located on a portion of the above described property due to the Councilman's partial ownership thereof. The agreement was to be between the city and two hotel developers and not with the Councilman or any member of his family.

On July 25, 2008, Councilman deeded his 4.3729% undivided interest in the zone to his adult children. The M.R. Woodward Family Limited Partnership was subsequently dissolved. As a result of the dissolved partnership, the Councilman was deeded a 2.470% undivided interest in the real property in the zone owned by the partnership. On September 4, 2008, the Councilman deeded this 2.470% undivided interest to his two adult children as well. As a result of these two transfers, the Councilman seemingly no longer had an ownership interest in any part of the zone.

In both of the above mentioned deeds to his children, the Councilman reserved the net proceeds from any future sale of the property and transferred and assigned those proceeds to the City of Huntsville to be used for the renovation, expansion and/or construction of the Public Library in memory of Dr. Mac Woodward.

At the end of September 2008, a contract expired on one of the above mentioned hotel sites. The contract was renewed and extended in October 2008. Earnest money was issued pursuant to the renewed and extended contract by the Title Company. The City of Huntsville received a check for \$1,026.54 as its portion of the earnest money from the above deed transfer and assignment by the Councilman mentioned above. The City of Huntsville accepted this payment by depositing the check which cleared the bank on October 22, 2008.

QUESTIONS

- 1) Did the reservations in the deeds operate to exclude the property from tax increment financing under Texas Tax Code 312.204(d)?
- 2) If the reservations and assignments do exclude the property under 312.204(d), do they operate to exclude the entire tract, or is it limited to the Councilman's portion of the tract?

ARGUMENT AND AUTHORITY

1) Do the reservations and assignments in the deeds operate to exclude the property from tax increment financing under Tax Code 312.204(d)?

In pertinent part to the facts of this case, Texas Tax Code 312.204(d) reads:

“... Property that is in a reinvestment zone and that is owned or leased by a person who is a member of the governing body of the municipality... is excluded from ... tax increment financing....”

Deeds fall under the “four corners” rule of construction. The Court’s primary duty when construing a deed is to ascertain the intent of the parties from all the language contained within the four corners of the document. *Cherokee Water Company v. Freeman*, 33 S.W. 3d 349, 355 (Tex. App. – Texarkana 2000). Where the true intent of the grantor, as indicated from the document as a whole, shows that the words used were intended to be given a commonly accepted meaning rather than a technical or legal one, such clearly manifested intent will be given effect. *Id.*

A reservation operates for the benefit of the grantor and serves to retain in him his ownership to the extent stated. *York v. Kenilworth Oil Company*, 614 S.W. 2d 468 (Tex. App. – Waco 1981). The assignor after an unqualified assignment and notice to the obligator generally loses all control over the chose and can do nothing to defeat the rights of the assignee. *The University of Texas Medical Branch at Galveston v. Allan*, 777 S.W. 2d 450, 453 (Tex. App. – Houston [14th Dist.] 1989).

In our case, the Councilman by Gift Deed granted to his adult children the property reserving only the right to the proceeds of a future sale of the property. Contemporaneously with the reservation, the Councilman transferred and assigned this right to the city of Huntsville. A reading of the language contained in the deed would indicate that the transfers and assignments are irrevocable under the authority of the case law cited above. Additionally, the City of Huntsville has received the benefit of this assignment through its receipt and acceptance of the earnest money from the title company.

Because the Councilman has irrevocably relinquished all rights to the property to persons over whom he has no control, it is the opinion of this office that the property is not excluded under Texas Tax Code 312.204(d).

2) If the reservations and assignments do exclude the property under 312.204(d), do they operate to exclude the entire tract or is it limited to the Councilman's portion of the tract?

In our case, the Councilman owned a 7% undivided fee simple interest in the property. Should his reservation and assignment operate to exclude this property from the benefit of tax increment financing, then it should only exclude his portion of the tract and not the remaining 93% of the tract.

My research has not yielded any similar cases. Therefore, I will revert to statutory and constitutional interpretation. Previous attorney general opinions cite the Code Construction Act when interpreting these statutes. Tex. Att'y Gen. DM 98-001 at 2-3. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Government Code 311.011(a). Texas Tax Code 312.204 when read according to the rules of grammar and common usage appears to exclude only

property that is owned or leased by a councilmember. There is not any reference to the remaining portion of the property, if any, in the statute. Therefore, by its silence, the statute does not appear exclude the entire tract of land from tax increment financing but only that portion owned by the councilmember.

Also, to read the statute as excluding the entire tract may operate to be a taking in violation of the U.S. and Texas Constitutions. A physical taking may occur when the government physically appropriates or invades private property, or unreasonably interferes with the landowner's right to use and enjoy it. *Tarrant Regional Water Dist. v. Gragg*, 151 S.W. 3d 546, 554 (Tex. 2004). When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation. *Id.*

Obviously if the statute in this situation prevents the owner(s) of the remainder of the tract from entering into agreements concerning their real property, this would constitute interference with the use and of their property. This interference could be construed as an unconstitutional taking.

Because a plain reading of the statute does not exclude property owned by persons other than councilmen, it should not operate to exclude the remainder of the tract in this instance from receiving tax increment reinvestment. Additionally, should the statute exclude persons who are not councilmen from entering into contracts regarding their real property, it may constitute an unlawful governmental taking.