



## REPRESENTATIVE MATT KRAUSE

— District 93 • Tarrant County —

The Honorable Ken Paxton  
Attorney General of Texas  
Attn: Charlotte M. Harper, Deputy Chair, Opinion Committee  
PO Box 12548  
Austin, TX 78711-2548  
opinion.committee@oag.texas.gov

### **RE: Revised Memorandum Re: “Grants of Public Funds”**

General Paxton,

Re: Request for an opinion as to the definition of “public money” in Texas Local Government Code Section 381.004(h) as it applies to a reimbursement of ad valorem taxes.

The question at issue is whether or not ad valorem taxes paid by a taxpayer under an agreement with a county which requires that the county pay the taxes back to the taxpayer within thirty days is a “grant of public money” under Texas Local Government Code Section 381.004(h).

### LEGAL BACKGROUND

*Authorization for counties to make grants of public money:*

Texas Local Government Code Section 381.004(g) provides,

The commissioners court may develop and administer a program authorized by Subsection (b) for entering into a tax abatement agreement with an owner or lessee of a property interest subject to ad valorem taxation. The execution, duration, and other terms of the agreement are governed, to the extent practicable, by the provisions of Sections 312.204, 312.205, and 312.211, Tax Code, as if the commissioners court were a governing body of a municipality.

The Attorney General was asked in 1999 whether Chapter 312 of the Texas Tax Code “precludes a commissioners court from providing an economic development grant to a private company pursuant to which the county would make payments to the company that are the economic equivalent of an abatement of real property taxes.” Tex Att’y Gen. Op. No. JC-0092 (1999) at 1. The requestor of the opinion called these payments “grants” and the Attorney General stated that “the legislature did not intend Section 381.004 to authorize counties to make economic development grants.” *Id* at 6. The opinion does not define or address what constitutes a “grant of public funds.” It does, however, state that to “construe section 381.004 to authorize a commissioners court to offer economic incentives akin to those that the legislature has expressly



authorized in chapter 312 would undermine these procedural protections.” *Id.* at 5. The opinion also points to Texas Government Code Section 311.023 which provides that in construing statutes court may consider both laws on similar subjects and consequences of particular construction. *Id.* at 5.

In 2001, the Legislature amended the Texas Local Government Code to add Section 381.004 (h) which states that “The commissioners court may develop and administer a program authorized by Subsection (b) for making loans and grants of public money and providing personnel and services of the county.”

The Attorney General addressed Texas Local Government Code Section 381.004 again in 2019 when it answered a question as to whether the limitations of the Texas Tax Code that apply to Section 381.004(g) also apply to Section 381.004(h). Att’y Gen. Op. KP-0261 (2019). However, Opinion KP-0261 did not define “public money” or “grant of public money” as it relates to Section 381.004(h).

#### *Definition of Money:*

Blacks Law Dictionary defines Money as, “1. The medium of exchange authorized or adopted by a government as part of its currency. 2. Assets that can be easily converted to cash 3. Capital that is invested or traded as a commodity. 4. (pl.) *Funds*; sums of money” MONEY, Black's Law Dictionary (11th ed. 2019). (emphasis added) (citations omitted) (examples omitted).

#### *Public Funds vs. Special Funds:*

Texas Government Code Section 552.003(5) defines “public funds” as “funds of the state or of a governmental subdivision of the state.” The Texas Attorney General has stated:

Public funds are funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose . . . The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian.

Tex. Att’y Gen. Op. KP-0142 (2017) at 2 citing *San Antonio Bldg. & Constr. Trades Council v. City of San Antonio*, 224 S.W.3d 738, 746 (Tex. App.—San Antonio 2007, pet. denied) (adopting Texas Attorney General's definition of public funds to construe PFIA (citations omitted)); see also Tex. Att’y Gen. Op. No. GA-0257 (2004) at 3.

In applying this definition, [the Texas Attorney General’s Office] looked to several characteristics to determine whether funds may be characterized as public, including whether the funds belong to the State or are held merely in a custodial role and whether the State may use the funds to discharge a public purpose or draw upon them only to benefit particular individuals.

Tex. Att’y Gen. Op. KP-0142 (2017) at 2 (citing Tex. Att’y Gen. Op. No. GA-0257 (2004) at 3).

Opinion KP-0142 stated a Texas court would likely find that funds initially collected for one purpose then used for an entirely different public purpose were public funds because the funds were not held in trust for the benefit of certain taxpayers. *Id.* at 2

While the opinions above relate to the Public Funds Investment Act, the Texas Attorney General has made clear that “those characteristics of ‘public funds’ are relevant to law outside the Public Funds Investment Act context.” Att’y Gen. Op. KP-0234 (2019) at 2.

#### *Authority of a county commissioners court*

The Attorney General, in Attorney General Opinion JC-0092, stated:

Courts of this state have long held “that although a commissioners court may exercise broad discretion in conducting county business, the legal basis for any action must be grounded ultimately in the constitution or statutes.” *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993) (citing *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948)). Specifically with respect to contracts, courts have held that the authority of a commissioners court to make contracts on behalf of the county is limited to that conferred either expressly or by necessary implication by the constitution and laws of the state. See, e.g., *Childress County v. State*, 92 S.W. 2d 1011, 1016 (Tex. 1936); *Jack v. State*, 694 S.W. 2d 391, 397 (Tex. App.-San Antonio 1985, writ ref’d n.r.e.).

#### FACTUAL BACKGROUND

The agreement at issue requires that the developer install improvements on the leased property, provide a certificate of completion to the county, pay the tax due on the improvements, operate the project, and provide proof that the developer has created two full-time jobs on the property. Under this agreement, the developer will owe no tax if the developer does not install its planned improvements. If the developer does install its planned improvements, the developer will owe tax on such improvements, but the county will be required to reimburse 100% of the developer’s tax payment back to the developer within 30 days of receipt each year for ten years.

Commissioners courts in unincorporated areas are being approached by solar developers requesting counties grant these types of agreements. The developers purport that the agreements are “grants of public money” authorized by Texas Local Government Code Section 381.004(h) and not subject to the procedural protections of the Texas Tax Code applicable to tax abatements. Attorney General Opinion JC-0092, which states that an owner who is a party to a tax abatement agreement does not pay the taxes that are abated pursuant to the agreement, has been cited in support of this position. Att’y Gen. Op. JC-0092 at 4.

QUESTION

At issue here is whether or not Texas Local Government Code Section 381.004(h) authorizes a commissioners court to approve an agreement between a developer and the county which requires the county to reimburse 100% of taxes paid back to the developer.

POSITION

It is our position that agreements that call for a reimbursement of taxes paid describe “special funds” earmarked for a particular purpose and therefore cannot be grants of public money under Texas Local Government Code § 381.004(h). Funds do not become public funds simply by being in the hands of the county and requirements that simply reiterate the plans of a developer are illusory.

If you have any questions, please do not hesitate to contact my Chief of Staff, Shane Birdwell, at [shane.birdwell@house.texas.gov](mailto:shane.birdwell@house.texas.gov) or 512-463-0562.

Sincerely,

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

Chairman Matt Krause  
Texas House District 93  
Texas House Committee on General Investigating, *Chairman*