

Opinion No. 2012-131

December 4, 2012

The Honorable Bobby J. Pierce  
State Representative  
587 Grant 758  
Sheridan, Arkansas 72150-6766

Dear Representative Pierce:

I am writing in response to your request for my opinion on the following two questions:

1. Do Sections 9 and 11 of Act 35 of 1979 deal with assessment of property values only?
2. Can these sections be used to increase tax liability against each assessed property in the fire district from 1/10th of 1% to 1.5/10th of 1%?
3. If the answer to question 2 is “no,” what can be done to correct this problem and not endanger operations in [the] department?

As background, you report the following:

Calvert township fire protection district was formed by organization meeting on October 27, 1985, pursuant [sic] to Act 35 of 1979.

At the time of organization, a tax was requested of 1/10<sup>th</sup> of 1%. This was used as a base tax for the operation of department. This is what the voting members of the township were promised and the fire district was approved in a special election held on September 10, 1985. It provided a tax revenue of approx. \$24,000.00 per year.

This tax was raised to 1.5/10<sup>th</sup> of 1% of property value in January of 1998, by the sitting board without the vote of the township members. Act 35 of 1979, Section 9(d) was used as the basis for the increase. Act 35 of 1979, Section 11 was followed and used to justify the increase.

You have attached to your request various documents that presumably bear on this summary. Arranged chronologically, the first is an Election Certificate, issued by the Grant County Board of Election Commissioners and file-marked September 16, 1985, proclaiming, in pertinent part, as follows:

This is to certify that we have canvassed the returns of the Special Election held in Grant County, Arkansas, Calvert Township, on Tuesday, September 10, 1985, and have found that the returns show that the establishment of a fire protection district in Grant County, Calvert Township, and the levy of assessed benefits on real property in the district to finance the district was approved by a majority vote.

The second, which is undated but was presumably produced contemporaneously with the meeting it records,<sup>1</sup> is captioned “Minutes of Organization Meeting Calvert Township Fire Protection District” (the “Minutes”). The Minutes report the activities at “[t]he organization meeting of Calvert Township Fire Protection District [the “District’] . . . on October 27, 1985.” The Minutes report that the Grant County Court, by “Grant County Court Order C 85-10,” apparently issued after the election but before the described meeting, had appointed five members as the District’s Board of Commissioners (the “Board”). The Minutes further report that the Board selected its officers and appointed two of its members, as well as a quorum court member who was present at the meeting, as the three District assessors. The Minutes finally report: “After a vote was taken the levying of one tenth of one percent tax unanimously carried.” Although the Minutes do not reflect whether this vote was conducted exclusively by the assessors, it appears, at the very least, that they participated in the unanimous result.

You have further attached to your request a document, dated August 6, 1987,<sup>2</sup> captioned “Proclamation Declaring Results of Election” and executed by the Grant

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<sup>1</sup> For reasons not explained, the document is file-marked February 13, 2007 by the County and Circuit Clerk of Grant County.

<sup>2</sup> This document is also file-marked August 6, 1987 by the County and Circuit Clerk of Grant County.

County Judge. This document proclaims the results of an election, certified by the Grant County Board of Election Commissioners, “approv[ing] by the voters in the special election conducted September 10, 1985,” the “establishment of a fire protection district known as Calvert Township Fire Protection District . . . and the levy of assessed benefits on real property in the district to finance the district.”

You have further attached a document, dated January 13, 1998,<sup>3</sup> captioned “Certificate of County Clerk,” declaring as follows:

The undersigned, County Clerk of Grant County, Arkansas, hereby certifies that there has been filed with me a certified copy of the Resolution of Calvert Township Fire Protection District adopted March 16, 1988, and the Pledge and Mortgage of the District executed and delivered on March 16, 1988, that there has been levied, and pledged to payment of the District’s Improvement Bonds, an increase in the special improvement tax on January 13, 1998, from .005% to .0075%, on the assessed benefits on the real property within the boundaries of the District and that the collections of the special improvement tax has [sic] been extended for collection in the year 1998 and thereafter. . . .

This record apparently documents an increase in January 1998 of the “special improvement tax” to service District bonds previously issued pursuant to Act 35.

I am frankly at a loss to determine the full significance of the above referenced documents to your questions or to reconcile their content with your narrative summary. Without attempting to itemize discrepancies and unanswered factual questions, I will merely note by way of illustration that the increase reflected in the Clerk’s Certificate just quoted bears no relation to the increase described in your factual summary.

The following circumstances, however, which will frame my analysis of your questions, do appear to be established:

- Citizens of the township by special election approved formation of the District and “the levy of assessments” in September 1985.

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<sup>3</sup> This document was file-marked by the County and Circuit Clerk on the same date.

- At some point between the election and the above referenced “organization meeting,” the County Court appointed Board members.
- The Board conducted an “organization meeting” in October 1985 during which it appointed three assessors, who approved the levy of an assessment.
- The District in 1998 increased a “special improvement tax” for the apparent purpose of servicing previously issued District Improvement Bonds. Although none of the documents in my possession reflects what entity authorized the increase, I infer from your request that it was effected without a vote of approval by district residents.
- All of these actions were undertaken under the recited authority of Act 35 of 1979.

Considered against this factual backdrop, your questions suggest a concern regarding the propriety both of imposing this tax in the first place and, assuming its initial validity, of increasing it without voter approval.

## **RESPONSE**

With respect to your first question, although sections 9 and 11 of Act 35 of 1979 indeed deal with “the assessment of property values,” they do not deal “only” with assessments. Section 9, for instance, further deals with the general powers of a district board of commissioners, of which the power to make assessments is only one, and section 11 deals with equalization procedures and appeals from the assessment decisions made by a district board of assessors. With respect to your second question, in my opinion, section 9 must be read as including a power to increase assessments. Moreover, with regard to the particular circumstances giving rise to your request, read in conjunction with Act 35 as a whole, both sections are in all respects consistent with the proposition that a district board of assessors can without voter approval increase assessments on district properties. In light of my response to your second question, your third question is moot.

***Question 1: Do Sections 9 and 11 of Act 35 of 1979, deal with assessment of property values only?***

Although both of the referenced sections deal with the issue of assessments, they do not “only” do so. Section 9 is broader, setting forth all of the powers assigned to a fire protection board organized under Act 35.<sup>4</sup> These powers include, but are not limited to, the authority to “make assessments of benefits against real property in the district benefitted by fire protection services of the district, and to provide for the collection of such assessments.”<sup>5</sup> Section 11 does not deal with the initial assessment, but rather sets forth the equalization process and the procedure for appealing any particular assessment or reassessment.<sup>6</sup>

***Question 2: Can these sections be used to increase tax liability against each assessed property in the fire district from 1/10th of 1% to 1.5/10th of 1%?***

If by “increase tax liability” you mean “raise assessments,” in my opinion, the answer to this question is “yes,” although the assessors’ authority to increase assessments is more directly addressed in another section of Act 35.

Section 10 of Act 35, which you do not mention in your request but which bears on my response to your question, directs, *inter alia*, that the board of commissioners of an Act 35 district, however formed, appoint three assessors “to assess the annual benefits which will accrue to the real property within the district” by virtue of the district’s operations.<sup>7</sup> More particularly, section 10 provides:

The assessors shall . . . assess the annual benefits to the lands within the district, and shall inscribe in a book each tract of land and shall extend opposite each tract of land the amount of annual benefits that will accrue each year by reason of said services.<sup>[8]</sup>

As this excerpt suggests, the assessments of benefits to property contained in a district is subject to annual review by the board of assessors, meaning that the assessments themselves might be subject to adjustment.

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<sup>4</sup> Acts 1979, No. 35, § 9, which is codified almost verbatim in A.C.A. § 14-284-211 (Repl. 1998).

<sup>5</sup> Act 35, § (9)(d), A.C.A. § 14-284-211(4).

<sup>6</sup> Section 11 is codified at A.C.A. § 14-284-213 (Repl. 1998).

<sup>7</sup> As amended, section 10 is codified at A.C.A. §14-284-212 (Supp. 2011).

<sup>8</sup> A.C.A. § 14-284-212(c).

The process of reassessing property to account for changed circumstances is set forth in section 12 of Act 35, which provides as follows:

The Commissioners shall, once a year, order the assessors to reassess the annual benefits of protected property in the district if there have been improvements made or improvements destroyed or removed from one (1) or more tracts of land in the district, making it necessary to have the annual benefits revised. Whereupon, it shall be the duty of the assessors to reassess the benefits of said district and the annual benefits assessed may be raised or lowered as fire protection services benefitting the property change. Provided, if the Commissioners determine that there have been no significant changes in improvements on the lands in the district it may direct that assessed benefits remain the same as the benefits assessed the preceding year.<sup>[9]</sup>

In my opinion, this provision is unequivocal in establishing the assessors' authority to raise assessments without an election of district members. I should note, however, that the ultimate authority regarding the imposition of assessments – an authority I consider to include raising assessments without voter approval – resides in the district board of assessors pursuant to Act 35, § (9)(d), which is set forth in my response to your previous question.<sup>10</sup>

With regard to your specific concern that the voters did not expressly approve the increase in assessments, I will additionally note that the concept of voter approval under Act 35 applies only to the District's formation and the grant of authority to the District to impose assessments upon its members. Act 35 contains no provision requiring voter approval of the size of assessments. More specifically, section 1 of Act 35 authorizes the establishment of a fire protection district in either of two ways: (1) by ordinance of the quorum court or (2) by order of the county court following an election approving the formation by the qualified electors of the proposed district.<sup>11</sup> The factual summary set forth above reflects

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<sup>9</sup> This provision is codified almost verbatim in A.C.A. § 14-284-214 (Repl. 1998).

<sup>10</sup> This subsection is codified at A.C.A. § 14-284-211(4). *Accord* Op. Att'y Gen. No. 87-379 ("The Commissioners appear to have final authority in this regard.").

<sup>11</sup> As amended, section 1 is codified at A.C.A. § 14-284-203 (Supp. 2011).

that the District in this case was established pursuant to the second of these methods. The 1987 Proclamation Declaring Results of Election attached to your request sets forth a ballot that tracks verbatim the language required for such an election under Act 35, § 5.<sup>12</sup> As reflected in the ballot measure reproduced in that document, the voters in 1987, in accordance with the template set forth in Act 35 itself, approved only “the levy of assessed benefits on real property in the district to finance the district”; this approval did not involve any specific rate of assessment. As noted above, the board of assessors is charged with determining these assessed benefits with respect to each parcel contained within the district.

Although you do not raise the issue directly, implicit in your concern over the propriety of the assessors’ action might be a question whether an across-the-board increase in what you term a “base tax” is consistent with the principle that assessments must be determined on a parcel-by-parcel basis. In my opinion, inasmuch as the revenues realized from any such “tax” will necessarily vary in accordance with the appraised value of each district property, this mode of assessment in all likelihood complies with the requirement of individualized assessment set forth in section 12 of Act 35. The assessed annual benefit to any parcel under such a system will be determined as a specified percentage of its value as appraised, presumably taking into account the availability through the district of fire protection services.

Although I have found no case law directly addressing this issue,<sup>13</sup> this office has previously suggested that a method of assessing benefits based upon property

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<sup>12</sup> This section of Act 35 is codified at A.C.A. § 14-84-205 (Supp. 2011).

<sup>13</sup> The Arkansas Supreme Court verged on addressing this question in *Cox v. Commissioners of Maynard Fire Improvement District No. 1*, 287 Ark. 173, 175, 697 S.W.2d 104 (1987), which declared as appropriate under Act 35 “an assessment of benefits and a corresponding tax.” The court distinguished as contrary to law a “flat tax rate” in a designated amount “for each house, . . . each business, . . . and . . . each mobile home, regardless of valuation.” *Id.* However, the variety of “flat tax” laconically characterized as impermissible by the court appears to betoken only an invariable fee applicable to all properties in a given category irrespective of their relative values. Such a flat fee is not at issue in the situation described in your request.

Although it does not bear on your question, I will note in passing that the subchapter dealing with assessments was amended in both 1989 and 1995, to authorize the levy of a “flat fee” per parcel of land. *See* Acts 1989, No. 648 and Acts 1995, No. 766, codified in pertinent part at A.C.A. § 14-284-212(g). *See* Ops. Att’y Gen. Nos. 2008-114 and 95-207 (generally discussing this change). As reflected in A.C.A. § 14-284-212(g), the option of assessing a flat fee applies only to districts formed after July 3, 1995. The District in this case was formed prior to this date.

values in all likelihood accords with the applicable legislation. In specifically addressing this question, one of my predecessors offered the following:

The assessors of the district are charged with the duty to “assess the annual benefits to the lands within the district” that will accrue “by reason of the [fire protection] services.” A.C.A. § 14-284-212(c). The legislation does not, however, specify or otherwise address the actual method to be used in determining the benefits accruing to each parcel. In my opinion, this is a matter for the board of assessors. Your question appears to assume that there will not be an assessment based on benefits accruing from services if the assessment is based on property values. I cannot accept that proposition. Indeed, the opposite assumption is reflected in A.C.A. § 14-284-214, which orders a reassessment “if there have been *improvements made or improvements destroyed or removed* from one (1) or more tracts of land in the district, *making it necessary to have the annual benefits revised.*” *Id.* at subsection (a) (emphasis added).<sup>14</sup>

I fully concur in my predecessor’s analysis.<sup>15</sup>

***Question 3: If the answer to question 2 is “no,” what can be done to correct this problem and not endanger operations in [the] department?***

This question is moot in light of my response to your previous question.

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<sup>14</sup> Op. Att’y Gen. No. 2001-318 (footnote omitted).

<sup>15</sup> Having agreed with this excerpt, I should note that another of my predecessors has questioned, without rejecting outright, the proposition that an Act 35 fire protection district could be financed through a tax millage on real property. Op. Att’y Gen. No. 88-023. My predecessor distinguished between a permissible assessment upon annual benefits accruing to real property and an impermissible “tax that is levied notwithstanding the benefits accruing to the property.” *Id.* The point in drawing this distinction appears to have been only that a fixed assessment failing to account for the possibly fluctuating value of annual benefits would be impermissible under Act 35. However, as reflected in the opinion just quoted in my text, any mode of assessment that takes into account the additional benefit resulting from fire protection when the underlying value of property increases would appear to comply with Act 35. Making assessments by applying what you term a “base tax” rate to the fluctuating value of property over time appears consistent with this principle.

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Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

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