



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-032

June 10, 2014

The Honorable Andrea Lea
State Representative
Post Office Box 1342
Russellville, Arkansas 72811-1342

Dear Representative Lea:

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

1. If a volunteer fire department petitions to become a fire protection district under A.C.A. § 14-284-205 (Act 35 [of 1979]) and the ballot measure is successful, the Board is given broad authority and responsibilities as to how to oversee the department. Are the fees/dues that the board is allowed to assess classified as taxes?
2. If the petition used to put a referendum on the ballot to create the fire protection district specifically lists the maximum amount of assessed levy that can be charged by the district – in this case \$20 – and does not provide for a method to change those limits and there have been no other elections to increase the maximums, can the Board of Directors randomly override or exceed those assessment caps or levies without going back to the ballot to have those caps or windows increased based once again on the wording and structure of the original petition for this ballot measure?
3. If the Board of Directors chooses to use the flat fee assessment method provided in Act 35 and assigns a rate of levy to each [of] the residential and commercial property categories, can the

commercial levy differ for different types of commercial properties or must that flat rate apply consistently throughout the district for all commercial property?

You have attached to your request a copy of a petition, file-marked October 16, 1981, seeking the creation of a fire district in Pope County. The petition is signed by various individuals who I assume were residents of the proposed district. You have further attached a copy of a Pope County Court order, dated February 4, 1982, reflecting district voter approval and duly creating the district. I will address your questions as relating to this particular district.

RESPONSE

With respect to your first question, in my opinion, a court directly faced with the issue would probably decline to classify as “taxes” assessments imposed pursuant to Act 35 of 1979. Although “assessments” are at times referred to as “taxes,” the Arkansas Supreme Court, in directly confronting the issue, has expressly distinguished between the two categories. I interpret your second question to be whether the district board of commissioners may exceed legally mandated assessment caps without first obtaining voter approval to do so. In my opinion, the answer to this question is “no.” With respect to your third question, Act 35 authorizes the adoption of a “flat fee assessment method” only in districts formed after July 3, 1989. The district here at issue was formed in 1982, meaning it is not authorized to impose any flat-fee assessments, whether differential or uniform.

Question 1: If a volunteer fire department petitions to become a fire protection district under A.C.A. § 14-284-205 (Act 35 [of 1979]) and the ballot measure is successful, the Board is given broad authority and responsibilities as to how to oversee the department. Are the fees/dues that the board is allowed to assess classified as taxes?

In my opinion, a court faced with the issue would in all likelihood classify the assessments as “fees,” not “taxes.”

I note initially that it is unclear what bearing the opening declaration in this question has on the question itself. I must point out, however, that “a volunteer fire department” cannot “petition[] to become a fire protection district under A.C.A. § 14-284-205” (Act 35 of 1979).¹ Act 35 does not authorize a fire

¹ Act 35, as amended, is codified at A.C.A. §§ 14-284-201 through -225 (Repl. 1998 & Supp. 2013).

department to seek district status, nor does the petition you have attached to your request appear to have been tendered by a fire department. The petition was signed by what I assume to be the requisite number of qualified electors pursuant to Act 35.

Act 35 provides two methods for the establishment of fire protection districts in rural areas – either by ordinance of the quorum court or by order of the county court following an election of the qualified voters of the proposed district.² The documents you have provided reflect that the district at issue in your request was created by the latter method, effective February 4, 1982.

On at least one occasion, the Arkansas Supreme Court has referred in *dictum* to Act 35 assessments as giving rise to a “tax” obligation.³ The Code in at least two instances requires that assessments be treated in the same manner as taxes.⁴ On various occasions, this office has further reproduced without commentary a requester’s reference to assessments as “taxes” under the Code chapter incorporating Act 35.⁵ On none of these occasions was the designation of assessments as either “taxes” or “fees” at issue.⁶ In another opinion, however, one of my predecessors suggested that Act 35 assessments are distinguishable from “bona fide taxes.”⁷

² A.C.A. §§ 14-284-204 and -205 (Supp. 2013); *see also* Op. Att’y Gen. 91-128 (discussing these alternatives).

³ *Cox v. Commissioners of Maynard Fire Improvement District No. 1*, 287 Ark. 173, 175, 697 S.W.2d 104 (1985) (striking an assessment because the levying ordinance did not “provide for an assessment for benefits and a corresponding tax”).

⁴ A.C.A. §§ 14-284-215(b) (Repl. 1998) (obliging the collector annually to collect such assessments “along with the other taxes”); and 14-284-114(b)(1)(c) and -217(c)(Repl. 1998) (obliging the district board of commissioners annually to file with the clerk a record of assessment receipts, “together with an itemized list of all delinquent taxes”).

⁵ *See, e.g.*, Op. Att’y Gen. 2012-131; 2008-114 and 96-114. Each of these opinions consistently encloses the term in quotation marks in order to reflect that the usage is that of the requester.

⁶ For a detailed discussion of the factual inquiries a court will make in distinguishing a “fee” from a “tax,” *see* Op. Att’y Gen. 2005-087.

⁷ Op. Att’y Gen. 95-207 (opining that “districts formed prior to July 3, 1989 must continue to assess benefits to the property located in the districts and collect the amount of the assessed benefit in the same manner as a tax, *along with bona fide taxes*” (emphasis added)).

The designation of “assessments” as “taxes” appears consistent with the general principle, articulated by the Arkansas Supreme Court, that “taxes” are “enforced burdens exacted pursuant to statutory authority.”⁸ In elaborating on this definition, the court noted that the term applies in particular to “a payment exacted . . . as a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection.”⁹ The court distinguished such payments from “fees” charged for “services to be rendered, such as “fogging the city with an insecticide three times a year.”¹⁰ The assessments at issue in your request were approved by the voters in accordance with an express statutory directive and were used for the “traditional governmental function” of providing ongoing fire protection services. At first blush, these facts would consequently appear to support designating the assessments as “taxes.”

Nevertheless, I believe a reviewing court addressed with the issue would decline to designate an Act 35 assessment as a true “tax.” When confronted squarely with the question of whether “assessments” indeed constitute “taxes,” the Arkansas Supreme Court has answered in the negative. In *Rainwater v. Haynes*,¹¹ the court offered the following summary of the relationship between the two terms:

[S]pecial assessments are not really “taxes” in the usual and ordinary meaning of the word. While both are referable to the sovereign power of taxation, the words “taxes” on the one hand and “assessment,” “special assessments” or “local assessments” on the other, ordinarily have distinct legal meanings. The word “taxes” refers to exactions laid by the government for purposes of general revenue. The word “assessments” refers to exactions laid for making local improvements for the benefit of property owners. The word “tax” does not include “assessments.” *Board of Improvement Sewer Dist. No. 2 v. Sisters of Mercy*, 86 Ark. 109, 109 S.W. 1165,

⁸ *City of North Little Rock v. Graham*, 278 Ark. 547, 548, 647 S.W.2d 452 (1983), citing *Miles v. Gordon*, 234 Ark. 525, 353 S.W.2d 157 (1962).

⁹ *Id.* at 549, citing *Olustee Co-operative Association v. Oklahoma Wheat Utilization Research & Market Development Comm.*, 391 P.2d 216 (Okla. 1964).

¹⁰ *Id.*, citing *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950) (designating as a “fee” the levy for spraying insecticide). In *Holman*, the challengers unsuccessfully sought to classify the assessments for spraying as a tax that exceeded the five mills allowed under Ark. Const. art. 12, § 4. *Id.* at 678.

¹¹ 244 Ark. 1191, 428 S.W.2d 254 (1968).

15 Ann. Cas. 347; *Martin v. Reynolds*, 125 Ark. 163, 188 S.W. 4; *Missouri Pacific R. Co. v. Izard Co. Highway Imp. Dist. No. 1*, 143 Ark. 261, 220 S.W. 452 See, also, *Wood v. Henderson*, 225 Ark. 180, 280 S.W.2d 226.¹²

Moreover, in districts formed after 1989, the Code expressly authorizes the commissioners to “assess a flat *fee* per parcel” or “per landowner” within the district.¹³ It defies credulity to suggest that an assessment imposed in a district formed under Act 35 in its unamended form constitutes “taxation,” whereas a “flat fee” for precisely the same service in a district formed after the amendment does not.

In my opinion, then, although the term “tax” has been occasionally applied to an Act 35 assessment, I believe a court confronted with the issue would conclude that such assessments are, in fact, “fees.”¹⁴ For reasons set forth in the above excerpt from *Rainwater*, I believe it would be inappropriate to classify an Act 35 assessment as a true “tax.”

¹² 244 Ark. at 1193-94. *Accord* Ops. Att’y Gen. 2010-043 (opining that energy improvement district assessments are not “taxes” subject to Ark. Const. art. 16, § 5, which requires that “[a]ll real . . . property subject to taxation shall be taxed according to its value, . . . making the same equal and uniform throughout the State”); 2004-206 (citing Op. Att’y Gen. No 95-348, opining that public property exempt from taxation pursuant Article 16, § 5 remains subject to assessments for local improvements); 97-016 (“[S]pecial assessments are not ‘taxes’ in the usual and ordinary meaning of the word. The word ‘taxes’ refers to exactions laid by the government for purposes of general revenue, and the word ‘assessments’ refers to exactions laid for making local improvements for the benefit of property owners.”); 94-301 (same).

For the reasons articulated in support of these previous opinions, I further do not consider assessments subject to the 5-mill restriction on *ad valorem* taxation set forth in Ark. Const. art. 12, § 4. This conclusion is only bolstered by the fact that an improvement district does not qualify as a “municipal corporation” of the sort covered by this constitutional provision. *Cf.* Ops. Att’y Gen. 2010-043 and 94-030 (distinguishing between “municipal corporations” and “inferior corporations, such as levee districts, school districts and the like,” which lack “political and legislative powers for the local government and police regulation of the inhabitants thereof”); *I.M. & S. Railway v. Board of Directors*, 102 Ark. 127, 145 S.W. 892 (1912) (holding that a levee district is not a “municipality” within the meaning of Article 12, § 4).

¹³ A.C.A. § 14-284-212(g)(1)(A) (Supp. 2013) (emphasis added). I further discuss this statute in my response to question 3, *infra*.

¹⁴ I note, in this regard, the Arkansas Supreme Court’s declaration that “this court in determining whether a governmental charge assessment or fee is a tax is not bound by how the enactment or levy labels it.” *City of Marion v. Baioni*, 312 Ark. 423, 425, 850 S.W.2d 1(1993) (citations omitted). *Accord* Op. Att’y Gen. 98-290.

Finally, I must note that the designation of an Act 35 assessment as either a “tax” or a “fee” would appear to be insignificant in determining the validity of the levy. The Code expressly authorizes the imposition of this assessment upon voter approval of the sort reportedly obtained in this case. Nothing suggests that, however designated, a legislatively approved assessment of this sort would violate any constitutional provision.¹⁵ Even if the assessment were deemed a “tax” – a result I consider highly unlikely – concluding as much would appear to be irrelevant in determining the validity of the assessment. Irrespective of how it is designated, such an assessment is consistent in all respects with applicable law.

Question 2: If the petition used to put a referendum on the ballot to create the fire protection district specifically lists the maximum amount of assessed levy that can be charged by the district – in this case \$20 – and does not provide for a method to change those limits and there have been no other elections to increase the maximums, can the Board of Directors randomly override or exceed those assessment caps or levies without going back to the ballot to have those caps or windows increased based once again on the wording and structure of the original petition for this ballot measure?

This question, as phrased, is both tendentious and somewhat confusing. Although the petition, for instance, does impose assessment caps on residential and commercial properties, the suggestion that these caps universally total \$20 appears mistaken.¹⁶ It is further unclear what you mean by your alternative references, on the one hand, to an increase “based once again on the wording and structure of the original petition” and, on the other, to a “random[] override” by commissioners of the assessment caps. Your underlying question, however, appears to be whether the district board of commissioners may exceed the assessment caps recited in a petition without first obtaining voter approval to do so. In my opinion, the answer to this question is “no.”

¹⁵ See discussion of constitutional issues set forth in note 12, *supra*.

¹⁶ The caps recited in the petition are as follows:

- \$12.00 per Residence (Barns, outbuilding[s], Chicken and Turkey houses excluded).
- \$8.00 for assessed lots up to 40 acres.
- \$.05 per acre all over 40 acres in same assessment.
- \$12.00 for the first 5,000 sq. ft. for a commercial building.
- \$.005 per sq. ft. all over the first 5,000 sq. ft. . . .

Section 4 of Act 35 expressly requires that any petition for the formation of a district directed to the county court “specify the maximum assessed benefits which may be levied against property within the district for the support of the district.”¹⁷ In my opinion, these caps, which are required by statutory mandate to be recited in the petition, must be given effect unless subsequently changed. In order to avoid rendering Section 4 meaningless, the conclusion just stated must apply even though the caps in this instance were not recited either in the ballot title or in the order creating the district. Act 35 requires only that these caps be specified in the petition. Any such cap of necessity defines the extreme of any residential or commercial exposure to assessments. Conspicuously absent in Act 35 is any authorization for the board of commissioners to exceed such caps. Although Act 35 does not expressly address the issue, I believe a reviewing court would conclude that any increase in the assessment caps must be approved by voters, as was the original imposition of an assessment obligation. Legislative clarification on this point is warranted, however.

Question 3: If the Board of Directors chooses to use the flat fee assessment method provided in Act 35 and assigns a rate of levy to each [of] the residential and commercial property categories, can the commercial levy differ for different types of commercial properties or must that flat rate apply consistently throughout the district for all commercial property?

This question mistakenly assumes that Act 35 indeed authorizes the adoption of a “flat fee assessment method.” Flat-fee assessments were authorized only in legislation enacted subsequent to the effective date of Act 35, and they are available only in districts formed after July 3, 1989. It follows that the board of commissioners in the district here at issue, which was formed in 1982, is not authorized to impose any flat-fee assessments.

A review of the pertinent legislative history supports this conclusion. As my predecessor noted in the attached Opinion 2008-114:

As originally adopted, by virtue of Acts 1979, No. 35, the applicable subchapter only authorized fire protection districts to levy “assessments,” which reflected the “benefits to the lands within the district.” Under this procedure, the board of the fire district is to appoint three assessors to assess the annual benefits. A.C.A. § 14-

¹⁷ This provision is currently codified at A.C.A. § 14-384-206 (Repl. 1998).

284-212(b). The assessors are to assess the annual benefits to the lands and “inscribe in a book each tract of land and extend opposite the inscription of each tract of land the amount of annual benefits that will accrue each year to that land by reason of the services.” A.C.A. § 14-284-212(c). Subsection (d) of the same statute provides that:

The original assessment of benefits and any reassessment shall be advertised and equalized in the same manner as provided in this subchapter, and owners of all property whose assessment has been raised shall have the right to be heard and to appeal from the decision of the assessors, as hereinafter provided.^[18]

. . . See also, A.C.A. § 14-284-214 (providing for an annual reassessment of benefits, if necessary).

The laws recited in this excerpt remain unchanged.

As my predecessor further noted, the pertinent subchapter of the Code was later amended to allow for flat-fee assessments *in districts formed following the effective dates of the amendments*. My predecessor noted as follows regarding subsequent legislative amendments:

The applicable subchapter was amended . . . in both 1989 and 1995, to authorize, *as an alternative to assessing benefits*, 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).¹⁹

¹⁸ I have stricken my predecessor’s emphasis of a portion of this statute.

¹⁹ Op. Att’y Gen. 2008-114 (emphasis in original; footnote omitted). The court in *Cox*, 287 Ark. at 175, struck an assessment because it imposed a “flat tax rate” in contravention of the assessment-of-benefits method required under Act 35, which had not yet been amended at the time of the decision. As noted by one of my predecessors regarding the amendment of Act 35 to “remedy” the effects of the *Cox* ruling:

[T]he language of this amendment [authorizing a “flat fee” assessment] . . . applies only to fire protection districts formed after July 3, 1989. Districts formed prior to that date, therefore, will continue to be governed by the law as it existed before the 1989 amendment, including the *Cox* decision. That is, districts formed prior to July 3, 1989 must continue to assess benefits to the property located in the districts.

This alternative, however, is not available to districts formed prior to the amendments. The pertinent section of the statute referenced in this excerpt currently provides as follows:

The elected board of commissioners of a fire protection district formed after July 3, 1995, under this subchapter may assess a flat fee per parcel of land or per acre of land located within the district or assess a flat fee per landowner who owns land located within the district, as an alternative to assessing benefits.²⁰

During the period between the enactment of Act 648 of 1989 and Act 766 of 1995, the highlighted passage in this statute read “fire protection districts formed after July 3, 1989.” As this statute in both versions reflects, the authorization to impose flat-fee assessments on parcels contained within a district formed under this subchapter of the Code applies only to districts formed after July 3, 1989 – a group that does not include the district at issue in your question. Imposing flat-rate levies on commercial properties in this district is thus barred, irrespective of whether these rates are uniform or differential.

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

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

²⁰ A.C.A. § 14-284-212(g)(1)(A) (Supp. 2013).