



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-101

December 8, 2014

Robert T. Rogers, II, Prosecuting Attorney
19th Judicial District – East
202 North Springfield
Post Office Box 536
Berryville, Arkansas 72616

Dear Mr. Rogers:

I am writing in response to your request for my opinion regarding the following question:

How many votes does a timeshare within a suburban improvement district have in a vote for the Suburban Improvement District Board?

You have provided the following “example”:

If there is one building containing 28 timeshare units, is the timeshare unit entitled to two votes for the entire building or does each of the 28 units get two votes? Could all owners of a timeshare unit get a vote?

You have specified no particular type of suburban improvement district as being at issue in your request.

RESPONSE

I cannot provide an unequivocal answer to this question, in part because you have not indicated what type of election relating to the board – or, for that matter, what type of suburban improvement district (“SID”) – is at issue. For reasons discussed below, your “example” suggests, although it does not clearly establish, that you

are referring to a time-share property¹ in an SID containing fewer than 6,000 lots that either has converted or may convert to selecting commissioners by vote of the property owners. If so, A.C.A. § 14-92-240 will control. Each “property” in such a district has two votes in the election to approve or to disapprove the conversion. By contrast, each “property owner” in such a district, as well as in SIDs conducting elections under some other statutory provision, has one vote in an election to fill board vacancies. Under current law, each owner of a “time-share estate” owns an “estate in real property” marked by the “incidents of an estate in fee simple” – a fact that would appear to qualify each holder of such an estate as a “property owner” entitled to vote for successor SID-board members.

DISCUSSION

In Op. Att’y Gen. 95-348, which I have attached for your convenience, one of my predecessors analyzed in detail the law with respect to elections in various types of SIDs. Given that the law remains the same in all material respects, I will not here repeat my predecessor’s analysis. Proceeding from my predecessor’s opinion, I will focus in my discussion below upon what issues of voting might arise under the limited facts provided.

You suggest in your “example” that the owner of a “timeshare unit”² might be entitled to two votes. The Code contemplates two votes per property only in one variety of SID, and only then within the context of changing the method for selecting board members. This Code section provides in pertinent part:

(a) Any suburban improvement district which contains fewer than six thousand (6,000) lots and which selects successor commissioners by a vote of the remaining commissioners may alter the number and method of selection of members of the board of commissioners of the district pursuant to this section.

¹ The Code currently defines a “time-share property” as follows:

- (A) One (1) or more accommodations and related amenities that are subject to a time-share instrument; and
- (B) Any other property or property rights appurtenant to the accommodations and amenities[.]

A.C.A. § 18-14-102(21) (Supp. 2013).

² The term “timeshare unit” is neither defined nor used anywhere in the Arkansas Code.

(b)(1) *Any property owner in the suburban improvement district may make a written request for an election on the question of whether to change the method of selecting the board of commissioners of the district.* The request shall be filed with a quorum court member whose district includes all or part of the suburban improvement district.

* * *

(4) *Two (2) votes shall be awarded for each property. The interests of time-share owners shall be voted by the time-share owners' association*

* * *

(c)(1)(A) *Not more than sixty (60) days nor less than thirty (30) days after the measure is approved, the quorum court member who conducted the election under subsection (b) of this section shall hold a meeting to accept nominations for the new commissioners.* Nominations for commissioners shall be made by property owners.

(B) *The commissioners shall be elected, from among those nominated, at a subsequent public meeting to be held not less than thirty (30) days after the meeting to nominate commissioners.*

* * *

(2) Each property owner in attendance at the meeting to nominate shall be entitled to nominate one (1) district resident property owner. *Each property owner shall be entitled to one (1) vote for each position of commissioner to be filled. A property owner may cast his or her vote in person at the meeting conducted to elect commissioners or may vote by an absentee ballot.* Absentee ballots must be received prior to the meeting held to elect commissioners. Any absentee ballot may be requested by any property owner.

(3)(A) *A meeting shall be held annually to nominate successor members, and a subsequent meeting shall be held to elect successor members.*

(B) The annual meetings shall be conducted by the board.³

As reflected in subsection (b) of the statute excerpted above, *in an election to change the method of selecting board members*, a “property” is entitled to two votes. In the case of time-share units, the time-share owners’ association is authorized to cast these votes.⁴ As further reflected in subsection (c), *in an election actually to select board members*, each “property owner” either present at an election meeting or voting by absentee ballot is entitled to one vote.

Under this statute, then, at issue are (1) what constitutes a “property” entitled to two votes in an election to change the manner of selecting successor members of an SID board; and (2) assuming an SID has committed to replace board members by election, what constitutes a “property owner” entitled to one vote to fill each vacant board membership.

³ A.C.A. § 14-92-240 (Repl. 1998) (emphases added). As discussed by my predecessor in Opinion 95-348, “[t]he only districts which ‘select successor commissioners by a vote of the remaining commissioners’ are pre-1981 districts.” Although such districts may choose not to convert to a system of electing successor board members pursuant to A.C.A. § 14-92-240, your question implies that such a conversion is either being contemplated or has in fact taken place in this instance.

⁴ A “time-share owners’ association” is ordinarily created in an “instrument[] for a time-share estate program” of the sort referenced in A.C.A. § 18-14-303 (Supp. 2013). A “time-share estate” is “an arrangement by which the purchaser receives a right to occupy a time-share property, together with a real estate interest in the time-share property[.]” A.C.A. § 18-14-102(17)(A) (Supp. 2013).

With respect to the legal status of a “time-share estate,” A.C.A. § 18-14-104 (Supp. 2013) provides:

(a)(1) A time-share estate is an estate in real property and has the character and incidents of an estate in fee simple at common law, including an estate for years with a remainder over in fee simple or an estate for years with no remainder if a leasehold.

* * *

(c) For purposes of title, a time-share estate constitutes a separate estate or interest in property, except for real property tax purposes.

A “time-share use,” by contrast, involves a lesser property interest that falls short of ownership in fee simple:

“Time-share use” means any arrangement under which the purchaser receives a right to occupy a time-share property but does not receive a time-share estate.

A.C.A. § 18-14-102(22).

With respect to the first of these issues, the subchapter of the Code generally devoted to SIDs⁵ defines “land” or “real property” as “all property subject to taxation for the purposes of this subchapter[.]”⁶ “Taxation,” as used in this definition, denotes assessments sufficient to defray the costs of SID improvements.⁷ In an election to change the method of selecting board members, then, each property subject to assessments would be entitled to two votes. In the case of each property occupied by time-share units, the time-share members’ association would cast these two votes.

With respect to the related issue of *how* the association would cast these votes, in my estimation, the time-share instrument that established the time-share estates would control.⁸ In this regard, the Code expressly provides:

A project and time-share instrument that establishes a time-share estate located or offered in this state shall contain:

* * *

(5) . . . any voting rights assigned to each time-share estate . . . [.]⁹

Pursuant to this provision, the owners of time-share estates might in theory be empowered to direct by election how the time-share members’ association should cast its votes in the SID election.

⁵ A.C.A. §§ 14-92-201 through -240 (Repl. 1998 & Supp. 2013).

⁶ A.C.A. § 14-92-101(3) (Repl. 1998).

⁷ A.C.A. § 14-92-228 (Repl. 1998).

⁸ The term “time-share instrument” denotes “a master deed, master lease, declaration, or other instrument used to establish a time-share plan[.]” A.C.A. § 18-14-102(18). The term “time-share plan” denotes the following:

“Time-share plan” means an arrangement, plan, scheme, or similar method, excluding an exchange program but including a membership agreement, sale, lease, deed, license, or right-to-use agreement, in which a purchaser, in exchange for consideration, receives an ownership right in or the right to use the accommodations for a period of time less than a year during a given year, but not necessarily consecutive years, regardless of whether the period of time is determined in advance.

Id. at subsection -102(20)(A).

⁹ A.C.A. § 18-14-302(5) (Supp. 2013).

With respect to the second issue identified above – namely, what constitutes a “property owner” entitled to one vote to fill each vacant board membership – the Code assigns one vote to each “property owner” either present at an election meeting or voting by absentee ballot.¹⁰ Significantly, this conclusion applies not only in converted SIDs containing fewer than 6,000 lots, but in any other SID that conducts elections to fill vacancies.¹¹

As previously noted, A.C.A. § 18-14-104(a)(1) characterizes a “time-share estate” as “an estate in real property” that “has the character and incidents of an estate in fee simple at common law.” As such, any owner of a “time-share estate” would appear to qualify as a “property owner” as that term is employed in A.C.A. § 14-92-240(c).¹² Each such owner would in turn appear to be entitled to one vote in the SID election.¹³

As noted above, based only upon your passing remark that “two votes” might be allowed per “timeshare unit,” I have identified A.C.A. § 14-92-240 as most likely being the focus of your question – speculation that admittedly constitutes a slender reed upon which to hang an analysis of voting rights in this case. Nevertheless, specifically with regards to A.C.A. § 14-92-240, the legislature has chosen to assign particular voting rights to “properties” in one context – namely, elections to convert to a system of filling board vacancies by election – whereas it has chosen to assign different voting rights to “property owners” in another – namely, elections actually to fill such vacancies. Unaccountably, the legislature has addressed the issue of time-share voting in the former context but not the latter. It may be that, if confronted with the issue, it would adopt a rule that addresses voting issues in succession elections relating to multiple ownership of the sort that frequently marks a time-share arrangement.¹⁴ For the moment, it remains unclear

¹⁰ A.C.A. § 14-92-240(c).

¹¹ A.C.A. §§ 14-92-204 (Repl. 1998) and -209 (Supp. 2103).

¹² Article 14, chapter 92, subchapter 2 of the Code at no point defines the term “property owner.”

¹³ Subsection 14-92-240(c)(3)(A) provides that nominees to fill vacancies will be selected at an annual public meeting, with successors to be elected as described above at another annual public meeting.

¹⁴ Obviously, the paramount issue to be addressed is the fact that a time-share property comprising numerous “time-share estates” might wind up with significantly greater voting power than would a comparable property owned by, say, two tenants by the entirety. This issue of vote concentration in time-share properties would not appear to arise if the time-share ownership interest conveyed is merely a “time-share use” of the sort referenced in note 5, *supra*.

to what extent such problems might be addressed in a time-share project instrument¹⁵ or in the SID's rules and regulations.¹⁶ Legislative clarification on these issues may be warranted.

Recognizing that other factual circumstances may apply, I can do little more than again refer you to the attached Opinion 95-348, which ably sets forth the rules potentially applicable to various forms of SID – including not only those addressed in A.C.A. § 14-92-240, but also those covered by A.C.A. §§ 14-92-209 and -204. I will summarize the pertinent provisions, however, as follows:

With respect to SIDs formed on or after March 16, 1981:

- (1) A.C.A. § 14-92-209(a) sets forth the procedures for any recall and subsequent election to fill the resulting vacancy. By cross-reference to A.C.A. § 14-92-204(b)(7), this statute at subsection -209(a)(6) restricts voting to one vote per owner.
- (2) Subsection 14-92-209(b) controls all elections to fill all other types of vacancies. By cross-reference to subsection (a), subsection (b) restricts voting to one vote per owner.

With respect to SIDs formed before March 16, 1981:

- (1) Subsection 14-92-209(c)(1) specifies that following a recall, the one-vote-per-owner rule set forth in subsection -209(a) will apply to fill any resulting vacancy.

¹⁵ The Code currently defines such an instrument as follows:

“Project instrument” means a time-share instrument or other applicable document that establishes a time-share plan that contains restrictions or covenants to regulate the use, occupancy, or disposition of a time-share plan, including a declaration, rule, or an amendment thereto, of a condominium, and the articles of incorporation, bylaws, rules of an association, or an amendment thereto[.]

A.C.A. § 18-14-102(13).

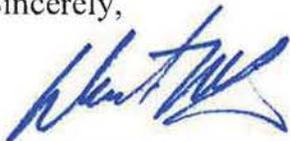
¹⁶ See A.C.A. § 14-92-210(3) (Repl. 1998) (empowering a SID board to “[e]stablish rules and regulations for the transaction of the district’s business and for the services, use, and right to use of its facilities or services, or both, or to effectuate any purpose of this subchapter”).

- (2) Subsection 14-92-209(d)(1) specifies that subsection -209(b) will control to fill any other type of vacancy in a pre-March 1981 municipal water or sewer district, likewise meaning that the one-vote-per-owner rule will apply.
- (3) Subsection 14-92-209(d)(2) dictates that prior law will apply to fill a board vacancy in any other type of SID falling in this general class. As my predecessor rightly noted, this rule does not foreclose an SID falling within this designation from opting to convert and proceed as described above pursuant to A.C.A. § 14-92-240, assuming the preconditions for doing so are met.

Irrespective of what type of SID is at issue, then, under current law, voting to fill SID vacancies, if authorized at all,¹⁷ will turn upon property ownership, with each owner assigned one vote per candidate under whichever of the statutes referenced above might apply. Local counsel fully apprised of all attendant circumstances would be best situated to offer advice in each specific case regarding which statute imposes this condition.

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

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure

¹⁷ As my predecessor discussed in Opinion 95-348, successor commissioners in a pre-March 1981 SID may continue to be selected by vote of the remaining commissioners.



STATE OF ARKANSAS
Office of the Attorney General

Winston Bryant
Attorney General

Telephone:
(501) 682-2007

Opinion No. 95-348

November 2, 1995

The Honorable Wayne Wagner
State Representative
P.O. Box 909
Manila, Arkansas 72442-0909

Dear Representative Wagner:

This is in response to your request for an opinion on eight questions concerning the implementation of A.C.A. §§ 14-92-202, 14-92-209 and 14-92-239¹ (Cum. Supp. 1993), which involve the selection and recall of suburban improvement district commissioners. Specifically, you note that there appears to be some conflicting language within the Arkansas Code as a result of three 1993 acts enacted on the same subject. See Acts 492, 524, and 782 of 1993.

Prior to setting out and answering your eight questions, it will be helpful, in my opinion, to set out the legislative history of the statutes in question and a quick summary of the substance of the three 1993 acts which amended the relevant statutes.

The relevant subchapter of the Arkansas Code is A.C.A. §§ 14-92-201 through -240 (1987) and (Cum. Supp. 1993), which was originally enacted in 1941 as Act 41 of 1941. The subchapter has been amended various times since its original adoption, most notably, for our purposes, however, in 1981 by the enactment of Act 510 of 1981. That act was entitled "AN ACT to Amend Various Sections of Act 41 of 1941, As Amended [Ark. Stat. Ann. 20-701 *et seq.*], to Establish New Procedures for the Creation and Dissolution of Suburban Improvement Districts,

¹ Although the original Act 524 of 1993 refers to the new section added thereby as A.C.A. § 14-92-239, this provision is actually codified as A.C.A. § 14-92-240.

and for other Purposes.” Prior to the 1981 amendments, suburban improvement districts could be created by a petition of the majority in *value* and *area* of owners in the district. See former Ark. Stat. Ann. § 20-701. Commissioners of suburban improvement districts were apparently named in the petition to create the district and appointed as commissioners by the county court. See former Ark. Stat. Ann. § 20-701. Vacancies on the board of commissioners were filled by the remaining commissioners. See former Ark. Stat. Ann. § 20-703. There was a recall provision prior to 1981 (see former Ark. Stat. Ann. § 20-742 which authorized recall of a particular commissioner or all commissioners upon a petition signed by the owners of two thirds of assessed value in the district.) This provision was specifically repealed by Act 510 of 1981.

The 1981 amendments provided a new method of creating suburban improvement districts, requiring a petition of a majority of the *number* of realty owners in the district as well as a majority of the owners of realty in *area* and *value*. See Act 510 of 1981, Section 1. The Act provided for the recall of commissioners upon a petition of twenty-five percent of the realty owners, and after a vote at a public hearing. See Act 510 of 1981, Section 8. The Act also provided for the filling of the vacancy created by the recall by election at a public meeting. *Id.* The Act also provided for the filling of all other vacancies at an election held at a public hearing. *Id.* The 1981 act, however, contained a provision (apparently a last minute amendment) which stated that: “[t]he provisions of this Act shall not apply to districts in existence on the effective date of this act, but such districts shall continue to be governed by the law in effect immediately prior to the effective date of this Act.” See Act 510, Section 9. Thus, pre-1981 districts were still governed by pre-1981 law, as summarized in the preceding paragraph above, and the substantive amendments of the 1981 act regarding recall and filling vacancies applied only to districts created after the effective date of the 1981 act.

This is where the three 1993 acts come into play.

The first such act, Act 492 of 1993, is entitled “AN ACT to Amend Arkansas Code 14-92-209 [section 8 of Act 510 of 1981] to Provide That the Commissioners of Suburban Improvement Districts Created Before March 16, 1981, Shall Be Subject to the Same Recall Provisions As for Districts Created After That Date; and for Other Purposes.” This act is very brief and merely applies, by operation of law, the recall provision of Act 510 to pre-1981 districts. It also states that any vacancy

created by a recall shall be filled in accordance with the 1981 act, that is, by nomination and election at a public hearing. It states, however, that all other vacancies (vacancies not created by recall) shall continue to be filled in the same manner as provided by law prior to March 16, 1981. That is, under Act 492, in districts created prior to 1981, vacancies not occasioned by recall will continue to be filled by a vote of the remaining commissioners.

The second relevant act is Act 782 of 1993 (which will be discussed out of numerical order for purposes of relating its subject matter to Act 492 above) and is entitled in relevant part "AN ACT to Amend Arkansas Code 14-92-202 to Allow Suburban Improvement Districts Without an Elected Board of Commissioners to *Petition for the Right* to Fill Vacancies by Election and to Allow for Recall of Any Commissioner...." Emphasis added. This act amends a different statute than does Act 492 above. It also provides, as does Act 492, for pre-1981 districts to exercise the right to recall commissioners, but it does so only if thirty-five percent of the realty owners petition to adopt the recall provisions of Section 8 of Act 510 (§ 14-92-209). If there is no petition to adopt the recall provisions, then the provisions of Act 782, when viewed alone, would not allow pre-1981 districts to exercise any right to recall commissioners. This may be seen as contrary to Act 492 of 1993 above which applies the recall provisions of Act 510 to such districts by operation of law. Act 782, however, unlike Act 492, also provides a mechanism for pre-1981 districts to fill vacancies occurring for *any* reason on the board by election at a public hearing (rather than having them filled by the remaining commissioners) and to, by petition, increase the number of commissioners from three to five.

The third relevant 1993 act, Act 524 of 1993, adds a new section to the subchapter, and is entitled "AN ACT to Amend Arkansas Code Title 14, Chapter 92, Subchapter 2 to Allow Certain Suburban Improvement Districts to Select a New Five (5) Member Board of Commissioners; and for other purposes." This act applies only to districts which have less than six thousand lots and which currently select successor commissioners by a vote of the remaining commissioners. The act provides a mechanism for these districts to do away entirely with an existing board of commissioners and to elect a new five member board of commissioners. The act provides that any property owner in the district may request an election on the question, and file the request with the relevant quorum court member. An election on the question is then conducted by mail. Notice of the results of the election is given, and if necessary, notice of meetings to be held for the nomination

and election of new commissioners is also given. Vacancies on the new board are ultimately filled by public election at an annual meeting. This particular act does not address any provisions for recall of commissioners.

I now may set out and address your eight specific questions in light of the background information provided above. Your first question is as follows:

- 1) Does Act 492 make § 14-92-209 applicable to all improvement districts, including specifically those which were in existence on March 16, 1981 (pre-1981 districts?)

It is my opinion that the answer to this question is a qualified "yes." Act 492 only makes one subsection of 14-92-209 applicable to pre-1981 districts. It only makes § 14-92-209(a) regarding the recall of commissioners applicable to such districts. Act 492 does not make subsection (b) of § 14-92-209, regarding the filling of non-recall vacancies by election, applicable to pre-1981 districts. Act 492 states that in pre-1981 districts the filling of vacancies occurring other than by reason of recall is still to be by vote of the remaining commissioners.

Your second question is as follows:

- 2) If so, can twenty-five percent (25%) of the 'owners of realty' petition for the recall of district commissioners?

It is my opinion that the answer to this question is "yes." Twenty-five percent of the number of realty owners in the district can petition for recall of commissioners. There must be a public hearing after the petition, however, where a majority of votes cast, (if at least 25% of all votes *entitled* to be cast,) may operate to remove a commissioner or commissioners. The successors will be nominated and elected at the public meetings provided for in 14-92-209(a)(5), and (6).

Your third question is as follows:

3) If one or more commissioners are removed by the process reflected in #2 above, by what process would they have to be replaced?

As stated above, under Act 492, if a commissioner is removed by recall, his or her replacement is selected by nomination at a public hearing, and by later election at a subsequent public meeting. See A.C.A. § 14-92-209(a)(5) and (6). Assuming the district employs the 25% procedure of Act 492, however, commissioners who are not removed by recall, but who leave office for any other reason, are still to be selected by the remaining commissioners under prior law (assuming that the district has not invoked the provisions of Act 782 of 1993 by petition of 35% of the realty owners or invoked the provision of Act 524 and elected a new five member board). See *discussion infra*.

Your fourth question is as follows:

4) Does Act 782 apply to districts in existence on March 16, 1981, and does it in any way repeal a portion of Act 492 if the provisions are inconsistent?

It is my opinion that Act 782 clearly applies to districts in existence on March 16, 1981, and that it does not in any way repeal a portion of Act 492, which in my opinion can be read consistently with Act 782. Act 782 clearly states that it applies to districts in existence on March 16, 1981. Act 782, Section 1, which amends A.C.A. § 14-92-202 by adding subsection (b), states that: "Upon the petition of thirty-five percent (35%) of the realty owners of a district *in existence on March 16, 1981*, the district shall be subject to the provisions of § 14-92-209....") In fact, districts in existence on March 16, 1981 are the *only* districts to which Act 782 applies.

In response to the second half of your fourth question, in my opinion Act 782 can be read consistently with Act 492. These acts pertain to the same general subject matter, and were passed at the same session of the legislature. A court is required to reconcile statutes of the same general subject matter, construing them together if possible, in order to implement the legislature's intent. It has been said that this rule of statutory construction is especially true where the acts were enacted during the same general session of the legislature. *Sargent v. Cole*, 269 Ark. 121, 598

S.W.2d 749 (1980). See also *Walker v. McCuen*, 318 Ark. 508, 886 S.W.2d 577 (1994). Thus, if at all possible, a court will read these acts harmoniously, so that one does not repeal the other. In my opinion such a construction is possible here. Act 492, as noted, provides only that realty owners in a pre-1981 district may petition (by twenty-five percent) to recall one or more commissioners. Those commissioners removed would be replaced by public election. Act 782, on the other hand, while also allowing a district to implement the recall procedure, requires an initial petition of thirty-five percent of the realty owners to adopt it, and thereafter would require the twenty-five percent petition to recall. This fact may seem to contradict Act 492, which requires no such initial petition. Act 782, however, also provides some other very important options. It authorizes a petition to provide that all vacancies occurring on the commission, whether by recall or not, will be filled by public election. Act 492 does not go this far. In addition, Act 782 authorizes the petition to include a provision for an increase in the number of commissioners from three to five. Act 492 does not go this far. It is my opinion that each of these acts is independent of the other, and it is up to the realty owners of a particular pre-1981 district to decide which act best suits their wishes for change in the district. If the realty owners simply want to recall one or more commissioners and have their replacements elected, they may choose to follow the provisions of Act 492, realizing of course, that future commissioners who leave office other than by recall will be replaced by vote of the remaining commissioners, and that the number of commissioners will remain at three. If the realty owners wish to go further, however, i.e. to provide for the recall of sitting commissioners, to elect their replacements, and to ensure that *any* future vacancies on the board will be filled by public election, and/or if they want to increase the number of commissioners to five, they may wish to employ the provisions of Act 782 to accomplish these goals. In sum, in my opinion, each of these acts (and Act 524, for that matter) may operate independently of each other, and it is up to the district realty owners to determine which act best suits their wishes and needs.²

Your fifth question is as follows:

² A contrary argument would assert that these two acts are contradictory, and that, Act 782, as the Act which was signed later, would operate to repeal Act 492 and require an initial petition of thirty-five percent in each case. I cannot reach this conclusion, however, in light of the strong presumption against repeals by implication, and a court's duty to reconcile conflicting acts, when possible.

Under Act 782, can the property owners of a district in existence prior to March 16, 1981 vote to come under the provisions of § 14-92-209 and by petition increase their board of commissioners from three to five members?

In my opinion the answer to this question is "yes," this is exactly what Act 782 authorizes. There must be a petition, however, of thirty-five percent of the realty owners of the district filed with the circuit court where most of the district is located.

Your sixth question is as follows:

Does § 14-92-209 apply to a pre-1981 districts only if 35% of property owners sign a petition that is filed and approved by their circuit court?

In my opinion A.C.A. § 14-92-209(b) regarding the filling of vacancies generally, only applies to such districts upon petition of thirty-five percent of the property owners and when such petition is filed with the circuit court. In my opinion, § 14-02-209(a) regarding recall, applies by operation of law (see Act 492) and may be invoked by petition of twenty-five percent of realty owners, and implemented through a public hearing and an order of the "county" court.

Your seventh question is as follows:

Does § 14-92-239 [codified at § 14-92-240] have any effect on pre- 1981 districts, or are they exempted under Act 782?

This statutory subsection was added by Act 524 of 1993. It is the 1993 act which provides for an entirely new five member board of commissioners to be elected. It does not mention recall. It merely assumes that upon the election of the new board, the service of the old commissioners expires. It is my opinion that this act does have applicability to pre-1981 districts, assuming that those districts have "less than six thousand lots." Section 1 of Act 524, wherein it adds § 14-92-240 (a) provides that "[a]ny suburban improvement district which contains less than six

thousand (6,000) lots *and which selects successor commissioners by a vote of the remaining commissioners* may alter the number and method of the board of commissioners of the district pursuant to this section.” Emphasis added. The only districts which “select successor commissioners by a vote of the remaining commissioners” are pre-1981 districts. Act 510 of 1981 required post-1981 districts to elect successor commissioners at a public meeting. It is therefore my opinion that Act 524 is applicable to those pre-1981 districts with less than six thousand lots. It is also my opinion that this act may be employed independently of Acts 492 and 782.³

Your eighth and final question is as follows:

8) If the improvement district falls within the boundaries of an incorporated city, is the city considered an ‘owner of realty’ and therefore eligible to participate with the various processes identified above?

It is my opinion, in response to this question, that the city is to be considered an “owner of realty” only to the extent of the property it owns which is not tax exempt. If all the property of the city in question is tax exempt, then it is my opinion that the property is not subject to assessment by the district, and the city is therefore not entitled to participate in the processes noted above. City property, even tax exempt property, can be subject to assessment for local improvements. The Arkansas Constitution art. 16, §5, which exempts “public property used exclusively for public purposes” from property taxation, does not apply to assessments for local improvements. *See Rainwater v. Haynes*, 244 Ark. 1191, 428 S.W.2d 254 (1968). The legislature may enact a statute, therefore, requiring tax-exempt city property to be subject to local assessments. The constitution does not prohibit such a statute. The rule is that: “[a]lthough the constitutional exemption is stated to be from ad valorem taxation, the same public purpose exemption extends to improvement district assessments unless a statute provides otherwise.” *Off-Street Parking Development District No. 1 v. City of Fayetteville*, 284 Ark. 453, 683 S.W.2d 229 (1985). No such statute is applicable here,

³ You have not inquired as to whether this act could be employed in conjunction with either of the other two acts, and thus I do not address this question.

however. There is no statute providing that suburban improvements districts assessments shall apply to city-owned property. Nevertheless, the court held in *Off-Street Parking* that property held by the city which is not tax-exempt (that is, which is not used exclusively for public purposes) is subject to such assessment even if there is no statute providing so.⁴

It is my opinion therefore, that to the extent the city owns taxable property, it will be entitled to participate in the procedures outlined above, and this property will be subject to assessment by the district. See note 3, *supra*, however. To the extent the city's property is tax -exempt, however, the city will not, in my opinion be included as a "realty owner" for purposes of A.C.A. §§ 14-92-201 through -240.

The foregoing opinion, which I hereby approve, was prepared by Deputy Attorney General Elana C. Wills.

Sincerely,

A handwritten signature in cursive script that reads "Winston Bryant".

WINSTON BRYANT
Attorney General

WB:ECW/cyh

⁴ Act 669 of 1995, however, purports to extinguish any claim existing on March 17, 1995 for improvement district assessments based upon the use of public property for events which are not open to the general public.