STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-143

April 14, 2016

The Honorable Jeremy Hutchinson
State Senator
201 East North Street
Benton, AR 72015

Dear Senator Hutchinson:

I am writing in response to your request for my opinion on a number of questions concerning the Holiday Island Suburban Improvement District ("HISID"). Your request sets out eight issues and related questions.

Before restating your questions, I must note that I cannot address those relating to issues arising under the settlement agreement between the HISID and property owners. You reference this agreement in connection with questions regarding rates and fees and certain expenditures. I cannot comment on questions that may depend to some extent on interpretation of a judicially-approved settlement agreement. Such questions are outside the scope of an Attorney General's opinion.[1] I must therefore respectfully decline to opine on the second and fifth issues identified in your request and the questions related thereto.

The other questions you have posed are as follows:

> (1) Are property owners who are subject to annual levies of the Assessment of Benefits (AOB) in a Property Owners Suburban Improvement District ("SID") allowed to pay off the entire

[1] *Compare* Op. Att'y Gen. 2014-045 (declining to opine on whether HISID's assessments are subject to prepayment, given that the assessments are addressed in a settlement agreement between HISID and property owners, citing "Order Approving Binding Settlement Agreement," *Bischoff v. Holiday Island Suburban Improvement Dist.*, No. 08WCV-12-69 (Circuit Court, 19th Judicial Circuit East, Carroll County Western Division, Feb. 18, 2014)).

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remaining principle amount of the AOB at any given time? Alternatively, is the SID allowed to refuse to accept a pay-off of the AOB and instead continue to levy an annual portion of the AOB plus interest?

(3) Is a SID bound in all respects to the Arkansas Freedom of Information Act? More specifically, is a SID required to turn over a district voter list upon request?

(4) Does a SID have the legal authority to waive the AOB levy on parcels owned by select private entities?

(6) Does a SID have the legal authority to make or allow lot line adjustments?

(7) Does a SID have the legal authority to "re-zone" or "reclassify" lots within the SID?

(8) Does HISID have the legal authority to collect [its] own AOBs or should collection be handled by the Carroll County Collector's office? Can a SID collecting [its] own AOB charge a late fee penalty? If so, is that penalty capped by any law, usury cap, or reasonableness standard?

RESPONSE

Question 1: Are property owners who are subject to annual levies of the Assessment of Benefits (AOB) in a Property Owners Suburban Improvement District ("SID") allowed to pay off the entire remaining principle amount of the AOB at any given time? Alternatively, is the SID allowed to refuse to accept a pay-off of the AOB and instead continue to levy an annual portion of the AOB plus interest?

The prepayment of SID assessments is expressly contemplated by the statute that governs the extension and collection of SID assessments:

> For his or her services in making the collections, *including prepayments*, the collector shall receive a commission of one and one-half percent (1.5%). *In the case of prepayments*, the maximum

> commission shall be the lesser of one and one-half percent (1.5%) or fifty dollars ($50.00).[2]

The statute does not, however, further address the matter of prepayments. Thus, while it seems that SID assessments may be prepaid in at least some instances,[3] I cannot answer the general question whether property owners in an SID may pay off the entire AOB at any given time. That question, and the related question whether an SID can refuse such a pay-off and instead continue levying the assessment annually, would require references to the particular SID – and the specific facts and circumstances surrounding the financing of its improvements and operations.[4]

Question 3: Is a SID bound in all respects to the Arkansas Freedom of Information Act? More specifically, is a SID required to turn over a district voter list upon request?

You state by way of background for this question that the HISID has received a request for a list of the voters in the district and has refused to turn over the list.

As "agents of the state"[5] supported through statutorily-authorized assessments,[6] suburban improvement districts are plainly subject to the FOIA.[7]

The FOIA provides that unless otherwise specifically provided by law, all "public records" and meetings shall be open to the public.[8] In response to your particular

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[2] Ark. Code Ann. § 14-92-230(b)(1)(A)(ii) (Supp. 2015) (emphasis added).

[3] *Accord* Op. Att'y Gen. 2014-045, *supra*, n. 1.

[4] *Id.* (and citations therein, noting that an SID's assessments may be for capital improvements or for operation and maintenance or pledged as security for bonds, and that the order imposing the assessments might address the matter of prepayments).

[5] *Quapaw Cent. Bus. Impr. Dist. v. Bond-Kinman, Inc.*, 315 Ark. 703, 706, 870 S.W.2d 390, 392 (1994).

[6] Ark. Code Ann. §§ 14-92-220(c) and -228 (Repl. 1998).

[7] *Accord* Op. Att'y Gen. 2007-262 ("When the SID board of commissioners meets to "open and compare the bids," [citing Ark. Code Ann. § 22-9-203(d)], ... such meetings in my opinion must be held as "public meetings" pursuant to the FOIA."). *See also* Ops. Att'y Gen. 2001-179; 2001-023; 97-016; 92-312; 87-420.

question regarding a "district voter list," therefore, the threshold question is whether the list fits within the FOIA's definition of "public records." If it does, then it is open to public inspection and copying unless covered by a specific exemption in the FOIA or some other pertinent law.

The FOIA defines "public records" broadly to include "writings ... or data compilations in any medium required by law to be *kept or otherwise kept* and that *constitute a record of the performance or lack of performance* of official functions...."[9] The definition further provides that "[a]ll records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records."[10]

I have no specific information regarding the voter list in question. But I take it that the list is in fact kept by the SID, perhaps because each realty owner is entitled to cast one vote on all questions submitted to the owners of realty in the district.[11] If the SID in fact keeps the list for voting purposes, then it seems clear the list reflects the performance or lack of performance of official functions and thus constitutes a "public record" under the above definition. It follows that the list is likely subject to disclosure under the FOIA, unless the FOIA itself or some other law specifically exempts it from disclosure.

There is a broad presumption in favor of disclosure of "public records" under the FOIA, and the burden of proving exemptions rests with the custodian claiming an exemption.[12] My research has yielded no specific exemption mandating nondisclosure of a list of voters of an SID. The list may therefore simply be a "public record" subject to no specific exemption from disclosure, and thus subject to inspection and copying under the FOIA. But I cannot definitively opine to that effect without at least considering the basis upon which HISID claims it is exempt. The initial decision whether to release records in response to a FOIA request rests

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[8] Ark. Code Ann. §§ 25-19-105(a)(1)(A) and -106(a) (Supp. 2015).

[9] Ark. Code Ann. § 25-19-103(7)(a) (Supp. 2015) (emphasis added).

[10] *Id.*

[11] Ark. Code Ann. § 14-92-204(b)(7) (Repl. 1998).

[12] *Orsini v. State*, 13 S.W.3d 167, 170 (Ark. 2000); *Gannett River States Pub. v. Arkansas Indus. Dev. Comm's*, 303 Ark. 684, 799 S.W.2d 543 (1990).

with the custodian, following a review of the particular record(s). The custodian for HISID clearly bears the burden of proving an exemption, but I have been provided no information regarding the list at issue; and there may be additional facts, outside the limited information before me, to be considered in determining whether a "district voter list" falls within an exemption.

Question 4: Does a SID have the legal authority to waive the AOB levy on parcels owned by select private entities?

The Code section governing the levy of an SID assessment of benefits is unambiguous in declaring that the tax assessed upon the real property of the district "shall be a lien upon all the real property in the district from the time it is levied ... and shall continue until the assessment, with any penalty and costs that may accrue thereon, shall have been paid."[13] The Arkansas Supreme Court has held, with regard to a virtually identical statute,[14] that an improvement district lacks the authority to release its lien except upon full payment of all assessments levied against the property.[15]

It is therefore my opinion in response to the above question that an SID likely lacks authority to waive the AOB levy if the order providing for the levy of the tax has been entered.[16] The unpaid assessment will have created a lien against all property in the SID at that point, which lien continues until the assessment is paid in full.

Question 6: Does a SID have the legal authority to make or allow lot line adjustments?

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[13] Ark. Code Ann. § 14-92-228(a)(1) and (b) (Repl. 1998). *See also* Ark. Code Ann. § 14-92-230(a)(2)(A) and (b)(1)(A)(i) (Repl. 2015) (making it the duty of the county clerk and county collector, respectively, to "extend the taxes annually upon the tax books of the county until the levy is exhausted" and "collect each year the taxes extended upon the tax books ... until the entire levy is exhausted.").

[14] Ark. Code Ann. § 14-90-805 (Repl. 1998) (regarding municipal improvement districts).

[15] *Lueken v. Burch*, 214 Ark. 921, 926, 219 S.W.2d 235, 238 (1949) ("There is no authority, statutory or otherwise, for an improvement district to release its lien except upon full payment of all assessments levied against the property").

[16] *See* Ark. Code Ann. 14-92-228(a)(1) (providing for the entry of an order by the board of commissioners levying the tax assessment).

Question 7: Does a SID have the legal authority to "re-zone" or "reclassify" lots within the SID?

I will address these questions together because I believe they call for essentially the same analysis. Regarding Question 6, you report that the HISID has "allowed property owners to buy adjoining lots and move the lot line of their property," and that this has created useless leftover parcels "while property owners with extended lot lines would still be paying only one AOB at the same rate of a regular sized lot." As for Question 7, you state that HISID has "voted to rezone lots for various reasons" and that "HISID's ability to rezone could affect the amount of AOB a property owner has to pay" because "the amount of AOB on a lot is tied to that lot's zoning classification."

I must note as an initial matter that, unlike a city, an SID does not actually engage in the regulation of lot lines or the zoning of property.[17] However, the size or area of lots and the way property is zoned or classified are undoubtedly proper considerations in connection with the assessment or reassessment of benefits, and the equalization of such, in an SID.[18] The Arkansas Supreme Court has identified the "proper basis for the assessment of value" in an SID as follows:

> [T]he proper basis for assessment of value for benefits to accrue to each piece of property is to consider the *value, area, location of the property*, *the improvements thereon, its relation to other properties*, and every other element which might go to make up the sum total of benefits.[19]

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[17] *See Memphis Trust Co. v. St. Francis Levee Dist.*, 69 Ark. 284, 286, 62 S.W. 902, 903 (1901) (distinguishing a levee improvement district, which has "limited and inferior powers," from "cities, towns, and other like organizations with political and legislative powers for the local government and police regulation of the inhabitants thereof.").

[18] *See* Ark. Code Ann. § 14-92-226(b) (Repl. 1998) (making it the duty of the board of commissioners to meet as a "board of equalization and to hear all complaints against the assessment and to equalize and adjust it") and § 14-92 -227(c) (Supp. 2015) (same regarding reassessments).

[19] *Pate v. Piney Sewer Imp. Dist. No. 32*, 15 Ark. App. 231, 233, 691 S.W.2d 882, 883 (1985) (emphasis added).

In response to your particular questions, therefore, an SID does not actually adjust lot lines or re-zone or re-classify property like a city. But it may well be appropriate, if not necessary, for the SID to consider lot sizes and different use classifications when assessing or equalizing benefits accruing to the real property within the district by reason of the improvements or facilities.

Question 8: Does HISID have the legal authority to collect [its] own AOBs or should collection be handled by the Carroll County Collector's office? Can a SID collecting [its] own AOB charge a late fee penalty? If so, is that penalty capped by any law, usury cap, or reasonableness standard?

You note in presenting this question that "HISID is not over 5,000 acres, yet they have been collecting their own AOB."[20] You also state that HISID "charge[s] delinquent property owners who pay the AOB levy a late fee of 25%, even if the payment is only one day late."

Ordinarily, the county collector is responsible for collecting SID assessments:

> When the board of commissioners in a suburban improvement district shall make the levy of taxes, it shall be the duty of the assessor to extend the amount levied and set it opposite each benefit assessed in a column marked "Annual Collection"....
>
> It shall then be the duty of the tax collector of the county to collect each year the taxes extended upon the books along with the other taxes until the entire levy is exhausted.[21]

With regard, therefore, to HISID, the county tax collector should be collecting the assessments if the area of this SID in fact is not at least 5,000 acres.[22]

There is an exception, however, for delinquencies. While delinquent assessments in SIDs are normally certified to the Commissioner of State Lands,[23] an SID can

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[20] An SID with an area *over* 5,000—called an "eligible district"—can elect to collect its own assessments. Ark. Code Ann. §§ 14-92-601(a)(1) and (2) (Repl. 1998) and -602(a)(1) (Supp. 2015).

[21] Ark. Code Ann. § 14-92-230(a)(1) and (b)(1)(A)(i) (Supp. 2015).

[22] *See* note 20, *supra*, regarding "eligible districts," i.e., those larger than 5,000 acres.

choose to enforce collection of *delinquent assessments* through court proceedings.[24] In that case, Ark. Code Ann. § 14-94-122 will govern the procedural requirements.[25] The court's judgment in such a case will include a *penalty, interest, and costs*:

> Delinquencies. If any taxes levied by the board under this chapter are not paid at maturity, the county tax collector shall not embrace the taxes in the taxes for which he shall sell the lands, but shall report the delinquencies to the board of the district, which shall add to the amount of the tax *a penalty of twenty-five percent (25%)*.
>
> The board shall enforce the collection by chancery proceedings in the chancery court of the county in which the lands are situated having chancery jurisdiction. The court shall give judgment against the lands for the amount of the delinquent taxes, and *the penalty of twenty-five percent (25%) and interest thereon, from the end of the sixty (60) days allowed for the collection thereof, at the rate of six percent (6%) per annum, and all costs of the proceedings*.[26]

Thus, in response to the above question as regards a penalty, the 25% penalty will apply if the SID has elected to enforce collection of delinquencies through court proceedings.

Sincerely,

LESLIE RUTLEDGE
Attorney General

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[23] Ark. Code Ann. § 14-92-232(b) (Repl. 1998).

[24] *Id.* at § 14-92-232(c).

[25] *Id.* ("A suburban improvement district may enforce collection of delinquent suburban improvement district assessments by chancery proceedings in the chancery court of the county in the manner as provided for municipal property owners' improvement districts under § 14-94-122.").

[26] Ark. Code Ann. § 14-94-122(b)(1) and (2) (Repl. 1998) (emphasis added).