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September 5, 2014

Dear Commissioners Court Members:

We have received several inquiries concerning the effect of AG Opinion GA-1076 concerning constitutional questions related to funding of County Energy Transportation Reinvestment Zones (CETRZ). This memo will address the effect of the Opinion and some options available to counties.

It is important to understand the general effect of an opinion of the Attorney General. Such opinions are advisory and do not have the effect of a court decision. An opinion of the Attorney General does not nullify an act of the legislature. While the courts will give considerable weight to an AG opinion, the courts are not bound by its reasoning or conclusion. No court has rendered any decision on the constitutionality of Section 222.1071, Transportation Code, as added by Senate Bill 1747. If the courts are presented with the question, they must attempt to apply an interpretation and construction of the statute that does not offend the Constitution.

Attorney General Opinion GA-1076 utilizes the principle that legislation that compels the use of general tax revenue in a particular geographic area of a taxing entity violates the "equal and uniform" taxation provisions of Article VIII, Section 1-g(b), Texas Constitution. The Opinion concludes that "a county's use of tax increment financing to fund transportation projects in a county energy transportation reinvestment zone could be subject to challenge under the equal and uniform taxation requirement in Article VIII, section 1(a) of the Texas Constitution (emphasis supplied). The Attorney General reached this conclusion by construing Section 222.1071 as requiring that all CERTZ increment funds be utilized solely on transportation project within the CERTZ: "Tax increment funds may be used...for zone infrastructure projects." (citing Section 222.1071(i)). The Opinion did not discuss the broader language in Section 222.1071(c) which states: "A commissioners court must:...dedicate or pledge all of the captured appraised value of real property located in the county energy transportation reinvestment zone to transportation infrastructure projects...." The sponsors of SB 1747 have asserted that since damages to county roads will not be confined to the CERTZ, the increment fund is available for projects throughout the county. Although the language in the bill may be ambiguous and confusing, any constitutional issue can be avoided by utilizing the CERTZ increment fund for transportation projects throughout the county.

There have been some suggestions that counties should rescind the creation of the CERTZ in response to this Opinion. Such action could have unanticipated results. First, it is not clear that a CERTZ can be rescinded or abolished within the first 10 years of its creation. Second, since creation of a CERTZ is a statutory requirement to receive a transportation infrastructure grant from TxDOT, rescinding the CERTZ could jeopardize the grant to the county.

Since no court has adopted the construction utilized by the Attorney General, we advise that counties continue to utilize the CERTZ and create the Tax Increment Fund as provided in Section 222.1071. Before expending any funds from the CERTZ increment fund, the Commissioners Court should adopt an Order determining that 1) the funds are available and will be utilized for transportation infrastructure projects throughout the county and 2) the support and funding of transportation infrastructure projects are within the general governmental powers and responsibilities of Texas counties under the statutes and state constitution. Attached is a sample Order that will assure a constitutional utilization of the increment fund. Upon adoption of this Order, the increment fund may be utilized for any transportation infrastructure project in the county.

The Attorney General Opinion did not involve the TxDOT County Infrastructure Grant program. The TxDOT Grant application did require the formation of a CETRZ as a condition of eligibility, but the Attorney General opinion has no relation to the TxDOT Grant Funds. Those funds are available for immediate distribution. Counties should begin invoicing for the TxDOT grant funds for reimbursement as soon as you receive authorization to proceed with construction. You may invoice for the TxDOT Grant funds between the 15th and 25th of each month for expenses incurred and paid on projects listed on the prioritized project list.

If you have questions regarding these matters, please contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert T. Bass', with a stylized flourish extending to the right.

Robert T. Bass

RTB/afb
Enclosure

IN THE COMMISSIONERS COURT
OF
WISE COUNTY, TEXAS

**GENERAL ORDER REGARDING DISBURSEMENTS FROM
COUNTY ENERGY TRANSPORTATION REINVESTMENT ZONE INCREMENT FUND**

BE IT REMEMBERED, that on the ___ day of _____, 20___, this Commissioners Court created a County Energy Transportation Reinvestment Zone pursuant to §222.1071 of the Texas Transportation Code.

Prior to the distribution of any funds from the increment fund of the County Energy Transportation Reinvestment Zone, the Commissioners Court of Wise County, Texas, makes the following findings:

- (1) Funds available within said increment fund will be distributed and will be utilized for transportation infrastructure projects located throughout the political boundaries of Wise County, Texas, and
- (2) The support and funding of transportation infrastructure projects is a general governmental function delegated to the Commissioners Court of Wise County, Texas and authorized by the Texas Constitution and statutes.
- (3) All disbursements from such fund shall be specifically authorized by separate order in conformity with these general provisions.

Dated:

County Judge, Wise County, Texas

Commissioner, Precinct 1

Commissioner, Precinct 2

Commissioner, Precinct 3

Commissioner, Precinct 4

Attest: _____
County Clerk, Wise County, Texas

IN THE COMMISSIONERS COURT
OF
WISE COUNTY, TEXAS

GENERAL ORDER REGARDING DISBURSEMENTS FROM
COUNTY ENERGY TRANSPORTATION REINVESTMENT ZONE INCREMENT FUND

BE IT REMEMBERED, that on the 27th day of January, 2014, this Commissioners Court created a County Energy Transportation Reinvestment Zone pursuant to §222.1071 of the Texas Transportation Code.

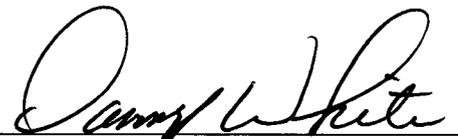
Prior to the distribution of any funds from the increment fund of the County Energy Transportation Reinvestment Zone, the Commissioners Court of Wise County, Texas, makes the following findings:

- (1) Funds available within said increment fund will be distributed and will be utilized for transportation infrastructure projects located throughout the political boundaries of Wise County, Texas, and
- (2) The support and funding of transportation infrastructure projects is a general governmental function delegated to the Commissioners Court of Wise County, Texas and authorized by the Texas Constitution and statutes.
- (3) All disbursements from such fund shall be specifically authorized by separate order in conformity with these general provisions.

Dated: September 15, 2014



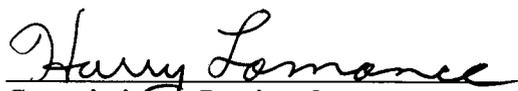
County Judge, Wise County, Texas



Commissioner, Precinct 1



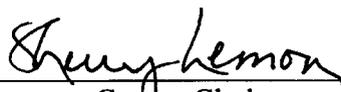
Commissioner, Precinct 2



Commissioner, Precinct 3



Commissioner, Precinct 4

Attest: 

County Clerk

Sherry Lemon
Ex-Officio Clerk of Commissioners Court
County Clerk, Wise County

