

**STATE ETHICS COMMISSION
ADVISORY OPINION
S.E.C. 2010-08**

Whether a Community Improvement District (CID) is an Agency as defined by the Ethics in Government Act (Act).

ADVISORY OPINION

Georgia law allows for the creation of a number of authorities and special purpose districts in order to address the varying needs of districts and neighborhoods. One form of special purpose district in Georgia is the Community Improvement District, a quasi-governmental entity created by the Georgia Constitution and local enabling legislation. CIDs are created to promote business and community development by providing services in addition to those provided by the local government for street and sidewalk improvements, parks and recreation, waste disposal and general beautification of the public areas of the district. The board of the CID has the power to raise funds by setting an additional ad valorem millage rate on commercial properties within the district, specifically excluding residential property which cannot be taxed by the CID. The additional taxes imposed by the CID are collected by the local municipality and transmitted to the CID Board for expenditure in accordance with the purposes of the district.

On November 1, 2010, Central Perimeter Community Improvement District (CPCID) requested that the Commission determine whether a Community Improvement District ("CID") is a state "Agency" as defined by § 21-5-30.2 of the Act. If a CID is an Agency under subsection 30.2 of the Act, it is prohibited from making a contribution to any campaign committee, political action committee or political organization or candidate.

Subsection 30.2 of the Act defines an "Agency" as:

- (A) Every state department, agency, board, bureau, commission, & authority;
- (B) Every county, municipal corporation, school district, or other political subdivision of this state;
- (C) Every department, agency, board, bureau, commission, authority, similar body of each county, municipal corporation, or other political subdivision of this state; and
- (D) Every city, county, regional, or other authority established pursuant to laws of this state.

After review of the enabling legislation and the charter of CPCID, the Commission has determined that, while CIDs may perform some governmental functions, they are not an Agency for purposes of § 21-5-30.2 of the Act.

The Commission has analyzed this issue using the framework outlined by the Second Circuit Court of Appeals in Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158 F.3d 92 (2d Cir. N.Y. 1998). Although a 2nd Circuit case, Kessler is the seminal authority on this issue and provides the framework for analyzing whether a quasi-governmental special purpose district should be considered a public agency.

The facts of Kessler are as follows; Non-owner residents of a Business Improvement District (BID), the New York version of a CID in Georgia, alleged that the BID was the equivalent of a local government agency denying them equal voting power in violation of the U.S. Const. Amend. XIV. The Court held that, although a few of the BID's functions were of the type also performed by the government, the BID's responsibilities were so circumscribed that the BID could not have been said to exercise the core powers or sovereignty typical of a general purpose governmental body and, thus, was not a governmental entity.

The court's analysis determining that a quasi-governmental entity, such as a BID, should not be considered an Agency hinged upon the following factors:

- The BID's functions bear a close relationship to the BID's limited purpose, which is the private interest of restoring and promoting business activity in the District¹.
- Services provided by the BID merely supplement and do not replace the local municipality's services. The BID is not concerned with the provision of general public services such as schools, housing, hospitals, jails, firefighting, transportation, utilities, or zoning.
- The BID lacks regulatory power and has no authority to enact or enforce any laws governing the conduct of persons present in the district.
- The BID does not have the power to impose income taxes, sales taxes or to set tax rates².
- The BID is subject to a high level of municipal control. The BID does not have perpetual existence and must be re-authorized by the city & can be dissolved by the city. The City must appoint Board members and must approve a district plan.
- Property owners foot the bill for BID activities by paying the assessment, but receive a significant benefit in the form of increased property values.
- While some of these are types of services often provided by local governments, the court concluded that the fact that the BID also provides them is insufficient to subject it to the governmental standard because (a) by law the BID responsibility for these functions is (at most) secondary to that of the Municipality (b) BID activities in these areas are quantitatively dwarfed by those of the Municipality, and (c) the services performed by the BID are qualitatively different from core municipal functions.

The Commission adopts the reasoning of the Kessler Court with respect to analyzing whether a special purpose district, such as CPCID or other Georgia CIDs, are Agencies under the Act.

First, a CID is created for limited private purposes, with respect to business, and can only perform certain quasi-governmental functions. The Georgia Constitution, article IX paragraph II, specifies that CIDs can be created to provide the following governmental services and facilities for the district (1) Street and road construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads. (2) Parks and recreational areas and facilities. (3) Storm water and sewage collection and disposal systems. (4) Development, storage, treatment, purification, and distribution of water. (5) Public transportation. (6) Terminal and dock facilities and parking facilities. (7) Such other services and facilities as may be provided for by general law³. Under the Georgia Constitution, CIDs do not have the authority to perform other governmental functions.

The local City/County government retains full authority and control over the area encompassed by a CID⁴. The City/County government still has the responsibility to provide core governmental services to the CID area⁵, such as schools, housing, hospitals, jails, public safety, transportation, utilities, or zoning and enforcement power.

¹ 960 F.Supp. at 774.

² Like Georgia's CID, a BID can set an internal levy on property owners within the district but cannot impose taxes generally; it does not levy or collect its own assessments. Those functions are performed by the municipality, which holds the moneys until they are disbursed- either to the District, or perhaps to another entity if the City is displeased with the District and elects to dissolve the entity

³ GA. CONST. ART. IX., para II

⁴ GA. CONST. ART. IX. para V

⁵ Id.

Second, The CID does not receive any general city/county tax revenue or government funding. They do not have the power to impose income taxes, sales taxes or to set tax rates, nor do they collect taxes. In order to raise revenue, the CID can impose an additional ad valorem real estate tax on commercial properties within the district (statutorily capped at 2.5% of the property value)⁶. The CID can issue tax-exempt special assessment bonds, but only to finance improvements for public use. Those bonds are backed by the full faith and credit of the CID, but do not constitute a debt or obligation of the State of Georgia⁷.

Third, CIDs are subject to a great deal of City/County control. CIDs must encompass a defined geographic area and can only exist for a limited period of time (requiring additional legislative action for extension of duration). CIDs must file a development plan with the City/ County, and can be dissolved at the election of the City/County⁸.

Fourth, before a CID can be created, both a simple majority of the commercial property owners AND the owners of at least 75% of the taxable value of the commercial property located within the proposed district must consent in writing and the state must take legislative action. Each CID must be governed by an administrative board, which must include at least one local government representative⁹.

The above factors comport with the federal Circuit Court analysis in Kessler which determined that a BID is not a public agency. The responsibilities of a CID are so circumscribed that it cannot be said to exercise the core powers or sovereignty typical of a general purpose governmental body and, is therefore, not an Agency as defined by the Act.

As a policy matter, the Act's ban on contributions by public agencies is intended to prevent public tax dollars, government resources and government authority from being used to finance campaigns. As explained above, CIDs are privately funded, do not have access to government resources and lack the power and authority of a government agency.

Prepared by
Sherilyn Streicker, Deputy Executive Secretary and
Stacey Kalberman, Executive Secretary
December 2, 2010

⁶ Those additional levies are collected by the local Tax Commissioner, returned to the CID by its respective county, then used by the CID board of directors for improvements within the district.

⁷ GA. CONST. ART. IX. para IV.

⁸ See, e.g., 1985 Ga. Laws 4016 sec. 5 (Cobb County Community Improvement Districts Act), 1987 Ga. Laws 5467 sec. 5 (Fulton County Community Improvement Districts Act).

⁹ GA. CONST. art. IX, para. III.