

The Senate of The State of Texas

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OPINION COMMITTEE



TROY FRASER

FILE # ML-44605-06
I.D. # 44605

February 6, 2006

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0441-GA

Dear General Abbott:

As Chairman of the Senate Committee on Business & Commerce, I would like to request you issue an opinion on the issue of how to handle the assets of a municipal utility district once that district has been dissolved.

Specifically, I would like to know the meaning of "inactive" under Section 49.321 of the Texas Water Code. Additionally, I would like to know if the district has the authority to refund excess tax monies and, if so, the proper allocation of those tax monies.

Attached you will find a letter from the Lake LBJ Municipal Utility District No. 2 outlining the background of the situation.

If you have any questions regarding this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Troy Fraser".

Troy Fraser
State Senator

enc.



Lake LBJ Municipal Utility District No.
510A Highland Drive
Highland Haven, Texas 78654
(830) 598-8314

Tuesday, January 17, 2006

The Honorable Troy Fraser
P.O. Box 12068
Capitol Station
Austin, Texas 78711

Re: Request for Attorney General Opinion

Dear Senator Fraser:

On behalf of Lake LBJ Municipal Utility District No. 2 (the "District"), I am requesting that you seek a legal opinion from the Attorney General of the State of Texas pursuant to the authority set forth at Section 402.042 of the Texas Government Code. The District would like an opinion regarding the manner of dissolution of the District and confirming its authority to refund excess tax monies to its taxpayers in connection with the dissolution of the District.

Background

The District is a conservation and reclamation district organized and operating under the authority of Chapters 49 and 54 of the Texas Water Code. The District was originally created for purposes of financing, owning and operating a centralized wastewater collection system for the residents and property owners within the District. Currently, the property owners utilize "septic systems" and other individual on-site sewage facilities to provide for the disposal of domestic sewage. Many of these systems are aging and may be failing.

The District previously undertook a number of actions in order to develop a centralized wastewater collection system for the community, including the following:

1. The District entered into a contract with Kingsland Municipal Utility District (a neighboring utility district) for wholesale wastewater treatment and disposal services.
2. The District retained engineering consultants to prepare the plans and specifications for the project, conducted environmental reviews, feasibility studies, and obtained numerous federal approvals for the project.
3. The District obtained easements for the project by agreement with landowners and in some cases, by condemnation.

4. The District obtained loan and grant commitments from the United States Department of Agriculture- Rural Development (formerly the Farmers Home Administration). USDA- RD approved a total development grant of \$2,613,000 to finance a significant portion of the project.
5. The District conducted elections on January 20, 2001 and again on May 3, 2003. At the second election, the voters authorized the District to take the following actions: (i) to issue bonds in the amount of \$687,000 for purposes of financing the wastewater collection system and related costs (that portion of the estimated construction costs not included in the USDA grant); (ii) to levy and collect a tax of not to exceed \$0.06 (6 cents) per one hundred dollars (\$100) valuation of taxable property in the District to pay the principal and interest on said bonds; and (iii) to levy and collect an operations and maintenance tax of not to exceed \$0.287 (28.7 cents) per one hundred dollars (\$100) valuation of taxable property in the District.
6. The District competitively advertised for bids from qualified contractors for construction of the wastewater collection system in early 2005, but all bids substantially exceeded the engineering estimates for the project (upon which the bond authorization was based).
7. In order to pay for the increased costs of construction of the project, the District conducted an election on May 7, 2005 to obtain approval for the issuance of the District's bonds in the total aggregate amount of \$2,100,000 and the levying and collection of a tax adequate to provide for the payment of the bonds.
8. The majority of authorized voters within the District voted against the issuance of bonds and collection of taxes to pay for the revised costs of the project.

Since the District cannot secure bond authorization sufficient to finance the revised costs of the project, the Board of Directors of the District has determined that the proposed construction of a centralized wastewater collection system for the District is impracticable and cannot be successfully and beneficially accomplished, and the Board of Directors intends to proceed with the dissolution of the District.

The Board of Directors requests that you seek an opinion from the Attorney General for guidance regarding the dissolution of the District and particularly regarding its authority to refund any excess tax monies to its taxpayers. Each of these questions is addressed separately below.

Question No. 1- What is the meaning of "inactive" under Section 49.321 of the Texas Water Code.

Section 49.321 of the Texas Water Code provides that the Texas Commission on Environmental Quality (TCEQ) may dissolve any district "that is inactive for a period of five consecutive years and has no outstanding bonded indebtedness." Similarly, Section 49.324 provides that TCEQ may enter an order dissolving a district after a hearing if it finds that the District has performed "none of the functions for which it was created" for a period of five consecutive years and has no outstanding bonded indebtedness.

The Board of Directors of the District desires to know whether it may dissolve the District under these Water Code procedures. The District has not provided wastewater

service, which was the function for which it was created. However, it has collected taxes, conducted elections, retained consultants who have rendered services for the District, and engaged in other actions during the previous five years in anticipation of providing wastewater service.

We note that Section 54.012 of the Water Code identifies the “purposes” of municipal utility districts. Again, the District has not “performed” any of these purposes in the preceding five years, but it has engaged in a number of actions (described above) in anticipation and preparation of achieving a statutory purposes (the preservation and protection of waters in the state).

We seek an opinion from the Attorney General regarding the meaning of “inactive” under Section 49.321, so that the Board of Directors may determine whether it can pursue dissolution through TCEQ under Texas Water Code Section 49.231. Under such circumstances, the Comptroller would determine the proper disposition of the assets of the District under its escheat authority, as more particularly described below.

Question No. 2- Authority of District to Refund Excess Tax Monies

If the District is eligible to dissolve under Section 49.231 of the Texas Water Code, then Section 49.327 provides that upon dissolution of such a district by the commission all assets of the district shall escheat to the State of Texas. Significantly, it appears that the escheat provisions of this statute are only applicable to districts dissolved “by the commission.” Under this statute, the remaining tax monies (and any other assets) held by the District would be provided to the Comptroller under the escheat laws set forth in the Texas Property Code.

If the District is not eligible for dissolution under Section 49.321 of the Texas Water Code, then the Board of Directors would seek to dissolve the District under the authority of Section 54.734 of the Texas Water Code. This statute authorizes a board of directors of a municipal utility district to “dissolve and liquidate the affairs of a district” after certain notice and hearing requirements are met.

The Board of Directors seeks an opinion from the AG regarding whether the authority to “liquidate the affairs of the District” includes the authority to refund remaining tax monies to taxpayers. The Board of District desires to make such refunds, but will only do so if it has legal authority.

In Opinion GA-0194, the Attorney General considered whether a school district may refund taxes collected on travel trailers. After noting that the refund provisions set forth in section 31.11 of the Tax Code apply only to cases in which a taxpayer erred in paying taxes correctly assessed, the Attorney General ruled that a school district may not elect to refund taxes on travel trailers that were retroactively exempted from taxation because “there is no express or implied statutory authority for school districts ... to make refunds.”

In the current situation, the District believes that the authority to “liquidate the affairs” of the District set forth in Section 54.734 constitutes express or implied authority to refund excess tax monies held by the District. Under Black’s Law Dictionary, “liquidate” is defined as “the process of reducing assets to cash, discharging liabilities and *dividing surplus* or loss.” (emphasis added). **In this case, the District would be dividing the surplus tax monies as part of its liquidation.**

If the liquidation authority set forth in Section 54.75-4 does not include the authority to refund tax monies, there is no statute that provides for the disposition of such monies. As noted above, the escheat provision set forth in Section 49.327 applies only to districts dissolved by TCEO.

Question No. 3- Proper Allocation of Refunded Tax Monies

In the event that the Attorney General confirms that the District's liquidation authority empowers it to refund tax monies, then the District also desires that the Attorney General opine as to the proper allocation of such monies between taxpayers. The District will have between \$100,000- \$300,000 in excess tax monies remaining after payment of outstanding costs and expenses, and repaying organizational and other costs. The District has collected maintenance and operations taxes since voters first authorized the levy of taxes in the January 2001 bond election. All tax monies have been commingled in the District's operating fund. It is not possible for the Board of Directors to determine which tax monies were paid by which individual taxpayers, or which taxes were expended for payment of costs and expenses during the intervening years. In addition, the ownership of property has changed in the intervening years. As a result, the current owner of property may not be the same person who originally paid taxes to the District for that property. **However, all taxpayers for the year 2005 can be identified.**

The District requests guidance from the Attorney General as to the proper manner of refunding tax monies. The District has the following specific legal questions regarding the refunding of excess taxes: (i) may the tax monies be paid to the current property owners only; (ii) should the District refund the money to all property owners who paid taxes since 2001, even though it may not be possible or practicable to identify many of the original taxpayers; (iii) what is the proper disposition of taxes for taxpayers who cannot be located; and (iv) what is the proper methodology for calculating the amount of refund payment to be made to each taxpayer.

We appreciate your consideration of this request, and hope that you will solicit an Attorney General opinion so that the Board may proceed with the proper dissolution of the District and the proper disposition of its assets.

If you have any questions regarding this matter, please do not hesitate to contact me at your convenience.

Sincerely,



Charles Danner, President
Lake LBJ MUD No. 2
830 598 6058

cc: Board of Directors