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January 14, 2010

RQ-0853-GA

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

Re: Request for an Attorney General's Opinion Regarding Potential Conflict of Interest arising under Chapter 171, Texas Local Government Code.

Dear General Abbott:

I respectfully request an Attorney General Opinion on behalf the Uvalde County Underground Water Conservation District ("District") concerning an interpretation of the meaning of the conflict of interest provisions set forth in Local Government Code § 171.004. As you know, Chapter 171 of the Local Government Code sets forth the conflict of interest provisions for officers of municipalities, counties and certain local governmental entities. These provisions also cover officers and board members of groundwater conservation districts created under Chapter 36, Texas Water Code. See Tex. Water Code § 36.058.

In a Board action on March 17, 2009, the District acted to adopt revised rules. Among the revisions considered by the Board was a revision to Rule 12.2(a)(1).

As originally proposed on February 3, 2009 (the "February 3rd version"), Rule 12.2(a)(1) provided:

A well or well system used for irrigation may be permitted to withdraw groundwater in an amount not to exceed a cumulative maximum production level of ten (10) gallons per minute per irrigated acre contiguously owned or operated by the same person, not to exceed two and one half (2 ½) acre feet per irrigated acre per year, regardless of which formation or aquifer is the source of the groundwater, unless an exception has been granted by the District. A tract of land otherwise contiguously owned and operated may be divided by a road or highway or similar right of way. In determining the two and one half (2 ½) acre foot production allocation, the District shall take in to account any groundwater

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withdrawal rights granted by any permitting authority associated with the tract, regardless of whether those rights have been conveyed.

The context and rationale for the proposed rule related to a prior decision of the Board on three pending applications for groundwater withdrawal permits from the District. The applicants for those permits already held groundwater irrigation rights from the Edwards Aquifer Authority to irrigate the same tract of land for which they were seeking irrigation withdrawal rights from the District. In other words, after the award from the District, the applicants would have held two groundwater irrigation withdrawal rights for the same tract of land – one in the amount of 2 acre feet per acre from the Edwards Aquifer Authority and one for 2.5 acre feet per acre from the District – for a cumulative total of 4.5 acre feet. On November 20, 2008, under the provisions of the District Rules, last revised in 2002 (the "2002 District Rules"), the District interpreted the definitions of "groundwater" and "waste" as limiting groundwater production rights to 2.5 acre feet cumulative, regardless of the aquifer from which the water was withdrawn or the permitting authority. In accordance with this interpretation of its 2002 District Rules, the District voted to deny the full allocation of water requested by the applicants; instead, it granted the applications in an amount that brought the applicants' total withdrawal rights for each tract of land up to 2.5 acre feet of water per acre per year. Following the Board's action on the applications on November 20, 2008, the Board sought to codify this interpretation of the 2002 District Rules. The District had already initiated a rules revision process. Accordingly, the Board incorporated the February 3rd version, as noted above. As originally proposed, no vote or action was taken by the Board on this version of the proposed Rule 12.2(a)(1).

On March 17, 2009, the Board acted to revise the proposed language (the "March 17th version") for Rule 12.2(a)(1) to read as follows:

A well or well system used for irrigation may be permitted to withdraw groundwater in an amount not to exceed a cumulative maximum production level of ten (10) gallons per minute per irrigated acre contiguously owned or operated by the same person, not to exceed two and one half (2 ½) acre feet per irrigated acre per year, ~~regardless of which formation or aquifer is the source of the groundwater,~~ unless an exception has been granted by the District. A tract of land otherwise contiguously owned and operated may be divided by a road or highway or similar right of way. ~~In determining the two and one half (2 ½) acre foot production allocation, the District shall take in to account any groundwater withdrawal rights granted by any permitting authority associated with the tract, regardless of whether those rights have been conveyed.~~

The March 17th version of Rule 12.2(a)(1) passed with a vote of 4 to 3.¹ Two of the "aye" votes in this rulemaking action were cast by the two Board Members who are the subject of this Attorney General Opinion request (Board Members A and B). Both Board Members A and B

¹ The Board is comprised of 8 members total. The Chair of the Board, not at issue in this request, abstained from voting on this rule adoption.

participated in the rulemaking proceeding. Board Member A made the motion to amend the rule prior to adoption and Board B seconded the motion.

When the Board took action on March 17, 2009 in the pending rulemaking proceeding, the applications described above were pending under a Motion for Rehearing filed by the applicants. Following the rulemaking action, on April 20, 2009, the Board considered and granted the applicants' Motion for Rehearing and reversed its prior decision on the applications. It awarded the applicants' full request, so that applicants would now hold 4.5 acre feet per year of irrigation water rights instead of being limited to 2.5 acre feet under the prior ruling.

In the consideration of the applications on the permits described above, Board Member A had filed an affidavit disclosing his business interest in one of the applicants. In that affidavit, Board Member A stated he is an employee of one of the two partners who are the applicants described above and that he derives more than 10% of his gross income from that employment. On the basis of his employment with one of the applicants, Board Member A abstained from participating in the consideration or deliberations on the applications.²

Following the Board's April 20th reversal of its decision, allegations were raised by members of the public in a second round of Motions for Rehearing, this time filed by the Protestants. On May 11, 2009, Protestants asserted that Board Members A and B hold an economic interest or an interest in real property that should have been disclosed in an affidavit filed with the District and should have been the basis for an abstention by these two Board Members on this matter pursuant to § 171.004, Local Government Code.

The allegations raised concerning a conflict of interest for Board Member A are that Board Member A should have abstained from voting on Rule 12.2(a)(1) because the March 17th modification to the proposed rule paved the way for the Board's initial decision to be reversed and the permits to be granted as requested on rehearing. The argument goes that without the March 17th rule modification the Board's decision to initially limit the amount of water that could be withdrawn under a permit by the applicants would have been affirmed. They assert it is doubtful the applicant's motion for rehearing would have been successful had the February 3rd version of Rule 12.2(a)(1) been approved. Protestants assert that Board Member A filed an affidavit disclosing that he derives more than 10 percent of his gross income from his employment with one of the applicants. He abstained from directly voting on the applications as a result of this economic interest, and Protestants assert he should have abstained from voting on this rule for the same reason.

The allegations raised concerning a conflict of interest held by Board Member B are that Board Member B owns a substantial parcel of land in Uvalde County underlain by the Buda, Austin Chalk, and the Edwards Aquifers. There are not a large number of landowners within the

² One other Board Member, not at issue in this request, also abstained from voting on the applications due to his employment by one of the applicants in another business.

District who own land with these particular geological/hydrological features. This land is currently valued at over \$2500. Board Member B holds permits issued by both the Edwards Aquifer Authority and the District. The effect of Board Member B's vote would allow him up to 4.5 acre feet of water per acre, not the 2.5 acre feet had the February 3rd version been adopted. Protestants assert the March 17th revisions to Rule 12.2(a)(1) directly benefit Board Member B in a manner distinguishable from the general public because he would be entitled to 4.5 acre feet per irrigated per year as opposed to 2.5 acre feet as would have been the case under the February 3rd version of Rule 12.2(a)(1). Attorney General Opinion DM-130 (1992) states that § 171.004, Local Government Code, would, in certain circumstances, bar a city council member's voting on a zoning matter affecting territory in which the member's residence is located if the vote would have a special economic effect distinguishable from the general public. Protestants assert that Board Member B's actions on Rule 12.2(a)(1) would have a special economic effect on the value of his property distinguishable from its effect on the public similar to that considered and described in Attorney General Opinion DM-130. Board Member B did not file an affidavit or abstain from voting on Rule 12.2(a)(1).

Because the votes cast by Board Members A and B constituted 2 of the 4 votes in favor of the revision to Rule 12.2(a)(1), Protestants protested their action and participation in this matter. On August 4, 2009, the Board voted unanimously to seek an Attorney General Opinion.

Questions presented

Accordingly, the Board of the District requests your interpretation and guidance concerning the meaning and applicability of Local Government Code § 171.004 in this context. Specifically, the Board seeks your guidance on whether the facts presented here required Board Member A and/or Board Member B to abstain on a vote on a rule of general applicability. In this regard, we seek guidance from you on the following questions:

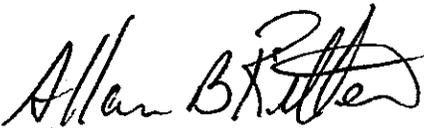
- 1) With respect to Board Member A, under the facts presented did the Board's action on Rule 12.2(a)(1) affect his substantial interests in a business entity in a manner that is distinguishable from the rule's effect on the general public and thus require disclosure and abstention under § 171.004, Local Government Code?
- 2) With respect to Board Member B, under the facts presented did the Board's action on Rule 12.2(a)(1) affect his substantial interests in real property in a manner that is distinguishable from the rule's effect on the general public and thus require disclosure and abstention under § 171.004, Local Government Code?
- 3) With respect to Board Member B, are the facts and circumstances described in Attorney General Opinion DM-130 sufficiently met so as to bar Board Member B's action on Rule 12.2(a)(1)? In other words, under DM-130, the Attorney General found that § 171.004, Local Government Code, would, in certain circumstances bar a

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city council member's ability to vote on a zoning matter affecting territory in which the member's residence is located if the vote would have a special economic effect distinguishable from the general public. In this circumstance, would § 171.004, Local Government Code act as a bar to Board Member B's ability to take action on Rule 12.2(a)(1) because of that rule's affect on land he owns in Uvalde County?

Thank you for your attention to this matter. Please let me know if I can be of further assistance.

Very truly yours,



Allan B. Ritter

cc: Mr. Vic Hilderbran, General Manager, Uvalde County Underground Water Conservation District
The Honorable Carlos Uresti, Texas Senate
The Honorable Pete Gallego, Texas House of Representatives
The Honorable William Mitchell, Uvalde County Judge