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VIA E-MAIL AND U.S. MAIL

February 26, 2010

The Honorable Judge Keith Self, County Judge
Mr. Bill Bilyeu, County Administrator
Collin County Administration Building
2300 Bloomdale Rd., Suite 4192
McKinney, TX 75071

Re: Letter Opinion Addressing Authority of Collin County to Enter into
Interlocal Agreement with the North Texas Groundwater Conservation
District

Dear Judge Self and Mr. Bilyeu:

The purpose of this correspondence is to provide you with my legal opinion on whether Collin County may enter into an interlocal agreement with the North Texas Groundwater Conservation District ("District") to loan the District funds on a short-term basis to assist with its start-up maintenance and operation expenses.

At the outset, there are no Texas cases to the best of my knowledge specifically addressing whether a county can generally loan money to any groundwater conservation district to assist with its initial start-up costs, much less any case law dealing with such issues and involving anything resembling the distinctive special county role created by the legislature for Collin County vis-à-vis the District. There are, however, numerous Texas cases and Texas Attorney General opinions addressing a county's authority to grant or loan money generally, including to other political subdivisions of the state such as the District, and the results of the analysis differ depending on the specific facts of each case. Thus, one must consider the specific facts and circumstances related to the District, Collin County, and the nature of the proposed interlocal agreement and apply the legal analysis set forth in the relevant case law and Attorney General opinions to derive an opinion.

In light of those considerations, as set forth herein, it is my opinion that Collin County does have the authority to loan money to the District for its start-up maintenance and operations in accordance generally with the terms of the proposed interlocal agreement.

Unlike other types of political subdivisions, counties can exercise only those express or implied powers granted by the Texas Legislature or Texas Constitution.¹ If the Texas Legislature or Texas Constitution provides express authority to a county, the commissioners court has the implied authority to carry out those express powers.² Although a commissioners court may act only under the authority given to conduct county business, “the courts of this state have allowed the exercise of broad authority, express or implied, necessary to achieve specific goals authorized by state law.”³ While there is no *express* authority provided to Collin County to loan money to the District, it is my opinion that loaning money to the District to facilitate its initial operations is *impliedly* authorized to achieve the purposes of the District’s enabling legislation and the and Collin County’s role in that legislation, as well as necessary to carry out the express powers Collin County does have with regard to regulation and planning regarding groundwater. Such an exercise of implied county authority is authorized and supported by the constitution, case law, numerous Attorney General Opinions, and is necessary to achieve specific goals authorized by state law.

In terms of express authority, the District’s enabling legislation provides Collin County with certain express powers not normally found in connection with other groundwater conservation districts. Collin County was given the express authority to hold public hearings on whether to be included in the District, to confirm or reject the county’s inclusion in the District, and was required to adopt a resolution to reflect the county’s decision.⁴ Collin County was also given the express power to appoint the directors of the District and to fill any vacancies on the District’s Board of Directors.⁵ It is important to note that the District’s enabling legislation specifically provides:

“This chapter shall be liberally construed to achieve the legislative intent and purposes of Chapter 36, Water Code. A power granted by Chapter 36, Water Code, or this chapter shall be broadly interpreted to achieve that intent and those purposes.”⁶

In addition, the District’s enabling legislation clearly states that “the district is created to serve a public use and purpose,” and also states that “all the land and other property included within the boundaries of the district will be benefitted by the works and projects that are to be accomplished by the district.”⁷ Thus, the legislature has expressly found a clear public purpose and benefit for all of Collin County from the creation and operations of the District, and has also clearly defined an interest for Collin County in the creation and start-up of the District.

¹ *City of Laredo v. Webb County*, 220 S.W.3d 571, 576 (Tex. App.—Austin 2007, no pet.); *See also City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003).

² *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941); Tex. Att’y Gen. Op. No. GA-0583 (2007).

³ Tex. Att’y Gen. Op. No. DM-317 (1995).

⁴ SPEC. DIST. LOC. LAWS CODE ANN. § 8856.003 (Vernon 2009).

⁵ *Id.* §§ 8856.023 and 8856.053.

⁶ *Id.* § 8856.007.

⁷ *Id.* § 8856.001.

Another express power provided by law to Collin County is the authority to require in certain plat applications a statement prepared by an engineer or geoscientist certifying that adequate groundwater is available for the subdivision in the proposed plat.⁸ One of the functions of the District will be to ensure groundwater is available to support development within its boundaries, including Collin County, and ensure that there is an adequate amount of groundwater to meet the needs of future generations. Because Collin County has the express authority to ensure water is available for new development within its jurisdiction, the county has the implied authority to assist the District since the District's mission of groundwater resource protection will further the county's express authority related to water availability and because the District itself must make determinations of groundwater availability within the county which will benefit the county in carrying out its own county authority.⁹

Texas counties have other express statutory duties to preserve water quality within their boundaries. Counties have the authority to enforce water quality laws as provided in the general sanitation and health protection statute in Chapter 341 of the Texas Health and Safety Code. Counties also have the authority to enforce water quality under Chapter 7 of the Texas Water Code. Counties have additional authority set forth in the Water Code to conduct inspections to determine water quality standards. For example, a county may enter property to conduct investigations and inspections concerning water quality and may enter into agreements with other local governments for purposes of water quality management, inspection, and enforcement.¹⁰ One of the responsibilities of a groundwater conservation district is to preserve and protect the water resources within its boundaries and to prevent the deterioration of the quality of groundwater within its boundaries. Groundwater conservation districts have the authority to manage and enforce water quality violations within their boundaries. As such, I believe that Collin County has the implied authority to fund the District's start-up costs because the District will help to carry out one of the county's express responsibilities of monitoring water quality within its boundaries.

Perhaps the most compelling argument in terms of overlapping responsibilities between the County and the District relates to the inclusion of Collin County in the Northern Trinity and Woodbine Aquifers Priority Groundwater Management Area ("PGMA") and the resulting statutory authority that such a designation extended to Collin County. As you are aware, Collin County is within the Northern Trinity and Woodbine PGMA designated by the Texas Commission on Environmental Quality on February 11, 2009, which means Collin County is experiencing, or is expected to experience, critical groundwater declines. Pursuant to Chapter 35 of the Texas Water Code, counties within a PGMA have broad authority to adopt water availability requirements within their boundaries and to inform their residents of the status of the area's water resources and

⁸ TEX. LOC. GOV'T ANN. §§ 232.032 and 232.030 (Vernon 2009).

⁹ See TEX. WATER CODE ANN. § 36.1071 (Vernon 2009).

¹⁰ TEX. WATER CODE ANN. § 26.171-.173 (Vernon 2009).

management options.¹¹ The PGMA designation continues to exist within Collin County even though the District was created and includes Collin County within its boundaries. Collin County continues to have powers and duties associated with the PGMA designation, but the county can rely on the District to perform these functions on behalf of the county. As such, the county has an interest in seeing its express powers associated with a PGMA designation be carried out and thus impliedly may assist the District to ensure that the District has the ability to carry out these powers.

Counties also have broad authority under the Interlocal Cooperation Act (“Act”) to enter into Interlocal contracts with other governmental entities to increase the effectiveness and efficiency of local governments.¹² The Act gives counties the broad authority to contract with other local governments for those functions and services in which both parties are mutually interested. Collin County’s execution of an Interlocal Agreement with the other counties to loan money to assist with the start-up costs of the District comports with the counties’ express authority to enter into interlocal contracts to perform those functions important to all parties to the contract. Moreover, a good argument could even be made that Collin County and the other counties could contract with the District under the Act and outright pay the District, without remuneration, to become operational and perform those functions for the counties that they could do individually.

Further, Article V, Section 18(b) of the Texas Constitution authorizes county commissioners courts to exercise such powers and jurisdiction over all county business, as such county business is set forth by the constitution and laws of the state.¹³ “County business” has been broadly construed by Texas Courts to include matters of general concern to county residents. Specifically, the affairs of conservation and reclamation districts have been determined to be “county business.”¹⁴ Commissioners courts have the authority to act on behalf of the county where such action is authorized by the constitution or laws. Because Article V, Section 18(b) of the Texas Constitution allows commissioners courts to exercise authority over all county business and county business has been held to include matters of general concern to county residents and the affairs of conservation and reclamation districts, it is my opinion that the Collin County Commissioners Court has the authority to loan money to the District as proposed. The affairs of the District are of general concern to county residents, as found by the legislature in the District’s enabling legislation, which means that the affairs of the District are county business. The Collin County Commissioners Court has the express authority provided in the Texas Constitution to exercise power over all county business and can therefore exercise powers to loan money to promote the accomplishment of such county business.

¹¹ *Id.* §§ 35.019, 35.012.

¹² TEX. GOV’T CODE ANN. § 791.011 (Vernon 2009).

¹³ Tex. Const. art. V, § 18(b).

¹⁴ *Rodgers v. County of Taylor*, 368 S.W.2d 794, 796-97 (Tex. Civ. App.—Eastland 1963, writ ref’d n.r.e.).

In light of all the express powers provided to Collin County by the constitution or legislature, loaning money to the District as proposed in the interlocal agreement is an act that can be considered impliedly necessary to carry out all of the county's express powers related to groundwater. The county clearly has an interest in ensuring that its express powers and duties are carried out and can exercise implied authority in this regard. Loaning money to the District to ensure that some of its express responsibilities are carried out is the type of implied authority the county may exercise.

It should be noted that there are numerous Attorney General Opinions addressing county authority to spend public funds, including expending funds on other political subdivisions. The opinions almost invariably involve a case-by-case analysis of the facts involved. There are only two Attorney General Opinions we could locate involving the ability of a county to expend funds regarding a groundwater conservation district, and neither of them involve facts similar to those presented in the interlocal agreement proposed between the District and Collin County.¹⁵ Attorney General Opinion GA-601 addresses Mills County's authority to outright fund the Fox Crossing Water District's ongoing maintenance and operation expenses. The Attorney General held that Mills County was not authorized to fund the maintenance and operation expenses of the district. However, the facts in that situation differ remarkably from those at hand in Collin County. First, the Fox Crossing Water District was to be an ad valorem tax-based district. When it failed to hold a successful tax election, it turned to Mills County to fund its operations on a continual, ongoing basis and did nothing to develop its own revenue stream. Collin County would be loaning money to the District to fund only its initial start-up costs and will eventually be reimbursed by the District. The District will thereafter be in a position to fund itself after it develops rules related to well registration, production, and payment of fees. Unlike Collin County with respect to the District, Mills County has no special role defined by the Legislature for the creation or start-up of the Fox Crossing district. Moreover, the Attorney General opined that Mills County had no express statutory authority with respect to water. As noted above, Collin County has numerous grants of express statutory authority with respect to water, including without limitation those that it acquired when it became designated as a PGMA (unlike Mills County, which is not in a PGMA), as well as specifically delegated powers in the District's enabling legislation. The second opinion, Attorney General Opinion JC-444, involved the payment by Kinney County of the costs of a confirmation election held by the Kinney County Groundwater Conservation District. The Attorney General ruled that the county could not pay for them because there was a specific statutory scheme set forth describing how the election costs would be paid by the district through a contract with the county. Once again, it was a completely different issue and Kinney County had no special powers, authority, or role with respect to groundwater or the formation of its local district that Collin County has with respect to the District.

As mentioned previously, Collin County was given the express authority in the District's enabling legislation to determine whether the county would be included in the

¹⁵ Tex. Att'y Gen. Op. Nos. JC-444 (2001) and GA-601(2008).

District and gives Collin County and the other counties the power to appoint the District Board of Directors as long as the District remains in existence. Collin County was given the express powers governing the creation and organization of the District, which is not only distinct from the powers conferred on the Fox Crossing or Kinney County districts, but is distinct from the powers given to most other groundwater conservation districts in Texas. For most other districts in the state, the county commissioners courts have no role in the creation and organization of districts. I point out these distinctions not to advocate that Collin County pay outright for the District's maintenance and operation expenses, but to show how the legislature's grant of power to the Collin County and the other commissioners courts within the District is different than other districts in the state.

Once the determination is made that the county has either express or implied authority to expend funds for a particular purpose, the next inquiry is whether the expenditure complies with the Texas Constitution. Article III, Section 52 of the Texas Constitution prevents political subdivisions like Collin County from lending public credit.¹⁶ However, a loan of public funds for a public purpose, with a clear public benefit received in return does not violate this constitutional provision.¹⁷ Whether a particular use of county funds is for an authorized county purpose is a determination that a commissioners court must make initially, subject to judicial review for abuse of discretion.¹⁸ Matters that serve a county purpose are county business for purposes of Article V, Section 18(b) of the Texas Constitution.

As mentioned previously, Article V, Section 18(b) of the Texas Constitution provides that a county commissioners court may exercise such powers and jurisdiction over all county business, as the county business is set forth by the state constitution and statutes. The Texas Supreme Court has interpreted the term "county business" as used in the constitution to include matters of general concern to county residents, including the affairs of conservation and reclamation districts.¹⁹ "County business" should be given a broad and liberal construction and can involve matters relating to other political subdivisions in the county as long as the matters are of public concern to the people in the county and thus serve a county purpose.²⁰ The Dallas Court of Appeals held that matters that are of public concern to residents in the county are, by nature, county business and that levee improvement district affairs are therefore county business if their affairs are of public concern.²¹ As noted above, the legislature has expressly declared that the works of the District will be a public benefit to all of the land and other property in Collin County. Based on the foregoing, it is my opinion that the purposes to be funded through the interlocal agreement with the District are clearly "county business" for Collin County.

¹⁶ Tex. Const. art. III, § 52.

¹⁷ Tex. Att'y Gen. Op. No. JC-36 (1999).

¹⁸ Tex. Att'y Gen. Op. No. GA-664 (2008).

¹⁹ *Harris Co. Flood Control Dist. v. Mann*, 140 S.W.2d 1098, 1104 (Tex. 1940).

²⁰ *Id.*

²¹ *Glenn v. Dallas Co. Bois D'Arc Island Levee Dist.*, 275 S.W.137, 145 (Tex. Civ. App.—Dallas 1925, judgm't rev'd on other grounds, 288 S.W. 165 (Tex. 1926)).

Thus, it is my belief that, if legally challenged for some reason, a court would find that Collin County was within its authority to participate in the proposed interlocal agreement with the District. A court exercises supervisory control over a commissioners court judgment only when the commissioners court acts beyond its jurisdiction or clearly abuses the discretion conferred upon the commissioners court by law.²² “If the commissioners court acts illegally, unreasonably, or arbitrarily, a district court may so adjudge.”²³ In reviewing a commissioners court judgment for abuse of discretion or authority, the reviewing court does not have the right to substitute its judgment and discretion for that of the commissioners court.²⁴ The district court may order the commissioners court to exercise its discretion, but cannot tell the commissioners court what decision to make.²⁵ Once again, whether a particular use of county funds is for an authorized county purpose is first and foremost a determination that a commissioners court must make.

Courts can be unpredictable, however, and it is possible, although I believe unlikely, that a court could determine that Collin County did not have the authority to enter into the interlocal agreement with the District. Where a court finds that a county violated a constitutional provision and abused its discretion by providing county funds for a unauthorized purpose, the county may seek to recover a payment erroneously paid. However, there is no law requiring the county to seek recovery of unauthorized payments.²⁶ If a reviewing court were to find for some reason that Collin County acted beyond its express or implied authority, it appears that the remedy will be for the county to stop providing loan money to the District and can request that the District pay the money back to the county. Therefore, interestingly, the remedy for a reviewing court’s decision that the county abused its discretion is likely the same outcome already provided in the proposed Interlocal Agreement between the District and the counties, which itself includes reimbursement, save and except that the County would have to cease further lending of money under the agreement.

CONCLUSION

In conclusion, in light of the facts presented in this inquiry and the analyses set forth under relevant law as applied to those facts, it is my opinion that Collin County does indeed have legal authority to loan money to the North Texas Groundwater Conservation District for its start-up maintenance and operations in accordance with the terms of the proposed interlocal agreement. The Legislature has unquestionably defined an active role for Collin County in the creation and start-up of the District, and has expressly declared that the works of the District will provide a public benefit to all of the land and other property in Collin County. Moreover, Collin County has express and

²² *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *City of Taylor v. Hodges*, 186 S.W.2d 61, 63 (Tex. 1945), *overruled on other grounds by Lubbock County, Tx. v. Trammel’s Lubbock Bail Bonds*, 80 S.W.3d 580 (Tex. 2002).

The Honorable Judge Keith Self

February 26, 2010

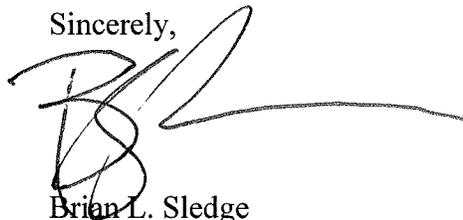
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implied authority over numerous groundwater and other water issues within its jurisdiction that will be served by the works of the District, not the least of which are the special duties and powers conferred on Collin County under Chapter 35 of the Texas Water Code when it was designated as a Priority Groundwater Management Area in 2009 by the Texas Commission on Environmental Quality (TCEQ). Furthermore, a compelling argument could be made that Collin County and/or the other two counties could outright contract with the District under the Interlocal Cooperation Act without expectation of repayment from the District to become operational and perform some of the groundwater and related duties that both the District and the counties have legal authority to perform independently; but, that inquiry is not before us, as the District fully intends to reimburse the County for this assistance as set forth in the interlocal agreement.

On behalf of the District, thank you for the opportunity to provide you with this letter opinion on my interpretation of the relevant law governing Collin County's authority to loan money to the North Texas Groundwater Conservation District as set forth in the proposed interlocal agreement. The District looks forward to working with Collin County and the other counties in the near future to determine ways in which the District may serve as a beneficial resource to the County in carrying out its groundwater availability and related duties, and vice versa, for the benefit of all citizens of the County and the District.

Please let me or your appointed District directors know if you have any questions or additional requests.

Sincerely,

A handwritten signature in black ink, appearing to be "BLS", with a long horizontal line extending to the right.

Brian L. Sledge

cc: Mr. Eddy Daniel, Board President
North Texas Groundwater Conservation District