



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 18, 2023

Mr. Tristan Marquez
Ector County Auditor
1010 East 8th Street, Room 121
Odessa, Texas 79761

Via E-Mail

Re: Request for an attorney general opinion regarding the legality of certain actions of the Ector County Utility District Board of Directors (RQ-0524-KP)

Dear Mr. Marquez:

We received your request for an attorney general opinion and have designated it as Request No. 0524-KP. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that deadline the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE § 402.042(c)(2). We received your request on December 15, 2023, setting a due date for your opinion of June 12, 2024.

We note from our initial review of your request that it contains many questions that are resolved only upon the investigation and resolution of issues of fact. The purpose of an attorney general opinion is to advise authorized requestors on the current state of the law. Unlike a court, which can resolve fact questions through an adversarial process involving sworn testimony and cross-examination, this office has neither the authority nor the resources to resolve disputed issues of fact through the opinion process. Accordingly, when presented with opinion requests that require the resolution of fact questions, this office has consistently concluded that such questions are outside the purview of the opinion process. *See, e.g.,* Tex. Att'y Gen. Op. Nos. GA-0896 (2011) at 1, JC-0020 (1999) at 2, M-187 (1968) at 3. Because many of your questions will require the resolution of issues of fact, we will be unable to answer all of them in an opinion. To the extent there are legal questions in your request we will endeavor to answer them.

By copy of this letter we are notifying those listed below of your request and inviting them to submit briefing on your questions if they have a special interest or expertise in the subject matter. The Office of the Attorney General accepts briefing from any interested party. If you are aware of other individuals or entities with an interest in this issue, please forward this invitation for briefing to them or let us know, so that we may notify them as soon as possible. We ask that the briefs be submitted by January 17, 2024, to ensure that this office will have adequate time to review and consider arguments relevant to the request from all interested parties. Briefs may be submitted by e-mail to opinion.committee@oag.texas.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

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

Sincerely,



Austin Kinghorn
Chair, Opinion Committee

Attachment: Request No. 0524-KP

cc: Ector County Commissioners' Court
The Honorable Dusty Gallivan, Ector County District Attorney
The Honorable Jane Nelson, Secretary of State
Mr. Adam Bitter, General Counsel, Texas Secretary of State
Ms. Kelly Keel, Interim Executive Director, Texas Commission on Environmental Quality
Ms. Mary Smith, General Counsel, Texas Commission on Environmental Quality
Mr. Jason Taylor, Chief, Texas Rangers Division, Texas Department of Public Safety
Mr. Phillip Adkins, General Counsel, Texas Department of Public Safety
Mr. James Allison, General Counsel, County Judges and Commissioners Association
Ms. Susan M. Redford, Executive Director, Texas Association of Counties
Mr. Michael Pichinson, General Counsel, Texas Association of Counties
Mr. Robert Kepple, Executive Director, Texas District & County Attorneys Association
Ms. Diane Burch Beckham, Staff Senior Counsel, Texas District & County Attorneys Association
Ms. Amy Cresap, General Counsel Division, Office of the Governor

Texas Office of the Attorney General

Ref: Requesting an Attorney General Opinion relating to actions of the Ector County Utility District Board of Directors including Open Meetings Act violations, vacancies of the Board of Directors, improper filing of candidate forms, the role of Commissioners Court in appointments or removal of directors, and whether or not misconduct of the Board of Directors has taken place.

1) Open Meetings Act Violation 11/8/2023

- a. **BACKGROUND:** On November 8, 2023, members of the public were barred from entering the Ector County Utility District board meeting. The stated reason for disallowing over a dozen members of the public from this public meeting was due to occupancy limits of 23 people. Citizens were told the Odessa Fire Marshall had issued this occupancy limit and signage, which had never existed prior to that meeting, and that the limit had been reached. Citizens asked the Odessa Fire Marshall if their department had in fact posted the occupancy limit and he advised they had not.
- b. **Relevant Texas Code**
 - i. Texas Gov't Code §551.002
 1. Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."
- c. **Questions:**
 - i. Does this action violates the Texas Open Meetings Act according to Texas Government Code §551.002 whereas the meeting of this governmental body was not open to the public and public testimony was disallowed?
 - ii. Does this constitute a criminal offense pursuant to Texas Government Code §551.144?
 - iii. What action should be taken and under whose jurisdiction does this fall under?

2) Vacancies of ECUD Board of Directors

- a. **Position A Eligibility**
 - i. **BACKGROUND** Former ECUD Board President, Mr. Tommy Ervin, held position A for 16 years until it was found that he was convicted of four felony counts of dealing illegal narcotics in the 1970's. When this was discovered, Ector County District Attorney Dusty Gallivan issued a letter on October 9, 2023 requesting immediate resignation or proof of pardon within ten days. Mr. Ervin did neither of these but instead elected to resign at the November 8, 2023 ECUD Board Meeting in which the public was locked out of attending. D.A. Gallivan publicly stated, "The bottom line is Mr. Ervin is holding office illegally."
 - ii. **Relevant Texas Code**
 1. Texas Election Code §141.001(a)(4)- Ineligibility to hold office
 - a. "To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must: ...have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities."
 2. Texas Local Government Code §87.031- Immediate Removal

- a. “The conviction of a county officer by a petit jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer.”

iii. QUESTION:

1. Did the preexistence of Mr. Ervin’s felony convictions result in an automatic vacancy, or to put another way, the perpetuation of the vacancy of the position he assumed on the board of directors?

b. Improper Filing of Candidate Forms

- i. **BACKGROUND:** Positions A, C, and E on the ECUD Board of Directors filed homemade candidate forms that exclusively satisfy Texas Water Code §51.072 rather than the typical Secretary of State Election Form 2-49 “Application for Place on the General Election Ballot for CSOs” with the elements required of Texas Election Code §141.001(a), §141.031, and §144.

ii. Relevant Texas Code:

1. Texas Water Code §51.072
2. Texas Election Code §141.001(a), §141.031, and §144.

iii. Questions:

1. Does improper filing of candidate forms, without the elements required by Texas Election Code §141.001(a), §141.031, and §144., result in an illegitimate claim to office for positions B, D, and E?

c. Historical Vacancies

- i. **BACKGROUND:** Historical vacancies longer than 90 days have taken on the ECUD Board of Directors for positions B, D, and E. Position B remained vacant from 6/3/2020 through 5/18/2021. Position D remained vacant from 11/2013 through 7/21/2014 and again 12/8/2021 through 3/15/2022. Position E remained vacant from 12/1/2001 through 6/17/2002. Statutes only allow a board of directors to make appointments “not later than the 60th day after the vacancy occurs.”

ii. Relevant Texas Code:

1. Texas Water Code §49.105
 - a. a) “Except as otherwise provided in this code, a vacancy on the board and in other offices shall be filled for the unexpired term by appointment of the board not later than the 60th day after the date the vacancy occurs.
 - b. c) “...or if a vacancy continues beyond the 90th after the date the vacancy occurs, the vacancy or vacancies may be filled... by the commissioners court if the district was created by the county commissioners court.

iii. Question:

1. Due to the vacancies of Positions B, D, and E lasting over 60 days, does this disqualify the board of directors from appointing to fill the vacancies?
2. Since the vacancies continued beyond the 90th day after the vacancy occurs, does the Ector County Commissioners Court have the sole authority to appoint a director to fill the vacancy?

3. If appointments by the ECUD Board of Directors has taken place after the 60th day, in direct contradiction with the expressed powers of Texas Water Code §49.105 (a), does this mean that the director that was appointed is not legally holding office?

d. Appointment by Commissioners Court

i. **BACKGROUND:** The Ector County Utility District was created pursuant to Chapter 51 of the Texas Water Code and pursuant to the provisions of Section 59 of Article XVI of the Constitution of Texas. Under this provision, statutes provide that Commissioners Courts have expressed powers to appoint directors. Parties have argued that the commissioners court has both the power and the obligation to replace board positions due to position eligibilities, improper filing of candidate forms, and historical vacancies.

ii. **Relevant Texas Code**

1. Texas Water Code §51.026(d)
 - a. "If any director appointed under this section fails to qualify, the commissioners court shall appoint another person to replace him."
2. Texas Water Code §49.105
 - a. c) "...or if a vacancy continues beyond the 90th after the date the vacancy occurs, the vacancy or vacancies may be filled... by the commissioners court if the district was created by the county commissioners court.

iii. **Questions:**

1. Is it the legislative intent to either allow or require the commissioners court to correct improper and extended vacancies of director offices of ECUD which was formed by the county commissioners court pursuant to Chapter 51 of the Texas Water Code?
2. Do the following positions for the following reasons constitute justification for replacement by commissioners court:
 - a. Position A due to a greater than 90 day vacancy (16 years) and improper filing of candidate forms;
 - b. Position B due to a historical vacancy over 90 days;
 - c. Position C due to improper filing of candidate forms;
 - d. Position D due to a historical vacancy over 90 days; and
 - e. Position E due to both a historical vacancy over 90 days and improper filing of candidate forms?

3) Official Misconduct of Directors

a. ECUD Election Questions

i. **BACKGROUND:** ECUD's most recent election in November 2022 took place under contested conditions to the extent that citizens inside of the district, who pay property taxes to the district, were not allowed to vote; additionally, there were cases of citizens who were not in the district, who do not pay ECUD property taxes, who were allowed to vote. This caused an issue at the Ector County Elections office and resulted in emergency ballots being necessitated

and utilized to conduct as close to a fair election as possible. These problems arose because of the improper voter registration data that was provided to the Ector County Elections Office by the ECUD Board of Directors. Some propose that the improper voter registration data is correlated to the fact that ECUD has not submitted its updated metes and bounds (district boundaries) to TCEQ (required by Texas Administrative Code) since 1992. ECUD regularly annexes properties according to agenda items and minutes throughout the past 31 years.

b. ECUD Violations of Bylaws

- i. **BACKGROUND:** At an October 11, 2023 meeting, the ECUD Board of Directors voted to amend their bylaws with only three board members present. ECUD Bylaws Article VIII states, "These By-Laws, may be altered, changed, or amended at a meeting... by the affirmative vote of not less than four-fifths of the entire membership of the Board of Directors." Despite the lack of the 5 required board members present and this concern being brought to the attention of the board by a citizen, the board continued with the vote to amend their bylaws.

c. Overcollection of Bond Revenues

- i. **BACKGROUND:** ECUD passed an original bond series to borrow funds to build a water distribution at its founding in 1977. Understanding is that the bond was ultimately paid off in 2005, and yet the property taxes levied by ECUD for purposes of paying off the bond continued to be collected. ECUD and its attorney have admitted that the taxes collected from 2005 to 2021 (totaling \$8,991,605) were done so in error/ illegally. ECUD has never found a way to pay back the citizens despite discussing it in official board meetings.

d. Relevant Texas Statutes

- i. Texas Local Government Code §178.053 provides statutory authority of a Commissioners Court to remove directors of Municipal Utility Districts and Water Control and Improvement Districts (§178.051 (39 & 65) for misconduct.
- ii. Texas Local Government Code §178.001 (3)
 1. Defines "misconduct" of a special district board member as "intentionally or knowingly violating a law relating to the office of director."
- iii. Civil Practice and Remedies Code §66.001
 1. "An action in the nature of quo warranto is available if: a person usurps, intrudes into, or unlawfully holds or executes a franchise or an office, including an office in a corporation created by the authority of the state; a public officer does an act or allows an act that by law causes a forfeiture of his office."

e. QUESTIONS:

- i. Has the threshold of misconduct, as defined in Chapter 178.053 (3), been crossed due to the actions of the ECUD Board of Directors due to:
 1. Open Meetings Act Violation on 11/8/2023; and/ or
 2. Violations of statutes regarding who is eligible for office and appointment processes; and/or

