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ATTORNEY GENERAL OF TEXAS

September 26, 2018

The Honorable Lyle Larson
Chair, Committee on Natural Resources
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0217

Re: Authority of the temporary directors of the
Southwestern Travis County Groundwater
Conservation District (RQ-0218-KP)

Dear Representative Larson:

You ask several questions about the authority of the temporary directors of the Southwestern Travis County Groundwater Conservation District (“District”).¹ You recount the following facts relevant to your questions. The Legislature created the District with the 2017 enactment of chapter 8871 of the Special District Local Laws Code. *See* Request Letter at 1–2. Seven temporary directors were appointed as directed by chapter 8871. *See id.* at 2; *see also* TEX. SPEC. DIST. CODE § 8871.021(a) (providing for the appointment of temporary directors by specified public officials). Chapter 8871 provides for a May 2018 election to confirm the District and to elect the initial directors. *See* TEX. SPEC. DIST. CODE § 8871.024(a); *see also* Request Letter at 2. The Travis County Commissioners Court approved a loan to the District to enable the District to pay for its share of the May 2018 election. *See* Request Letter at 2. On March 2, 2018, the District’s temporary directors cancelled the election citing concerns about loan costs. *See id.*

Chapter 8871 of the Special District Local Laws Code provides for the creation of a groundwater conservation district in Travis County under Texas Constitution section 59, article XVI. *See* TEX. SPEC. DIST. CODE § 8871.002. It provides for the appointment of seven temporary directors by various public officials. *See id.* § 8871.021(a). The temporary directors serve until the date the initial directors are elected in an election held under section 8871.024, and they generally have “the same permitting and general management powers as those provided for initial and permanent directors” in chapter 8871 and in chapter 36 of the Water Code. *See id.* §§ 8871.021(c), .023(a). Section 8871.024 requires that the “temporary directors shall order an election in the district, to be held not later than the uniform election date in May 2018, to confirm the creation of the district and to elect the initial directors.” *Id.* § 8871.024(a); *see also id.* § 8871.024(c) (providing for application of section 41.001(a), Election Code). “If the [D]istrict’s creation is not confirmed . . . , the candidate who receives a majority of the votes cast at that election for each of the seven positions on the board becomes a temporary director.” *Id.* § 8871.024(e), (f) (distinguishing from temporary directors the terms of “[t]emporary directors

¹*See* Letter from Honorable Lyle Larson, Chair, House Comm. on Nat. Res., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Apr. 4, 2018), <https://texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

elected under Subsection (e)"). This second set of temporary directors elected under subsection 8871.024(e) "shall order a subsequent election . . . to confirm the creation of the district and to elect the initial directors not earlier than the uniform election date in May 2020." *Id.* § 8871.024(e). Subsection 8871.025 sets out specific tasks for the second set of temporary directors elected under subsection 8871.024(e) with respect to the initial directors if the District is confirmed. *See id.* § 8871.025(a).

You first ask what legal authority allows the temporary directors to cancel the May 2018 election of directors and voter confirmation of the District. *See* Request Letter at 1. Subsection 8871.024(a) provides that the "temporary directors shall order an election in the district, to be held not later than the uniform election date in May 2018, to confirm the creation of the district and to elect the initial directors." TEX. SPEC. DIST. CODE § 8871.024(a); *see also* TEX. ELEC. CODE § 41.001(a)(2) (providing the uniform election dates). Without context providing otherwise, the word "shall" imposes a mandatory duty. *See* TEX. GOV'T CODE § 311.016(2); *see also* Tex. Att'y Gen. Op. No. MW-380 (1981) at 1 (concluding that "shall" in legislation requiring temporary board of drainage district to call confirmation election imposes a mandatory duty). In subsection 8871.024(a), the Legislature imposed a duty on the temporary directors to call a confirmation and candidate election in May 2018.

Provisions elsewhere in Texas statutes authorize the cancellation of elections but none are applicable here. Water Code section 49.112, generally applicable to water districts, allows for the cancellation of an election "called *at the discretion* of the district," but the mandatory nature of subsection 8871.024(a) means that the May 2018 election is not within the District's discretion. TEX. WATER CODE § 49.112 (emphasis added). Election Code section 2.051 also allows for the cancellation of a candidate election when the candidate is unopposed. *See* TEX. ELEC. CODE § 2.051. You do not tell us whether the candidates for initial directors were unopposed but in light of the duty imposed by subsection 8871.024(a) and the fact that the election is for initial directors, a court would likely find that section 2.051 does not apply here. Election Code section 2.081 allows for the cancellation of an election of a measure where the action "authorized by the voters may not be taken"—or is essentially moot. *See id.* § 2.081. It does not apply here because the confirmation or lack of confirmation of the District is not a moot measure. Absent application of these Water Code and Election Code provisions, we find no authority allowing the temporary directors to cancel the confirmation and candidate election.

Your remaining questions stem from the temporary directors' failure to fulfill their duty to call the May 2018 election. *See* Request Letter at 2–3. You also ask whether the cancellation of the election "either contemporaneously or subsequently terminate[s] all authorities" of the temporary directors and what legal authorities do the temporary directors have. Request Letter at 1. Section 8871.023 enumerates the authority of the temporary directors. *See* TEX. SPEC. DIST. CODE § 8871.023. Subsection 8871.023(a) gives the temporary directors the "same permitting and general management powers" held by the initial and permanent directors under chapter 8871 and chapter 36 of the Water Code. *Id.* § 8871.023(a). Additionally, they have the authority to "enter any public or private property located in the district to inspect" certain wells. *Id.* § 8871.023(b). Subsection 8871.023(c) provides that the temporary directors do not have the authority granted by specific, enumerated provisions of Water Code chapter 36. *See id.* § 8871.023(c). "The temporary directors may regulate the transfer of groundwater out of the district as provided by [the Water

Code] but may not prohibit the transfer of groundwater out of the district.” *Id.* § 8871.023(d). These powers are distinguished from those powers granted to the District in section 8871.101 because the District is unconfirmed. *See* Tex. Att’y Gen. Op. No. MW-380 (1981) at 2–3 (recognizing that district is not created until approved at an election and that the directors cannot exercise powers granted until it is approved).

The sole contingency chapter 8871 anticipates and provides for is the potential need to hold a second confirmation election in the event the voters do not vote for confirmation in May 2018. *See* TEX. SPEC. DIST. CODE § 8871.024(e). Chapter 8871 does not expressly speak to any contingency involving the failure to hold either the confirmation or the candidate election. The provision addressing the temporary directors’ terms states that they hold office until the date the initial directors are elected under an election called under subsection 8871.024. *See id.* § 8871.021(c); *cf. id.* § 8871.024(f) (providing for terms for the contrasting “[t]emporary directors elected under Subsection [8871.024](e)”). Absent any legislative intent regarding the lack of a candidate election, this provision could serve as a basis for a court to conclude that the temporary directors hold office and can exercise those powers expressly given them in subsection 8871.023 until the initial directors are elected. *See generally* Tex. Att’y Gen. Op. No. JC-0569 (2002) at 9 (concluding that authority of unconfirmed groundwater conservation district’s temporary, but elected, directors is limited to that expressly granted to the temporary directors).

You do not suggest that the appointment of the temporary directors by those designated to make the appointments was improper. *See* Request Letter at 2–3; *see also* TEX. SPEC. DIST. CODE § 8871.021. Accordingly, the temporary directors are likely de facto officers acting under the color of authority. *See Williams v. State*, 588 S.W.2d 593, 595 (Tex. Crim. App. 1979) (describing a de facto officer as “one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take the oath, give a bond, or the like” (quotation marks omitted)). As such, the temporary directors’ actions are binding because the “law validates the acts of de facto officers as to the public and third persons on the ground that, though not officers de jure, they are in fact officers whose acts public policy requires should be considered valid.” *Plains Common Consol. Sch. Dist. No. 1 of Yoakum Cty. v. Hayhurst*, 122 S.W.2d 322, 327 (Tex. Civ. App.—Amarillo 1938, no writ).

Lastly, you ask whether the public officials who appointed the temporary directors may withdraw their appointment, nullifying their respective appointee as a temporary director. *See* Request Letter at 1. Chapter 8871 does not provide any mechanism by which the officials who appointed the temporary directors may withdraw their respective appointment. *See generally* TEX. SPEC. DIST. CODE §§ 8871.001–.157. Absent such express authority, a court would likely conclude that the appointing officials may not withdraw their respective appointments.

Certainly, the Legislature has authority to amend chapter 8871. And though appointing officials may not withdraw their appointment, temporary directors may be subject to removal for misconduct. *See* TEX. CONST. art. V, § 24 (providing for removal of county officers); TEX. LOC. GOV’T CODE §§ 87.011(3), .012(15), .013(2) (defining “official misconduct,” naming which officers may be removed, and listing general grounds for removal); *J.C. Engleman Land Co. v. Donna Irrigation Dist. No. 1*, 209 S.W. 428, 429 (Tex. Civ. App.—San Antonio 1919, writ ref’d) (determining that director of irrigation district is a county officer for removal purposes); *see also*

Tex. Att’y Gen. Op. No. MW-380 (1981) at 2 (suggesting that upon a showing of the requisite intent, a temporary director who fails to call a mandatory election may be found guilty of official misconduct). Additionally, a quo warranto proceeding is a method by which to challenge a de facto officer. See TEX. CIV. PRAC. & REM. CODE §§ 66.001–.003 (providing for a quo warranto action); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Consol. Indep. Sch. Dist.*, 497 S.W.2d 455, 456–57 (Tex. Civ. App.—El Paso 1973, writ ref’d n.r.e.) (recognizing that “[q]uo warranto is held to be the exclusive remedy afforded to the public by which it may protect itself against usurpation or unlawful occupancy of a public office by an illegal occupant”), *cert. denied*, 415 U.S. 991 (1974); see also TEX. WATER CODE §§ 36.301–.310 (Subchapter I, governing performance review and dissolution).

S U M M A R Y

A court would likely conclude that the temporary directors of the Southwestern Travis County Groundwater Conservation District had no authority to cancel the 2018 confirmation and candidate election.

A court would also likely conclude that the temporary directors hold office and can exercise those powers expressly given them in section 8871.023 of the Texas Special District Local Laws Code until the initial directors are elected under section 8871.024.

Absent express authority in chapter 8871, a court would likely conclude that the appointing officials may not withdraw their respective appointments.

Certainly, the Legislature has authority to amend chapter 8871. Other potential options to address the disarray resulting from the absence of the confirmation and director election include removal of the temporary directors for misconduct or a quo warranto proceeding challenging the authority of the temporary directors to hold office.

Very truly yours,



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