THE ATTORNEY GENERAL
OF TEXAS

November 20, 1989

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ATTORNEY GENERAL

Mr. H. Ritman Jons
President
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P. O. Box 1278
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LO-89-98

Dear Mr. Jons:

You ask whether the Upper Guadalupe River Authority has power to conduct a non-binding referendum in a limited area within its boundaries. The Upper Guadalupe River Authority is a conservation and reclamation district established under article XVI, section 59, of the Texas Constitution. It has the right to construct, own, and operate sewage gathering, transmission and disposal services, to charge for these services, and to contract in connection with them. Acts 1971, 62d Leg., ch. 430, at 1586 (formerly codified as V.T.C.S. art. 8280-124, § 16(a)).

You inform us that the Board of Directors of the river authority wants to investigate the feasibility of developing sewage facilities in two areas under its jurisdiction that currently utilize septic tank waste disposal systems. Grant money is available from and through the Environmental Protection Agency and the Texas Water Development Board to investigate the feasibility of providing this service. To help determine the feasibility of each project, the Upper Guadalupe River Authority wishes to conduct a non-binding referendum of the residents of the area that will be served by the facilities. The purpose of the referendum is to determine whether the residents are willing to connect to and pay for the sewage services if the facilities are constructed. If residents are unwilling to participate, the projects would not be economically feasible. The river authority wishes to limit costs by conducting a referendum in a limited area instead of a district-wide election.

The legislature has granted the Upper Guadalupe River Authority power

> to do any and all acts and things which may be necessary to the exercise of any and all

> of the rights, powers, privileges, functions and authority of the District, and same may be accomplished by any and all practical means . . . .

V.T.C.S. art. 8280-124, § 16(a). The river authority also has the powers enumerated in chapters 30, 51, and 54 of the Water Code. As you state in your letter, neither article XVI, section 59, of the constitution nor any statute expressly authorizes an election such as you wish to hold.

It is well established that express constitutional or statutory authority is required to call an election. In Smith v. Morton Indep. School Dist., 85 S.W.2d 853, 857 (Tex. Civ. App. - Amarillo 1935, writ dism'd), the court said:

> In our form of government elections must be held by virtue of some legal authority, and an election held without affirmative statutory authority or contrary to a material provision of the law is universally held to be a nullity.

See Countz v. Mitchell, 38 S.W.2d 770 (Tex. 1931); Ellis v. Hanks, 478 S.W.2d 172 (Tex. Civ. App. - Dallas 1972, writ ref'd n.r.e.); Ellis v. State, 383 S.W.2d 635 (Tex. Civ. App. - Dallas 1964, no writ); Williams v. Glover, 259 S.W. 957 (Tex. Civ. App. - Waco 1924, no writ).

Attorney General Opinion H-425 (1974) of this office considered whether a county commissioners court could hold a referendum to determine public sentiment toward a dam construction project that had been authorized by election several years previously. The proposed project had become controversial since the bond election. A delegation of county residents to Washington "was assured by the Chairman of the Subcommittee on Public Works of the House Appropriations Committee that, if a county-wide referendum revealed that public support no longer existed, steps could be initiated to stop funding of the project." Id. at 1. Relying on the authorities cited above, the opinion held that the commissioners court could not call for a public opinion referendum, nor could public funds be used for a referendum.

In Attorney General Opinion V-564 (1948), this office determined that the four members of a Board of Directors of a Water Control and Improvement District had no authority

to call a special election to fill a vacancy in the fifth position on the board. Under these circumstances, the statute provided that the remaining members of the board were to fill the vacancy by appointment. The opinion went on to state as follows:

> We have been advised that the District in question is hopelessly deadlocked on all matters, two for and two against any decisions required by the Board. Under these circumstances, it is very difficult for us to say that the remaining members of the Board, assuming that they can agree to a special election, have no authority to call such an election, to be followed by appointment under Art. 7880-38 of the person receiving the largest vote. Nevertheless, the authorities are clear as to the effect of such an election and it is our opinion that neither the special election nor the expense incidental thereto would be authorized. No doubt the remaining members of the Board may test the public will by some sort of straw vote provided it is free of expense to the District, but this is not the question.

Id. at 3-4.

We agree that a governmental body may not hold a non-binding election or referendum in the absence of statutory authority. The Election Code applies to "all general, special, and primary elections held in this state." Elec. Code § 1.002(a). The code establishes detailed procedures for conducting elections, remedies for violations of election law, and other provisions directed at fairly and correctly ascertaining the expressed will of the people. See generally Ex parte White, 28 S.W. 542 (Tex. Crim. App. 1894); Ferrell v. Harris County Fresh Water Supply Dist. No. 23, 241 S.W.2d 242 (Tex. Civ. App. - Galveston 1951, no writ). Given the complexity of these procedures and the expense of implementing them, it is reasonable to conclude that a river authority may not set them in motion unless the legislature has expressly authorized it to do so. We conclude that the Upper Guadalupe River Authority may not hold a non-binding referendum election to determine whether residents of certain areas within the district are willing to connect to and pay for sewage services if a proposed sewage facility is constructed.

Although the river authority may not hold an election, it may use less formal means to ascertain public support for the project as part of investigating its economic feasibility. We believe the board of directors has power under section 16(a) of article 8280-124 to survey residents' interest in the project through various means, for example, by sending out questionnaires or holding public hearings at which members of the public may speak, and to spend public funds for this purpose. See Attorney General Opinion H-188 (1973). Any such exercise of discretion would be subject to judicial review for abuse of discretion.

The Upper Guadalupe River Authority may not hold a non-binding referendum election to determine whether residents of certain areas within its boundaries are willing to connect to and pay for sewage services if a proposed sewage facility is constructed.

Very truly yours,

Rick Gilpin

Rick Gilpin, Chairman
Opinion Committee

Sarah Woelk

Sarah Woelk, Chief
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RG/er

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Approved: Opinion Committee

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