



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

August 25, 1993

Honorable Libby Linebarger  
Chair  
Public Education Committee  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 93-70

Re: Applicability of doctrines of dual office holding and incompatibility of office to members of the board of directors of the Edwards Aquifer Authority (RQ-581)

Dear Representative Linebarger:

You have asked about the doctrines of dual office holding and incompatibility of office as they apply to persons appointed to the board of directors of the newly mandated Edwards Aquifer Authority (the "EAA"). In particular, you are concerned that one or both of these doctrines will preclude certain individuals from appointment to the EAA's board of directors.

With the passage of S.B. 1477 in 1993, the legislature created the EAA under article XVI, section 59 of the Texas Constitution and abolished the Edwards Underground Water District (the "EUWD"). *See* Acts 1993, 73d Leg., ch. 626, §§ 1.02, 1.41(a). The provisions creating the EAA and abolishing the EUWD are effective September 1, 1993. *See id.* § 4.02. The EAA, a conservation and reclamation district, encompasses all or part of Atascosa, Bexar, Caldwell, Comal, Guadalupe, Hays, Medina, and Uvalde counties. *See id.* §§ 1.02, 1.04. The area within the EAA thus includes all of the area that has been in the EUWD, which currently encompasses all or part of Bexar, Comal, and Hays counties, as well as some additional territory not currently under the jurisdiction of the EUWD. *Compare id.* § 1.04(b) with Acts 1987, 70th Leg., ch. 333, § 1, at 1747-48.

A board of nine directors is to govern the EAA. *See id.* § 1.09(a). The members of the board are to be appointed as follows:

(1) a member appointed by the South Central Texas Water Advisory Committee created by [section 1.10] of this Act;

(2) three residents of Bexar County, with two residents appointed by the governing body of the city of San Antonio and one resident appointed by the Commissioners Court of Bexar County to represent cities and communities in the county other than the city of San Antonio;

(3) one resident of Comal County or the city of New Braunfels appointed by the Commissioners Court of Comal County;

(4) one resident of Hays County appointed by the governing body of the city of San Marcos;

(5) one resident of Medina County appointed by the governing body of the Medina Underground Water Conservation District;

(6) one resident of Uvalde County appointed by the governing body of the Uvalde Underground Water Conservation District; and

(7) one person appointed in rotation who is from Atascosa, Medina, or Uvalde counties, with that person appointed by the governing body of the Evergreen Underground Water District, by the Medina Underground Water Conservation District, or by the Uvalde County Underground Water Conservation District, with the person appointed by the Evergreen Underground Water District serving the first term, followed by a person appointed by the Medina Underground Water Conservation District to serve the second term, followed by a person appointed by the Uvalde County Underground Water Conservation District to serve the third term, and rotating in that order of appointment for subsequent terms.

*Id.* § 1.09(b).

Section 1.11 provides the board and the EAA with general powers and duties, which include: rule-making; regulating permits for the withdrawal of water from the Edwards Aquifer; closing abandoned, wasteful, or dangerous wells; enforcing chapter 32 of the Water Code (relating to the regulation of water well drillers); and collecting and keeping water well drillers' logs in accordance with chapter 32 of the Water Code. Section 1.15(a) requires the EAA to manage withdrawals and withdrawal points from the aquifer. Accordingly, the EAA is empowered to issue regular, term, and emergency permits to persons seeking to withdraw water from the aquifer.<sup>1</sup> *Id.* § 1.15(c). The EAA may not levy a property tax (*id.* § 1.28(a)), but it may issue "revenue bonds to finance the purchase of land or the purchase, construction, or installation of facilities or equipment" (*id.* § 1.28(b)). The EAA also will receive revenues from fees it will collect from users of the aquifer and downstream water rights holders. *See id.* § 1.29.

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<sup>1</sup>In general, a person without a permit may not withdraw water from the aquifer or construct a well. *Id.* § 1.15(b). *But see id.* §§ 1.17, 1.33 (providing for interim authorization of person with existing producing well on September 1, 1993, and exempting wells that produce no more than 25,000 gallons of water a day for domestic or livestock use).

We have been asked if the doctrines of dual office holding and incompatibility of office pose a problem for a member of the EAA board of directors who is also on the governing board of another governmental entity. We conclude that holding an office in addition to membership on the EAA board does not implicate the constitutional prohibition against dual office holding. On the other hand, with regard to the doctrine of incompatibility of office, we cannot provide a definite answer because we are not informed specifically what the other governmental entity is. We can, however, provide some general guidelines regarding incompatibility that may be helpful.

Article XVI, section 40 of the Texas Constitution provides that, with various exceptions, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." Section 40 applies only to persons who profit monetarily from their office. 2 D. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 777 (1977) (citing *Irwin v. State*, 177 S.W.2d 970 (1944)) (citation omitted); see also Attorney General Opinion MW-450 (defining "emolument"). Under section 1.09(f) of the law creating the EAA, an EAA board member receives no compensation for service on the board, although the member is entitled to reimbursement for actual and necessary expenses that the member incurs in the performance of his or her duties. Consequently, we conclude that a member of the EAA board would not violate the constitutional prohibition against dual office holding if the member holds, in addition to the position on the EAA board, a "civil office of emolument." *But see* Attorney General Opinion JM-1266 (1990) at 3 (and authorities cited therein) (indicating that "reimbursement" in excess of actual expenses constitutes compensation for purposes of article XVI, section 40 of Texas Constitution).

The common-law doctrine of incompatibility, however, may prohibit a member of the governing board of another governmental body from serving as a member of the EAA. The common-law doctrine of incompatibility has multiple facets. First, the common-law doctrine of incompatibility disqualifies all officers who have the appointing power from appointing themselves to a different position. *Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); *St. Louis Southwestern Ry. Co. of Texas v. Naples Indep. Sch. Dist.*, 30 S.W.2d 703, 706 (Tex. Civ. App.—Texarkana 1930, no writ); Attorney General Opinions JM-934 (1988) at 3; C-452 (1965) at 3; O-410 (1939) at 5-9. As the Texas Supreme Court has stated:

It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

*Ehlinger*, 8 S.W.2d at 674. Thus, unless a specific statute provides otherwise, a public governing body must not appoint one of its members to an office or position while that person remains a member of the governing body. Attorney General Opinion C-452 at 3;

see Attorney General Opinion JM-1157 (1990) at 3. Any appointment that contravenes this common-law principle is void as a matter of law. *Ehlinger*, 8 S.W.2d at 673-74; *St. Louis Southwestern Ry. Co. of Texas*, 30 S.W.2d at 706; Attorney General Opinion C-452 at 4. See generally Letter Opinion No. 92-8 (1992).

Second, the common-law doctrine of incompatibility prevents one person from holding two positions if the duties are inconsistent or in conflict. See Attorney General Opinion JM-203 (1984) at 3 [and sources cited therein]. To determine whether a position is an "office," we apply the test the Texas Supreme Court adopted in *Aldine Independent School District v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955). Under the test, a public officer is one upon whom the legislature has conferred any sovereign function of the government to be exercised by the officer for the benefit of the public largely independent of the control of others. *Aldine*, 280 S.W.2d at 583 (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740-41 (Tex. Civ. App.—Galveston 1949, writ ref'd)). A member of the EAA board of directors is a public officer; consequently, he or she may not hold another position—whether office or employment—with duties that are inconsistent or in conflict with the duties of the EAA board.

Because the EAA has no authority to levy property taxes, it is not apparent to us that the office of board member of the EAA would be incompatible with any other position. See Attorney General Opinions JM-1266 (1990) at 4; JM-129 (1984) at 2; Letter Opinion No. 92-10 (1992) at 1, 4. However, specific circumstances may arise in which the office of board member of the EAA is incompatible with another position. In such instances, it should be borne in mind that an officer who accepts a second incompatible office is deemed to have resigned the first office. Attorney General Opinion JM-203 (1984) at 10 (citing *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgment adopted)).

Finally, the common-law doctrine of incompatibility prevents one person from holding an office and a public employment if one is subordinate to the other. See Attorney General Opinion JM-203 at 3 [and sources cited therein]. As we determined above, membership on the board of the EAA is an "office" for purposes of the doctrine of incompatibility. Thus, the EAA may not employ a member of the EAA board. See Letter Opinion No. 89-57 (1989). Cf. Attorney General Opinion JM-1087 (1989). Because you have not provided us with any specific situations in which a prospective EAA board member also holds a public employment, however, we cannot determine whether one position is subordinate to the other, thereby contravening the doctrine of incompatibility.

**S U M M A R Y**

Because section 1.09(f) of the act creating the Edwards Aquifer Authority, Acts 1993, 73d Leg., ch. 626, provides that a member of the EAA board of directors receives no compensation for service on the board, the constitutional prohibition against dual office holding does not preclude the member from holding, in addition to the position on the EAA board, a "civil office of emolument."

The governing body of an entity that is authorized to make an appointment to the board of directors of the EAA may not appoint one of its own members to that position. An appointed member of the EAA board may not be employed by the EAA in any other capacity. Whether membership on the EAA board is inconsistent or in conflict with any other office or employment requires the determination of facts that have not been presented to us and that, in any event, could not be addressed in the opinion process.

Yours very truly,



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Opinion Committee