



Office of the Attorney General

State of Texas

December 22, 1998

DAN MORALES

ATTORNEY GENERAL

The Honorable Michael P. Fleming
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 98-124

Re: Whether an individual may simultaneously serve as municipal judge and as a director of the Gulf Coast Waste Disposal Authority, and a related question (RQ-1103)

Dear Mr. Fleming:

You ask two questions concerning the directors of the Gulf Coast Waste Disposal Authority, a conservation and reclamation district and a political subdivision created by the Texas Legislature pursuant to article XVI, section 59 of the Texas Constitution.¹ The legislature adopted the Gulf Coast Waste Disposal Authority Act to develop and effectuate "for Chambers, Galveston, and Harris Counties a regional water quality management program including provision of waste disposal systems and regulation of disposal of wastes."² The legislature found that creation of the Gulf Coast Waste Disposal Authority (the "authority") would advance the state's policy of maintaining the quality of the waters in the state.³

You first ask whether one person may simultaneously serve as a director of the authority and a municipal judge for the City of Houston. Article XVI, section 40 of the Texas Constitution prevents any person from holding or exercising "at the same time, more than one civil office of emolument." The Texas Supreme Court has determined that an officer is an individual upon whom "any sovereign function of the government is conferred . . . to be exercised by him for the benefit of the public largely independent of the control of others."⁴

By this standard, the directors of the authority are officers. The authority's powers, rights, duties, and functions are exercised by a board of nine directors, appointed to two year terms of

¹Gulf Coast Waste Disposal Authority Act, Act of May 23, 1969, 61st Leg., R.S., ch. 409, § 1, 1969 Tex. Gen. Laws 1336; see *State v. Malone Serv. Co.*, 829 S.W.2d 763, 765 n.3 (Tex. 1992); *Satterlee v. Gulf Coast Waste Disposal Auth.*, 576 S.W.2d 773, 774 n.1 (Tex. 1978).

²Gulf Coast Waste Disposal Authority Act, § 1.01, at 1336.

³*Id.* § 1.02.

⁴*Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955).

office.⁵ The powers, rights, duties, and functions of the authority that the board may exercise include the power to make rules, prescribe water quality standards in the district, exercise the power of eminent domain, enter into contracts, and issue bonds.⁶ Thus, various sovereign functions of the government have been conferred upon the board of directors of the authority to be exercised independently for the benefit of the public. The directors are entitled to receive an allowance of \$100 a day and reimbursement for actual and necessary expenses incurred for each day spent attending meetings of the board or attending to the business of the authority which is authorized by resolution of the board.⁷ Because they receive compensation over and above out-of-pocket expenses,⁸ the directors hold offices of emolument.

A municipal judge is an officer,⁹ and a municipal judge for the City of Houston “is entitled to a salary from the city.”¹⁰ Accordingly, a municipal judge for the City of Houston is a civil officer of emolument within the prohibition of article XVI, section 40. One person may not simultaneously serve as a director of the authority and a municipal judge for the City of Houston.¹¹

You next ask whether chapter 171 of the Local Government Code applies to the Gulf Coast Waste Disposal Authority. The following conflict of interest provision was included in the 1969 act creating the authority: “A director who is financially interested in a contract to be executed by the authority for the purchase of property or the construction of facilities shall disclose that fact to the

⁵Gulf Coast Waste Disposal Authority Act, *supra* note 1, §§ 2.03, 2.05 at 1338.

⁶*Id.* subch. 3 §§ 3.01-.24 at 1341-49.

⁷Act of April 25, 1995, 74th Leg., R.S., ch. 48, § 1, 1995 Tex. Gen. Laws 430.

⁸Attorney General Opinion MW-450 (1982) at 1.

⁹Attorney General Opinions DM-428 (1996) at 2; JM-333 (1985) at 2.

¹⁰Gov’t Code § 30.00674(h).

¹¹Article XVI, section 40 of the Texas Constitution also includes the following provision: “It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation.” Attorney General Opinion DM-428 (1996) considered whether this provision would allow an individual to serve as a municipal judge in more than one city, noting the difficulties of small cities in obtaining the services of part-time municipal judges. The opinion concluded that this question could not be resolved in an attorney general opinion and called for a legislative resolution. *See also* Letter Opinion No. 97-027 (1997) at 2. The application of this provision to the City of Houston municipal judge raises questions of fact that cannot be resolved in an attorney general opinion. We note, however, that the City of Houston is unlikely to have the same difficulty in obtaining the services of municipal judges as do the small cities at issue in Attorney General Opinion DM-428.

other directors and may not vote on the acceptance of the contract.”¹² No penalty is attached to this provision, although contracts made in violation of similar provisions have been held to be void.¹³

The provisions of Water Code, chapter 49 are also relevant to your second question. In 1995, the Legislature adopted chapter 49 to establish more uniform procedures between the different kinds of local water districts.¹⁴ A study by the House Subcommittee on Districts determined that “[e]ach special law and general law district is governed by a variety of procedural requirements,” and that the inconsistencies lead to confusion among citizens, district board members, and state agency personnel.¹⁵ Section 49.002 of the Water Code states that chapter 49 “applies to all general and special law districts to the extent that the provisions of this chapter do not directly conflict with a provision in any other chapter of this code or any Act creating or affecting a special law district.”¹⁶ If there is such a conflict, the specific provisions in the other chapter or act prevail.¹⁷ “District” is defined for purposes of chapter 49 as “any district or authority created by authority of either Sections 52(b)(1) and (2), Article III, or Section 59, Article XVI, Texas Constitution, regardless of how created.”¹⁸

Section 49.058 of the Water Code provides that “[a] director of a district is subject to the provisions of Chapter 171, Local Government Code, relating to the regulation of conflicts of interest of officers of local governments,” while section 49.214 of the Water Code states that “[t]he provisions of Chapter 171, Local Government Code, shall apply to the award of district contracts.” Thus, these provisions apply to the directors of the authority to the extent that they do not “directly conflict” with a provision of the special act establishing the authority.¹⁹ We must determine whether provisions subjecting a director of the authority and the authority’s contracts to chapter 171 of the Local Government Code would “directly conflict” with the conflict of interest provision in the Act.

¹²Gulf Coast Waste Disposal Authority Act, *supra* note 1, § 2.09, at 1340.

¹³*See City of Edinburg v. Ellis*, 59 S.W.2d 99 (Tex. Comm’n App. 1933, holding approved); *Meyers v. Walker*, 276 S.W. 305 (Tex. Civ. App.--Eastland 1925, no writ).

¹⁴Senate Natural Resources Comm., Bill Analysis, C.S.S.B. 626, 74th Leg., (1995).

¹⁵*Id.*; House Natural Resources Comm., Bill Analysis, C.S.S.B. 626, 74th Leg., (1995).

¹⁶Water Code § 49.002. *See Loyd v. Eco Resources, Inc.*, 956 S.W.2d 110, 122 (Tex. App.--Houston [14th Dist.] 1997, no writ) (MUD’s sovereign immunity waived by adoption of section 49.066(a) of the Water Code).

¹⁷Water Code § 49.002.

¹⁸*Id.* § 49.001(a)(1).

¹⁹*See* Letter Opinion No. 97-028 (1997) at 3 (chapter 171 of the Local Government Code applies to director of an authority created under article XVI, section 59 of the Texas Constitution).

In our opinion, statutes that “directly conflict” are statutes in irreconcilable conflict, so that it is impossible to comply with both provisions at the same time.²⁰ Under this test, the Water Code provisions applying chapter 171 of the Local Government Code to the directors and contracts of the authority are not in direct conflict with the conflict of interest provision in the Gulf Coast Waste Disposal Authority Act (the “Act”). Although there are areas of difference as well as areas of overlap between chapter 171 and the special conflict of interest provision, the directors of the authority could comply with both. Under the Act, a director who is financially interested in a contract of the authority to purchase property or build facilities is required to disclose that fact to the other directors and may not vote on the acceptance of the contract. Chapter 171 of the Local Government Code prohibits a local public official from participating in a vote on a matter involving a business entity or real property in which the official has a substantial interest if it is reasonably foreseeable that an action on the matter would confer an economic benefit on the business entity or real property. Under these circumstances, the official must file an affidavit stating the nature and extent of the interest before a vote or decision on any matter involving the business entity or real property and abstain from further participation.²¹ A local public official who knowingly violates this provision commits a class A misdemeanor.²²

Thus, the differences between chapter 171 of the Local Government Code and the conflict of interest provision in the Act do not place the two provisions in direct conflict. Chapter 171 does not deprive the directors or the authority of any specific rights or powers granted by the Act. Moreover, both the conflict of interest provision in the Act and section 49.214 of the Water Code, which references chapter 171, apply specifically to the authority’s contracts. In these circumstances, section 49.002 of the Water Code provides that chapter 171 of the Local Government Code, as referenced by sections 49.058 and 49.214 of the code, applies to the directors of the authority and to the authority’s contracts.²³

Where a general provision conflicts with a special provision, the Code Construction Act²⁴ states that its provisions are ordinarily to be construed, if possible, so that effect is given to both.²⁵ It is certainly possible to give effect to both provisions in this case. However, the rules provided in

²⁰*State v. Jackson*, 370 S.W.2d 797, 800 (Tex. Civ. App.--Houston [1st Dist.] 1963) *aff’d* 376 S.W.2d 341 (Tex. 1964) (direct and irreconcilable conflict between two statutes); *cf. Employers Cas. Co. v. Nat’l Bank of Commerce*, 166 S.W.2d 691, 692 (Tex. 1942) (direct conflict between decision of court of civil appeals and decision of another appellate court or of Texas Supreme Court).

²¹Local Gov’t Code § 171.004(a). The affidavit is to be filed with the official records keeper of the governmental entity. *Id.* § 171.004(b).

²²*Id.* § 171.003.

²³Water Code § 49.002.

²⁴Gov’t Code ch. 311.

²⁵*Id.* § 311.026(a).

the Code Construction Act “are not exclusive but are meant to describe and clarify common situations.”²⁶ The courts have noted an exception to the general rule that statutes are to be harmonized, if possible: “A later general act may be held to supercede a prior narrower one where the later act purports to deal comprehensively with the subject to which it pertains.”²⁷ Although repeals by implication are not favored, if a new law covers the subject matter of an earlier one and prescribes a different penalty from the earlier one, it repeals the earlier statute by implication.²⁸

Because chapter 49 of the Water Code was adopted to provide for uniform procedures among water districts, we believe the legislature intended chapter 171 of the Local Government Code to prevail over the conflict of interest provision in the Act.²⁹ Accordingly, the directors of the Gulf Coast Waste Disposal Authority must comply with chapter 171 of the Local Government Code and are no longer subject to the specific conflict of interest provision found in the Act.

²⁶*Id.* § 311.003.

²⁷2B Norman J. Singer, SUTHERLAND STAT. CONST. § 51.05 at 175 (5th ed. 1992).

²⁸*Lane v. State*, 305 S.W.2d 595 (Tex. Crim. App. 1957); *See Roby v. Hawthorne*, 84 S.W.2d 1108, 1110-11 (Tex. Civ. App.--Dallas 1935, writ dism'd w.o.j.); *Conley v. Daughters of the Republic of Tex.*, 151 S.W. 877, 880 (Tex. Civ. App.-- San Antonio 1912), *rev'd on other grounds*, 156 S.W. 197 (Tex. 1913).

²⁹*See* Senate Natural Resources Comm., Bill Analysis, C.S.S.B. 626, 74th Leg., (1995); House Natural Resources Comm., Bill Analysis, C.S.S.B. 626, 74th Leg., (1995).

S U M M A R Y

A municipal judge of the City of Houston and a director of the Gulf Coast Waste Disposal Authority each hold civil offices of emolument within article XVI, section 40 of the Texas Constitution. That constitutional provision bars one person from simultaneously holding both offices. Pursuant to sections 49.058 and 49.214 of the Water Code, chapter 171 of the Local Government Code applies to directors of the Gulf Coast Waste Disposal Authority and to the contracts entered into by the authority.

Yours very truly,

A handwritten signature in cursive script that reads "Susan Garrison".

Susan Garrison
Assistant Attorney General
Opinion Committee