



Joe F. Grubbs

ELLIS COUNTY AND DISTRICT ATTORNEY

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December 8, 2003

RECEIVED

DEC 10 2003

RQ-0142-GA

OPINION COMMITTEE

**VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED**

Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548, Capital Station
Austin, Texas 78711-2548

FILE # ML-43371-0
I.D. # 43371

Re: Request For Opinion

Dear General Abbott:

I am writing to ask for an opinion as to whether a City of Midlothian¹ employee may serve as a director and/or officer of the Mountain Peak Water Supply Corporation. Specifically, the City wants an opinion from your office as to whether the doctrines of dual office holding, incompatibility, conflict of interest or any other doctrine, Attorney General ruling or statute, including but not limited to Chapter 171 of the Texas Local Government Code affects this individual's ability to serve both as a City of Midlothian employee and as a director and/or officer of the Mountain Peak Water Supply Corporation. The City of Midlothian does not believe that any type of conflict exists and contends that the individual may serve concurrently as a City employee and as the President of the Mountain Peak Water Supply Corporation. The facts of this situation are set forth below, and then followed by my legal analysis.

FACTS

The employee in question works in the City of Midlothian's Utility Department. He is a front line supervisory employee whose duties include mowing City parks and roadsides. Except for the purchase of approved supplies used in the course and scope of his daily duties, he has no authority to enter into any type of contract on behalf of the City. His City job description is attached hereto.

¹ The City of Midlothian is a home-rule city.

This employee currently serves as President of the Mountain Peak Water Supply Corporation.² The Mountain Peak Water Supply Corporation is a nonprofit rural water supply corporation. As President of the Mountain Peak Water Supply Corporation, the individual's duties include chairing its meetings and voting when a "tie-breaking" vote is needed. The employee does not receive any form of compensation for the services he performs as President of the Mountain Peak Water Supply Corporation. He is, however, reimbursed for any out-of-pocket expenses he incurs in carrying out his duties as President.

The City of Midlothian has, in the past, contracted with the Mountain Peak Water Supply Corporation for the sale of water. The City anticipates that it will continue to sell water to Mountain Peak Water Supply Corporation in the future. With the exception of occasional maintenance work on the City's water lines, the individual's job duties have nothing whatsoever to do with water. With respect to the City, the individual is not involved whatsoever in the purchase or sale of water, or even discussions pertaining thereto.

LEGAL ANALYSIS

Dual Office Holding

The employee in question does not receive any form of compensation for serving on the Mountain Peak Water Supply Corporation. The "dual office holding" provision in the Texas Constitution prohibits a person from holding two "offices of emolument" Tex. Const. Art XVI, § 40. "Emolument" means compensation, and since this individual does not receive compensation for service on the Mountain Peak Water Supply Corporation, this constitutional prohibition would not apply to him.

Incompatibility

The doctrine of incompatibility has three aspects: self-appointment, self-employment, and conflicting loyalties. See Tex. Att'y Gen. Op. Nos. JC-0564 (2002), JC-0199(2000), JM-1266 (1990). The first two branches of this common law doctrine do not apply at all to this fact situation—the individual is employed by the City, not by the Mountain Peak Water Supply Corporation, and he receives

² The City understands that Mountain Peak Water Supply Corporation has recently (or will soon) changed its name to Mountain Peak Special Utility District.

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no remuneration for his services to that corporation. The third aspect, that of "conflicting loyalties", is not applicable to this employee, as his job duties do not include entering into contracts on behalf of the City.

Conflicts of Interest

Conflicts of interests are prohibited by statute, Chapter 171 of the Texas Local Government Code. A "local public official" is defined as a member of the governing body or another officer, whether elected, appointed, paid or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature." This individual is clearly not a "local public official" in his capacity as a City employee.

The individual may be considered a local public official in his capacity as a director for the Mountain Peak Water Supply Corporation. However, the statute requires that the local public official have a "substantial interest in a business entity or real property", and that the action before the governmental entity would have a *special economic effect* on the person's interests, different than the effect on any other member of the public. What a "substantial business interest" consists of is described in § 171.002, but a quick overview of the statutorily described fact scenarios clearly demonstrate that this individual does not have a substantial business interest in the Mountain Peak Water Supply Corporation, as he derives no income from his services to that corporation, nor owns any voting stock of that corporation.

CONCLUSION

For the reasons set forth above, it is the City's position that the individual in question may serve concurrently as a City employee and as the President of the Mountain Peak Water Supply Corporation.

Thank you in advance for your response to this request for an opinion. If you need any additional information in order to formulate your opinion, please let me know.

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Sincerely,

A handwritten signature in black ink, appearing to read "Joe F. Grubbs". The signature is fluid and cursive, with a prominent "J" and "G".

The Honorable Joe F. Grubbs
Ellis County and District Attorney

JFG/
Enclosure

cc: Joseph LaBeau
City Manager
City of Midlothian