



**THE ATTORNEY GENERAL  
OF TEXAS**

September 30, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

Ms. Betty Strohacker  
President  
Upper Guadalupe River  
Authority  
P. O. Box 1278  
Kerrville, Texas 78029

Opinion No. JM-961

Re: Authority of the Upper  
Guadalupe River Authority to  
compel septic tank users within  
its service area to connect to  
a sewage gathering, transmission,  
and disposal facility (RQ-1375)

Dear Ms. Strohacker:

You request an opinion concerning the authority of the Upper Guadalupe River Authority to compel septic tank users within the boundaries of the authority to connect to a sewage gathering, transmission, and disposal system operated by the authority, either by itself or pursuant to an agreement with some other governmental entity permitted to contract with the authority for the operation of such a system. You limit your questions to a sewage system wholly within the service area of the authority, including:

(1) locations within the corporate limits of a home rule city;

(2) locations within the extraterritorial jurisdiction of a home rule city;

(3) locations outside the corporate limits and extraterritorial jurisdiction of a home rule city;

(4) locations wholly within the corporate limits of a general law city;

(5) locations within the boundaries of an entity authorized to provide sewage collection and disposal services pursuant to a Certificate of Convenience and Necessity; and

(6) locations not within the boundaries of any of the entities described in (1)-(5).

We conclude that the authority has no power, either express or implied, to compel septic tank users to connect

to a sewage system operated by it, either on its own behalf or pursuant to an agreement with some other governmental entity, including both home rule and general law cities.

We also conclude that while home rule cities have the express power to compel property owners within the boundaries of the city to connect to sewage systems operated by them, they may not delegate that power to the authority.

The authority has the power to purify water before it returns to the groundwater table and hence to the river system. Thus, the authority may treat and dispose of sewage generated within its service area. Parker v. San Jacinto City Water Control and Improvement District No. 1, 273 S.W.2d 586 (Tex. 1954). However, the authority has no general police powers to protect the public health and general welfare that can be used to force septic tank users to abandon those systems in favor of a sewage system operated by it, nor any express power to do so. Powers may not be implied merely because they are convenient to the use of express powers. Tri-City Freshwater Supply District No. 2 of Harris County v. Mann, 142 S.W.2d 945, 948 (Tex. 1940).

The authority has express authority under its enabling statute and Water Code provisions to operate a sewage disposal system. See Acts 1971, 62d Leg., ch. 430, § 1, at 1586; Water Code § 30.021 (regional waste disposal system); § 51.331 (water control and improvement district); § 54.030 (municipal utility district). However, the authority to operate a sewage disposal system does not include the implied authority to require all septic tanks to be connected with the system. Septic tanks are not parts of a sewer system. See, e.g., McWilliams v. Barnes, 242 P.2d 1063 (Kan. 1952); Lake Township, McComb County v. Millar, 241 N.W. 237, 239 (Mich. 1932). Chapter 26 of the Water Code, which pertains to water quality control, authorizes the Texas Water Commission to issue permits for the discharge of waste or pollutants into water in the state. Water Code § 26.027. The following definitions are applicable to chapter 26:

(6) 'Waste' means sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste, as defined in this section.

. . . .

(14) 'Sewer system' means pipelines, conduits, storm sewers, canals, pumping stations, force mains, and all other

constructions, devices, and appurtenant appliances used to transport waste.

(15) 'Treatment facility' means any plant, disposal field, lagoon, incinerator, area devoted to sanitary landfills, or other facility installed for the purpose of treating, neutralizing, or stabilizing waste.

(16) 'Disposal system' means any system for disposing of waste, including sewer systems and treatment facilities.

Water Code § 26.001.

Section 26.031 of the Water Code defines "private sewage facilities" to mean

septic tanks, pit privies, cesspools, sewage holding tanks, injection wells used to dispose of sewage, chemical toilets, treatment tanks, and all other facilities, systems, and methods used for the disposal of sewage other than disposal systems operated under a permit issued by the commission. (Emphasis added.)

Water Code § 26.031. Thus, the chapter 26 definitions show that septic tanks are distinct from a sewer system and not part of one. The express power of the Upper Guadalupe River Authority to operate a sewer system does not include the authority to regulate septic tanks by requiring their connection with the system. See also Local Gov't Code § 214.013 (providing that home rule cities may operate sewage systems and require connections with a sewer system operated by the city); Water Code § 26.084(a)(1). (Water Commission may compel tie-in to regional or area-wide waste disposal system designated under section 26.083 of the Water Code.)

The authority has assumed the powers of a municipal utility district pursuant to section 54.030 of the Water Code, and therefore has the following statutory power:

A [MUD] may adopt and enforce reasonable rules and regulations to:

(1) secure and maintain safe, sanitary, and adequate plumbing installations, connections, and appurtenances as subsidiary parts of its sanitary sewer system . . . .  
(Emphasis added.)

Water Code § 54.205. It is suggested that the underlined language authorizes a municipal utility district to require septic tank users to connect to a sewage treatment system operated by it. Section 54.205 does not grant such authority. A septic tank is not a "subsidiary part" of the sanitary sewer system because it operates in its place.

No other provision in the Water Code specifically permits municipal utility districts to force connections by septic tank users to sewage disposal operated by it. Nor do we think that such a power can be implied from the express powers granted to the authority in the code. Ordinarily, forcing septic tank users to connect to a sewage system can only be considered to be convenient, and not necessary, to the operation of a sewage system by a MUD. Tri-City Fresh-water Supply District, supra.

The legislature has, moreover, recognized that septic tanks in the appropriate circumstances are adequate means to preserve the waters subject to the jurisdiction of the district. The 70th Legislature enacted a statute regulating the location, design, construction and operation of on-site sewage disposal systems, including septic tanks. Acts 1987, 70th Leg., ch. 406, § 1, at 1932 (codified at 4477-7e, V.T.C.S.);<sup>1</sup> see V.T.C.S. art. 4477-7e, § 2(7). The purpose clause includes the following legislative findings:

(2) on-site sewage disposal systems, when properly designed and constructed in suitable soils, provide a safe and adequate method of sewage disposal; and

(3) in some areas of the state, the soil is not suitable for normal underground sewage disposal and the improper and unapproved construction and installation of on-site sewage disposal in those areas has created conditions dangerous to the public health.

V.T.C.S. art. 4477-7e, § 1(b).

The Department of Health or its authorized agent is responsible for adopting rules regulating on-site sewage

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1. Two other statutes adopted by the 70th Legislature were also codified as article 4477-7e, V.T.C.S. See Acts 1987, 70th Leg., ch. 162, at 1327; Acts 1987, 70th Leg., ch. 810, at 2808.

disposal and issuing permits to build, alter, repair, extend or operate an on-site sewage disposal system. V.T.C.S. art. 4477-7e, §§ 4, 7. A city, county, river authority, or special district may be designated an authorized agent by the department and may then exercise the regulatory powers set out in article 4477-7e, V.T.C.S. To become an authorized agent, a local government must, among other statutory requirements, enter an order or resolution which meets the department's minimum requirements for on-site sewage disposal systems. Id. § 5(c).

Article 4477-7e, V.T.C.S., is directed at assisting "the state's citizens in obtaining safe and adequate on-site sewage disposal systems," not at prohibiting them. Id. § 1(a). The department or an authorized agent may refuse a permit to construct an on-site sewage disposal system if issuing it would conflict with the public policy declared under the statute or with other applicable laws, id. § 7(e)(2), but may not deny any and all permits or require all septic tanks to be connected to a sewage system. Moreover, no permit is required for an on-site sewage disposal system for a single residence on a land tract of 10 acres or larger, subject to meeting statutory conditions designed to protect the public health. Id. § 7(f). The authority may not rely on article 4477-7e, V.T.C.S., to require septic tanks to be connected to its sewage disposal system. The statute also expresses the legislature's intent to allow properly designed and constructed septic tanks and other on-site sewage disposal systems to exist, id. § 1(b)(2), and its recognition that in some areas of the state the soil is not suitable for normal underground sewage disposal. Id. § 1(b)(3). The legislature's findings and expression of intent in article 4477-7e and its adoption of comprehensive regulations applicable to septic tanks lend additional support to our conclusion that the authority may not rely on implied authority to regulate septic tanks requiring connections with their sewage system.

The authority suggests that because the Local Government Code allows home rule cities to force connections with sewage collection systems operated by the city, such a power can be delegated by a home rule city to the authority. We disagree. Chapter 30 of the Water Code permits cities to contract with the authority for the operation of sewage disposal systems. Water Code §§ 30.021-035. However, the Local Government Code specifies that only a home rule city may "provide for a sanitary sewer system" and "require property owners to connect to the sewer system." Local Gov't Code § 214.013.

The provision of sewage collection, transportation, and disposal is a governmental function of a municipality. Dilley v. City of Houston, 222 S.W.2d 992 (Tex. 1949); see also Gotcher v. City of Farmersville, 151 S.W.2d 565 (Tex. 1941). Cf. Local Gov't Code § 402.063(e). A municipality may not delegate a governmental function to another political subdivision so as to lose control over the discharge of the function or to inhibit the exercise of necessary discretion by the municipality concerning the function. City of Farmers Branch v. City of Addison, 694 S.W.2d 94 (Tex. App. - Dallas 1985, writ ref'd n.r.e.); Fidelity Land & Trust Co. v. City of West University Place, 496 S.W.2d 116 (Tex. Civ. App. - Houston [14th Dist.] 1973, writ ref'd n.r.e.).

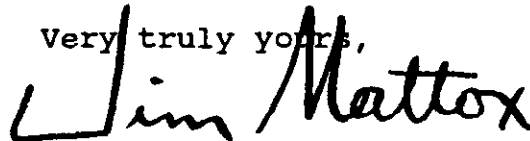
Thus, while a home rule city may by statute contract with the authority for the collection, transportation, and disposal of sewage, and cities which have the power to force property owners to connect to their sewage systems may force them to connect with the sewage system operated by the authority, such cities may not surrender that power completely and unequivocally to the authority as a condition of such a contract. City of Farmers Branch, supra.

In conclusion, the authority has no power to require septic tanks within its boundaries to connect to a sewage system which it operates.

#### S U M M A R Y

The Upper Guadalupe River Authority, which possesses cumulatively the powers of a water control and improvement district and a municipal utility district, has no power to force septic tank users to connect to a sewage disposal system operated by the entity. Home rule cities may require septic tank users to connect to a sewage system operated by the city inside of its corporate limits, but the city may not delegate that power to any other governmental entity or political subdivision.

Very truly yours,



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