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OPINION COMMITTEE
November 22, 2013

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I.D. # 47461

RQ-1168-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

via certified mail:7004 1160 0002 3028 7687

Re: Request for Opinion Relating to the Authority of Hays County to
Contract for the Reservation and Purchase of Groundwater Supplies
for Municipal Purposes

Dear General Abbott:

Pursuant to the authority to issue advisory opinions granted the Attorney General in § 22 of Article IV of the Texas Constitution and § 402.041 *et seq.* of the Texas Government Code, I am writing to request an opinion regarding the authority of Hays County (the "County") to enter into a contract for the reservation and purchase of groundwater supplies to meet the future water needs of residents and property owners in the County.

Effective October 1, 2013, the Hays County Commissioners Court voted unanimously to enter into a contract with Forestar Real Estate (USA) Group Inc. ("Forestar") to reserve and purchase up to 45,000 acre-foot of groundwater to be produced from the Carrizo-Wilcox Group (Simsboro Aquifer) underlying approximately 20,000 acres of land leased by Forestar for such purposes in Lee County, Texas (the "Contract").¹ The purpose of the Contract is to make a significant water supply available to meet the demands of the County's growing population and economy. During the course of the public deliberations leading to the execution of the Contract, the questions presented below were raised regarding the County's authority to enter into the Contract.

¹ A copy of the Contract between the County and Forestar is attached hereto as Appendix "A." Additional details related to the Contract are summarized in Appendix "B."

I.
QUESTIONS PRESENTED

1. Whether Hays County is authorized to enter into a contract with a private for-profit entity to reserve and purchase groundwater for beneficial municipal water supply purposes; and
2. Whether the County, once it has determined that a public purpose exists for such action, has the authority to use *ad valorem* tax revenues to pay for the water supply contracted to be reserved and purchased.

II.
BACKGROUND AND FACTS

For the purposes of providing context for Opinion(s) to the questions presented herein, the following recitation of background and facts should be considered undisputed.

A. Documentation of Hays County's Water Needs

Hays County occupies an area of approximately 693 square miles and its population exceeds 169,000 persons. The County is one of the fastest-growing counties in the State of Texas and in the nation. The availability and sufficiency of water supplies to meet future population demands is one of the most significant challenges confronting the County. According to the State Water Plan² and multiple local planning studies,³ significant water supply deficits are predicted based on projected population growth and additional water supplies must be developed to meet future demands in the County.

In 1987 the Texas Water Commission (predecessor agency to the Texas Commission on Environmental Quality) and the Texas Water Development Board commenced a study to determine whether eight Hill Country Counties, including Hays County, should be included in a groundwater critical area based upon observed declines in the groundwater tables of identified aquifers underlying the eight Hill Country Counties. Following completion of the study (the "HCCA Study"),⁴

² 2012 Water for Texas, The State Water Plan (TWDB December 15, 2011) (available online at www.twdb.texas.gov/waterplanning/swp2012/index.asp).

³ See, e.g., "Water and Wastewater Facilities Plan for that Portion of Hays County, Texas West of the I-35 Corridor" (HDR Engineering, February 2011); "Ground Water Protection and Management Strategies for the Hill Country Area (A Critical Area Ground Water Study)" (TCEQ & TWDB, February 1990); "Hays County Regional Water and Wastewater Study" (HDR Engineering, May 1989).

⁴ The Study is documented in a report entitled "Ground Water Protection and Management Strategies for the Hill Country Area (A Critical Area Ground Water Study)(February 1990)."

and public hearings conducted by the Texas Water Commission in the Spring 1990, the region, including Hays County, was declared a ground water "critical area."⁵

Hays County along with other local sponsors, formed the Hays County Water Development Board (HCWDB) in 1986 to develop a regional water supply and wastewater services plan for Hays County. The HCWDB commissioned the "Hays County Regional Water and Wastewater Study" with financial assistance from the Texas Water Development Board (the "HCWDB Study").⁶ Among the conclusions and recommendations of the HCWDB Study were the identification of the County's inability to meet its projected water supply demands and the need to develop water sources other than additional groundwater production from the Trinity and Edwards Aquifers within Hays County.

On May 9, 2000, the Hays County Commissioners Court created the Hays County Water and Sewer Authority ("HCWSA").⁷ The original focus of HCWSA was to expand surface water availability in Hays County to reduce demands on the Trinity and Edwards Aquifers.

In 2008, Hays County applied to the TWDB for funding to conduct an updated study evaluating the County's water and wastewater supplies and infrastructure needs based upon the County's considerable growth during the preceding twenty years. The study results included, *inter alia*, reaffirmation of earlier study findings of a lack of locally available water supplies necessary to meet the growing demands of Hays County's booming population and economy. Among the recommendations in the study were to reduce dependence upon dwindling local groundwater supplies and to import the necessary water supplies to support projected growth.⁸

In June 2011, HCWSA was re-formed and incorporated in order to organize, finance, purchase and transfer, or hold, operate and sell, water and wastewater assets, facilities, utilities and systems due to the long-term drought conditions confronting the region and the need to secure additional water supplies. HCWSA actions continue to be subject to approval by the Hays County Commissioners Court.

⁵ The "critical area" designation was based upon a determination that continued reliance upon the local groundwater resources could not be sustained over a twenty-five year period. Based upon amendments to Chapter 35, Texas Water Code, the designation of "critical area" has been changed to "Priority Groundwater Management Area" or "PGMA." See Texas Water Code §§ 35.002(12), 35.007-35.008.

⁶ The HCWDB Study is documented in a report entitled "Hays County Regional Water and Wastewater Study (May 1989)."

⁷ The Hays County Water and Sewer Authority was formed pursuant to Section 412.016, Tex. Local Gov't Code (now Section 562.016).

⁸ The findings of the study are memorialized in a 2011 Report entitled "Water and Wastewater Facilities Plan for that Portion of Hays County, Texas West of the I-35 Corridor" (HDR Engineering, February 2011).

B. Recent Hays County Initiatives to Address its Water Supply Needs:

1. Hays County Forms a Public Utility Agency.⁹ While Hays County does not currently own or operate its own water utility system at this time, it does have beneficial ownership in both a water and wastewater system through its membership in WTCPUA. In November 2010, the Lower Colorado River Authority (LCRA) announced its plans to divest itself of certain water and wastewater retail businesses. In response to this announcement, the County joined with the West Travis County Municipal Utility District No. 5 (MUD No. 5)¹⁰, and the City of Bee Cave¹¹, Texas, to form the West Travis County Public Utility Agency (“WTCPUA”)¹². In November 2012, the LCRA Board of Directors passed a resolution authorizing the negotiation and sale of its west Travis County regional water and wastewater system to the WTCPUA. The WTCPUA is governed by a Board of Directors with six members, two of whom are appointed by the Hays County Commissioners Court and one member, in fact, is a Hays County Commissioner. The WTCPUA services approximately 5200 retail water customers and 15 wholesale water customers in western Travis and northern Hays Counties.¹³

2. Hays County Publishes its “Water RFP”. In response to HCWSA’s recommendations and in response to a state-funded Water and Wastewater Study, which was adopted by the Hays County Commissioners Court in 2008, the Hays County Commissioners Court issued a Request for Proposals for Alternative Groundwater Supply (“RFP”) on April 16, 2013, to address the County’s existing and projected water supply needs. The RFP sought technical and cost proposals from respondents for groundwater originating from the Carrizo-Wilcox Aquifer Group for annual delivery to the County in a quantity not less than 25,000 acre-feet per annum, and not to exceed 50,000 acre-feet per annum.

Forestar (USA) Real Estate Group Inc. (“Forestar”) responded to the County’s RFP. Following its review and evaluation of the responsive RFP submissions, the County, acting through its Commissioners Court, voted unanimously to negotiate and, subsequently, execute, a contract with Forestar. That contract is the subject of this request.

Hays County has not yet determined the manner in which groundwater available under the Forestar Water Supply Agreement will be delivered to, and utilized by, Hays County. Because of the significant infrastructure costs required to transport the groundwater from the well field to Hays County, it is likely that Hays County will contract with other entities to jointly finance and construct the infrastructure project. In the alternative, Hays County may assign its interests in the

⁹ See Tex. Local gov’t Code Chapter 572.

¹⁰ MUD No. 5 is an Article XVI, Sec. 59, Texas Constitution created District operating under applicable general laws of the State, including Chapters 49 and 54 of the Texas Water Code.

¹¹ The City of Bee Cave is a municipal body authorized to provide governmental services including water and wastewater services within its corporate boundaries and adjoining environs.

¹² The WTCPUA was formed pursuant to Chapter 572, Texas Local Gov’t Code.

¹³ See WTCPUA website at www.wtcpua.org.

Forestar Water Supply Agreement, in whole or in part, to one or more third parties that would construct and finance the infrastructure improvements. The County intends for the additional water supply to be made available to unincorporated areas within Hays County, and to supplement existing water supplies held by third party purveyors, including municipalities, within Hays County.

C. Basis for the Requested Opinion

Section 3.2(f) of the Contract provides for Hays County to request an opinion of the Attorney General regarding the County's authority to enter into and carry out the transactions contemplated by the Contract utilizing *ad valorem* tax revenues for payment of all costs incurred by the County under the Contract. Accordingly, I am hereby requesting that your office render an opinion as to the following questions of law:

1. Whether Hays County is authorized to enter into a contract with a private for-profit entity to reserve and purchase groundwater for beneficial municipal water supply purposes; and
2. Whether the County, once it has determined that a public purpose exists for such action, has the authority to use *ad valorem* tax revenues to pay for the water supply contracted to be reserved and purchased.

**III.
DISCUSSION**

Hays County has not yet determined whether it will create a wholly owned water utility system for the groundwater supply it has reserved/purchased from Forestar on a wholesale or retail basis, or transfer its interests to the WTCPUA or other water utilities eligible to contract with the County on a wholesale basis. Based upon the Contract, Hays County may create a water utility system, may assign its contractual rights to HCWSA, may contract with one or more other entities on an interlocal basis,¹⁴ or Hays County may assign its rights to third parties that would finance and construct the infrastructure necessary to transport all or a portion of the reserved groundwater from the well field to its place(s) of use in Hays County. The County negotiated the Contract to provide it with flexibility to do all of the above. Hays County intends to engage in negotiations and joint planning efforts with other local entities in Hays County to determine the most efficient and cost effective way for the groundwater to be delivered to and within the County.

Under Texas law, a commissioners court of a county has only that authority to contract conferred either expressly or by necessary implication by the constitution and laws of the State of Texas. TEX. CONST. art. V, §18(b); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Texas 2003); *Childress County v. State*,

¹⁴ See Tex. Gov't Code Chapter 791 (Interlocal Cooperation Contracts).

92 S.W.2d 1011, 1016 (Tex. 1936); Tex. Att’y Gen. Op. No. JC-0584(2002) at 17. In *Edwards County v. Jennings*, 33 SW 585 (Civ. App. 1896), the Court of Appeals concluded that although a county had the authority to contract for a sufficient water supply for the county’s public buildings, it had no authority to contract to supply the general public with water. Since the *Edwards County* decision, however, the Legislature has expanded the authority of counties with respect to water supplies on numerous occasions.

The authority of a county to contract for and secure surface water supplies is clear. Section 562.013, Texas Local Government Code, authorizes a county with a river that flows through it or that forms part of its boundary to, upon voter approval, make expenditures to conduct an investigation relating to present and future water needs of the county inhabitants and to the feasibility of developing the water resources of the river for uses in the county. Section 562.014, Texas Local Government Code, expressly authorizes a county to acquire property or an interest in property that the commissioners court finds necessary to obtain a surface water supply or to transport and deliver surface water. Similarly, the statute authorizes a commissioners court to contract with any political subdivision of the state for the management and operation of all or part of the property and for the beneficial use of the surface water.

While there is no similar *express* authority for a county to contract for, or acquire a groundwater supply, to meet the needs of the county and its inhabitants, multiple statutory provisions necessarily imply (if not expressly grant) a county such powers.¹⁵ Chapters 562 and 572 of the Texas Local Government Code are examples.

Section 562.002, Texas Local Government Code, authorizes a county to sell “county surplus water” to political subdivisions of the State of Texas, including municipalities, water control and improvement districts and freshwater supply districts. “County surplus water” is defined at Section 562.001 as “water that a county has acquired from an **underground source** for the county’s water supply and that is not needed for county purposes.” See Tex. Local Gov’t Code §§ 562.001-562.002 (emphasis added).

By authorizing a county to sell surplus groundwater, the statute implicitly recognizes a county’s authority to own and/or acquire groundwater. In other words, a county could not be authorized to sell surplus groundwater if it did not have authority to acquire groundwater.

Chapter 562 also provides that:

- (i) the county commissioners set the rate at which the county’s

¹⁵ See, e.g., Tex. Local Gov’t Code Chapters 562, 572.

surplus water is to be sold;¹⁶

- (ii) prescribes the maximum term for any such surplus water contract – 40 years;¹⁷ and
- (iii) authorizes the buyer of the county's surplus water to use or resell it for any lawful purpose.¹⁸

The legislative history of Section 562.001 supports this analysis. Section 562.001 was originally enacted in 1950 as an amendment to Article 2351, Vernons Revised Civil Statutes of Texas. According to the original bill's caption, the intent of the bill was to "empower the commissioners court of each county of this state, where said county has acquired a water supply from subterranean waters *for county purposes*, to sell, contract to sell and deliver to any public or municipal corporation or political subdivision of the state, for use or resale, any or all such water not needed for county purposes." (emphasis added).

The original legislation declared an emergency suspending the rule that bills be read on three days in each House of the Legislature for the following reason:

"the fact that there is no provision in the present laws of this State permitting counties to sell excesses of water from wells or supplies of water *acquired by counties for county purposes*, and that the fact that there are instances where counties have such excess of water which are being wasted, because such counties are not authorized to sell such excess of water, and natural resources of this State are being wasted rather than conserved, and the further fact that such wells or supplies of water exist in such quantities that it is not economically feasible for other public corporations or subdivisions of this State to drill other wells tapping the same source of subterranean supplies of water, creates an emergency and an imperative public necessity...."

(emphasis added).

Subsequent to the enactment of Article 2351(2), the Legislature enacted the predecessor to Section 562.016 of the Local Government Code.¹⁹ This statute authorizes a county to acquire, own, finance, operate or contract for the operation of, a water or sewer utility system. Thus, even if Section 562.002 of the Local Government Code is a limit on a county's authority to acquire groundwater supplies to groundwater supplies acquired for county purposes, the scope of county use has now been expanded by the Legislature to include the ownership and operation of a

¹⁶ Tex. Local Gov't Code § 562.003.

¹⁷ *Id.* § 562.004.

¹⁸ *Id.* § 562.005.

¹⁹ See Acts of 1999, 76th Leg. R.S. Ch. 191 (codified as Tex. Local Gov't Code § 412.16; recodified as Section 562.016 pursuant to Acts of 2007, 80th Leg. R.S. Ch. 885, Sec. 3.76(b)(2)).

water utility system.²⁰

Moreover, we also note that Section 562.016 of the Local Government Code implicitly authorizes a county to acquire a groundwater supply independent of the implicit authority conveyed by Section 562.002. The operation of a water utility system necessarily requires a water supply. The statute does not specify whether the water supply must be a surface water supply or a groundwater supply, nor does it preclude the use of groundwater as a part of the requisite water supply. Since Hays County is authorized to own and operate a water utility system, either by itself or as a member of a PUA,²¹ the statutes implicitly (if not expressly) authorize the County to reserve a water supply for any such utility system whether existing or that may hereafter be created by the County.

It should be noted that Section 562.016 also expressly provides that a county may own and operate a water utility system "in the same manner and under the same regulations as a municipality under Chapter 552."²² Section 552.018(a)²³ authorizes a municipality that owns and operates a water distribution system to "*contract with an individual, firm, or corporation that operates without profit* to make available for delivery to and use by the municipality all or part of the raw or treated water to be used for the municipal water distribution system." (emphasis added). In the event you determine that Section 562.016 of the Local Government Code authorizes a county to acquire a groundwater supply in connection with the potential ownership and operation of a water utility system, please confirm that the phrase "*operates without profit*" applies only to a "*corporation*" in the above-stated provision, and not to an "*individual*" or "*firm*."

Use of Ad Valorem Tax Revenues

Hays County intends to utilize funds from its general operating fund collected as *ad valorem* taxes for purposes of providing payment of the Base Rate and Delivered Rate to Forestar. Each annual payment would be subject to appropriation by the Commissioners Court in connection with the annual budget process. In determining to use a portion of its tax revenues to make payments under the Contract, the Commissioners Court concluded that providing an adequate water supply for the County was a public purpose in accord with the requirements of Article VIII, Section 3 of the Texas Constitution. Moreover, the Commissioners Court determined that the payments to reserve and purchase the groundwater under the terms of the Contract represented an adequate consideration or *quid pro quo* for the monies to paid to Forestar consistent with Article III, Section 52(a) and Article XI, Section 3 of the Texas Constitution and applicable general laws of the State. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Worker's Comp. Comm'n*, 74 S.W.3d 377, 383 (Texas. 2002); *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex.

²⁰ Texas Gov't Code §§ 311.021; 311.023.

²¹ *E.g.*, Texas Local Gov't Code §§ 562.016; 572.001 *et seq.*

²² Tex. Local Gov't Code § 562.016 (*citing* Chapter 552, Texas Local Gov't Code).

²³ Local Gov't Code.

1905); Tex. ATTY GEN. Op. No. GA-0583 (2007); *see generally* Brooks, 35 Tex. Prac. Counties and Special District Law, §12.7(ThomsonWest 2002).

Providing for a water supply for public health and safety within the County, as well as to facilitate the economic development of the County are "Public Purposes" under Texas Law for which the County is entitled to collect and spend tax monies, including revenues from its collection of *ad valorem* taxes. Additionally, the State of Texas, including the central Texas region that covers Hays County, is currently in a severe drought. According to some sources, the ongoing drought is worse than the historic drought of record of the 1950s. This drought, and the lack of available adequate local public water supply sources to meet demands within the County, particularly surface water supplies which have been severely tested due to the lack of rainfall during this period, is memorialized by the Governor Perry's statewide disaster proclamation first issued on July 5, 2011 (<http://governor.state.tx.us/news/proclamation/>). [The Governor's Proclamation]. On October 3, 2013, the Governor renewed his disaster proclamation continuing to identify Hays County among the enumerated counties in a state of disaster. According to the Governor's Proclamation, this "exceptional drought" has "reached historic levels" and poses an "imminent threat to public health, property and the economy." In his proclamation the Governor authorizes and directed that "all necessary measures, both public and private, as authorized under Section 418.017, of the Texas Government Code be implemented to meet the threat.

Under the aforesaid facts, the Hays County Commissioners Court determined that the expenditure of *ad valorem* taxes satisfies the Supreme Court's analysis in *Tex. Mun. League Intergovernmental Risk Pool*,²⁴ that your office announced it follows when determining whether an expenditure of public monies "serves a public purpose." Tex. Att'y Gen. Op. No. GA-0583 (2007) at 3 (*citing* Tex. Att'y Gen. Op. Nos. GA-0480 (2006) at 2, GA-0321 (2005) at 3). In your Opinion No. GA-0583 you quoted the Supreme Court's three-pronged test from *Tex. Mun. League Intergovernmental Risk Pool, supra*, to determine that a "public purpose" within the meaning of Article III, Section 52(a) existed as follows:

- (1) the predominant purpose of a statute requiring a public expenditure must be to accomplish a public purpose, not to benefit private parties;
- (2) the statute must impose public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and,
- (3) the statute must ensure that the political subdivision receives a return benefit.

²⁴ *Supra*, 74 S.W.3d at 383.

Tex. Att'y Gen. Op. No. GA-0583 (2007) at 3 (citing *Tex. Mun. League Intergovernmental Risk Pool*, *supra*, 74 S.W.3d at 384). Accordingly, the County's plan to make annual payments for the reservation and purchase of a groundwater supply are a "public purpose," and such payments may be made from the County's general fund utilizing tax revenues or any other revenues not dedicated to roads, that would be incorporated into the County's general operating fund.

IV.
CONCLUSION

Based upon the foregoing, on behalf of the Hays County Commissioners Court, I respectfully would request that you issue an opinion confirming the following:

1. Whether Hays County is authorized to enter into a contract with a private for-profit entity to reserve and purchase groundwater for beneficial municipal water supply purposes; and
2. Whether the County, once it has determined that a public purpose exists for such action, has the authority to use *ad valorem* tax revenues to pay for the water supply contracted to be reserved and purchased.

We appreciate your consideration of this request. If you have any questions regarding this matter, please do not hesitate to contact me at your convenience.

(SIGNATURE FOLLOWS ON THE NEXT PAGE)

Sincerely,

A handwritten signature in black ink, appearing to read "S. Tibbe", written over a horizontal line.

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cc: Hays County Commissioners Court
Hays County Office of General Counsel