

NOTICE OF OPEN MEETING

Notice is given that a **Regular Meeting and Work Session** of the Board of Directors of the Barton Springs/Edwards Aquifer Conservation District will be held at the **District office**, located at 1124 Regal Row, Austin, Texas, on **Thursday, September 22, 2016**, commencing at **6:00 p.m.** for the following purposes, which may be taken in any order at the discretion of the Board.

Note: The Board of Directors of the Barton Springs/Edwards Aquifer Conservation District reserves the right to meet in Executive Session at any time during the course of this meeting to discuss any of the matters listed on this agenda, as authorized by the Texas Government Code Sections §551.071 (Consultation with Attorney), 551.072 (Deliberations about Real Property), 551.073 (Deliberations about Gifts and Donations), 551.074 (Personnel Matters), 551.076 (Deliberations about Security Devices), 551.087 (Economic Development), 418.183 (Homeland Security). No final action or decision will be made in Executive Session.

1. **Call to Order.**
2. **Citizen Communications (Public Comments of a General Nature).**
3. **Work Session.**

The Board will hold a work session to discuss District strategic planning and setting FY 2017 District Goals and Performance Objectives for the General Manager. **Pg. 4**

4. **Routine Business.**

a. Consent Agenda. *(Note: These items may be considered and approved as one motion. Directors or citizens may request any consent item be removed from the consent agenda, for consideration and possible approval as a separate item of Regular Business on this agenda.)*

1. Approval of Financial Reports under the Public Funds Investment Act, Directors' Compensation Claims, and Specified Expenditures greater than \$5,000. **NBU**
2. Approval of minutes of the Board's September 8, 2016 regular Meeting. **Not for public review at this time**
3. Approval of District support of the Amicus Brief filed in support of the Lone Star Groundwater Conservation District. **Pg. 16**

b. General Manager's Report. *(Note: Topics discussed in the General Manager's Report are intended for general administrative and operational information-transfer purposes. The Directors will not take any action unless the topic is specifically listed elsewhere in this agenda.)*

1. **Standing Topics.**

- i. Personnel matters and utilization
- ii. Upcoming public events of possible interest
- iii. Aquifer conditions and status of drought indicators

2. **Special Topics.** *(Note: Individual topics listed below may be discussed by the Board in this meeting, but no action will be taken unless a topic is specifically posted elsewhere in this agenda as an item for possible action. A Director may request an individual topic that is presented only*

under this agenda item be placed on the posted agenda of some future meeting for Board discussion and possible action.)

- i. Update on Team activities and highlights
- ii. Update on regulatory and enforcement activities
- iii. Update on District grant projects and other Aquifer Science Team projects
- iv. Update on activities related to area roadway projects
- v. Update on the HCP/ITP application and the associated draft EIS
- vi. Update on activities related to the Travis County PGMA
- vii. Update on interim legislative activity

5. Discussion and Possible Action.

- a. Discussion and possible action related to the District's process to conduct a contested permit case. **Pg. 58**
- b. Discussion and possible action related to the City of Dripping Springs TPDES permit application to authorize direct discharge of treated wastewater to Onion Creek in the contributing zone of the Barton Springs segment of the Edwards Aquifer. **NBU**

6. Directors' Reports. *(Note: Directors' comments under this item cannot address an agenda item posted elsewhere on this agenda and no substantive discussion among the Board Members or action will be allowed in this meeting. Communications reported under this item may be used to support Performance Standard 4-1 of the District's Management Plan related to demonstration of effective communication with District constituents.)*

Directors may report on their involvement in activities and dialogue that are of likely interest to the Board, in one or more of the following topical areas:

- Meetings and conferences attended or that will be attended;
- Conversations with public officials, permittees, stakeholders, and other constituents;
- Commendations; and
- Issues or problems of concern.

7. Adjournment.

Came to hand and posted on a Bulletin Board in the Courthouse, Travis County, Texas, on this, the _____ day of September, 2016, at _____ m.

_____, Deputy Clerk

Travis County, TEXAS

Please note: This agenda and available related documentation have been posted on our website, www.bseacd.org. If you have a special interest in a particular item on this agenda and would like any additional documentation that may be developed for Board consideration, please let staff know at least 24 hours in advance of the Board Meeting so that we can have those copies made for you.

The Barton Springs/Edwards Aquifer Conservation District is committed to compliance with the Americans with Disabilities Act (ADA). Reasonable accommodations and equal opportunity for effective communications will be provided upon request. Please contact the District office at 512-282-8441 at least 24 hours in advance if accommodation is needed.

Item 1

Call to Order

Item 2

Citizen Communications

Item 3

Worksession

The Board will hold a work session to discuss District strategic planning and setting FY 2017 District Goals and Performance Objectives for the General Manager.



**Barton Springs
Edwards Aquifer**
CONSERVATION DISTRICT

MEMORANDUM

Date: September 16, 2016
To: Board of Directors
From: John T. Dupnik, P.G., General Manager
Re: Item 3 – FY17 Goal Setting Work Session

The District conducts annual strategic planning through the setting of overarching goals at the beginning of each Fiscal Year. The goals provide an opportunity to identify evolving priorities from year to year and work in concert with other District obligations and responsibilities as outlined in the District's Management Plan. Further, the goals provide direction to the General Manager and staff on where to focus efforts and allocate resources throughout the year.

The District Planning Team consisting of the General Manager and Team Leaders have been working over the last couple of months to identify projects and objectives needed to meet the District's ever-evolving needs and priorities. During the work session, each Team Leader will provide an overview of the product of these internal discussions. This overview is intended to prompt Board discussion and ultimately input and direction from the Board.

The work session is not accompanied with an action item. Rather, staff will compile inputs and formulate draft goals for the Board's consideration in the October 6, 2016 Board meeting. Our objective through the discussion of the work session is to develop an overarching goal for each team.

Attached are the FY16 goals and progress report to facilitate discussion.

FY 2016 District Goals
(Adoption Date: October 8, 2015)
Staff Progress Report

The following goals were adopted by the Board to guide the District's efforts for Fiscal Year 2016. Each Goal below includes a narrative summary in blue of District activities completed through the fiscal year to demonstrate sufficient progress towards achievement of the goals and a staff assessment of whether each goal was achieved or not.

1. Continue implementation of HB 3405 and activities related to annexation of the Shared Territory including conducting scientific studies as the basis for establishing policies and developing a regulatory framework to manage the Trinity Aquifer that are protective of local existing wells and the regional aquifer and freshwater resources.

Lead Team: All Teams

This goal was achieved.

Activities demonstrated progress related to this goal involve many the activities involved in Team specific goals that were integral to the successful implementation of the statutory provisions of HB 3405. For further detail see activities described for Goal 3 related to elections and redistricting, Goal 5 related to outreach efforts in the new annexed area, and Goal 6 related to establishing new rules.

2. Continue to participate in initiatives to preserve and protect the water quality of recharge to the Barton Springs segment of the Edwards Aquifer such as advocating for the appropriate pollution controls for roadway runoff and supporting implementation of sound wastewater management practices to protect groundwater and conserve resources.

Lead Team: General Management

This goal was achieved.

Activities related to Roadway Projects:

- The General Manager and the District's engineering consultant, Tom Hegemier, participated in multiple meetings throughout FY 16 of the technical workgroup convened by the Central Texas Regional Mobility Authority to provide input into the SH 45 Southwest roadway projects stormwater control design per the Consent Decree which afforded the opportunity for review of "changed" stormwater plans.
- The Board Committee on SH45 convened meetings throughout FY 16 to receive progress reports and provide direction to staff and consultant on the design review.
- At the February 11, 2016, the Board approved a letter to be submitted to CTRMA outlining the District's technical review and comments on the roadway design plans and the draft WPAP. The comments were submitted with a letter dated February 16, 2016.
- The General Manager accepted an appointment to and participated in the CTRMA's Environmental Compliance Manager Procurement Team. Participation included providing input into the RFQ, review of all the submitted proposals, and a daylong meeting on April 18, 2016 to interview the short-listed firms and score and rank proposals based on set criteria.

Activities related to Wastewater Management

- At the December 17, 2015 Board meeting, the Board approved Resolution No. 121715-01 to support the City of Austin's petition for rulemaking to modify TCEQ rules related to land application permits and encourage beneficial reuse of reclaimed wastewater.
 - In May of 2016, the Aquifer Science Team along with other regional hydrogeologist completed the draft of the Onion Creek Study showing evidence of a connection between Onion Creek and the Middle Trinity Aquifer directly downstream of the proposed Dripping Springs wastewater outfall.
 - In June of 2016, the GM convened an Ad Hoc Team of technical staff and consultant, Kirk Holland, to review the Dripping Springs TPDES permit application requesting authorization to discharge final phase volume of 0.995 MGD into Onion Creek in the contributing zone of the Barton Springs segment of the Edwards Aquifer.
 - At the June 16, 2016 Board meeting, the Board was provided a presentation by the Aquifer Science Team on the results of the Onion Creek Study and was briefed on the staff review of the Dripping Springs TPDES application in executive session. In that same meeting, Board President, Blayne Stansberry, appointed a Board committee consisting of herself and Director Stone to focus on the Dripping Springs wastewater issues.
 - At the June 30, 2016 Board meeting, the Board passed Resolution 063016-01 to oppose the Dripping Springs TDPEs permit application as proposed.
 - District staff and the Board subcommittee continue to attend meetings and participate in discussion with the City of Dripping Springs and other affected stakeholders related to the Dripping Springs wastewater plans.
3. Implement measures necessary to prepare for the upcoming 2016 elections including redistricting and coordination with County officials in new area and voting precincts added through the recent annexation.

Lead Team: General Services Team.

This goal was achieved.

This goal is in process through the end of the election period which began in earnest in August and continues on after Election Day, November 8th, through December 19th. Preparations needed in advance of the elections with the new area primarily involved the process of redistricting and the following associated tasks:

- At the September 24, 2015 Board meeting, Bill Dugat presented an overview of the redistricting process.
- District staff prepared the final maps and shape files to incorporate the new area including reconciling minor boundary discrepancies.
- At the December 17, 2015 Board meeting, Bill Dugat presented the initial assessment report with maps and charts depicting population, demographic analysis, and projected timeline.
- The Board directed Bill Dugat and staff to meet with directors in groups of two and individually to receive input on redistricting options. Several meetings were held with directors during January and February of 2016.

- At the April 14, 2016 Board meeting, Bill Dugat presented several illustrative plans to be considered by the Board. The Board designated two versions of the Austin precincts (4 and 5) and three versions of the non-Austin precincts (1, 2, and 3) to be the subject of a public hearing.
- A public hearing on the selected illustrative plans was held on April 28, 2014. The Board opened up a comment period on the proposed plan which expired on May 9, 2015.
- At the May 12, 2016 Board meeting, the Board considered the comments received which were predominately in favor of Plan CD which would align community interests in the non-Austin area. After considering the comments, the Board directed staff to draft a resolution and findings of fact to support Plan CD.
- At the May 26, 2016 Board meeting a resolution was approved to adopt new boundaries for the Directors' precincts to accommodate the expanded area.

Additional activity related to election preparations involves coordinating with the three counties' election personnel (including the new shared territory area) regarding election agreements and joint agreements. Use of contracted support with County elections personnel facilitates the District's efforts to conduct elections in the District's expanded jurisdictional area.

4. Conduct scientific studies and develop the regulatory framework that support the development and the use of alternative water supplies through methods such as aquifer storage and recovery (ASR) of groundwater and/or floodwaters and desalination that may substitute for use of the Edwards Aquifer and explore opportunities where such methods might provide the added benefit of flood control.

Lead Team: Aquifer Science

This goal was achieved.

The prime role of the Aquifer Science Team is to conduct scientific investigations that will help District management and policy makers make decisions about aquifer management and protection. The projects related to alternative water supplies have been in the planning phase for a number of years, but in FY 2016, substantial progress was made with the award of a Regional Facilities Planning Grant from TWDB. Activities related to the grant include:

- Working with the direction of the Board Alternative Supply Committee, staff solicited and interviewed consultants to assist in the grant work in accordance with the District's procurement process.
- Carollo Engineers, Inc. was selected and a contract was executed to conduct the ASR/desalination feasibility portion of the project.
- Another key aspect of the project is the installation of a multiport monitor well on the Texas Disposal Systems landfill site. Drilling of the well started on August 2, 2016. Results from this grant should provide significant information relating to the potential for ASR and desalination of the saline Edwards Aquifer.
- The District is also working closely with the City of Buda to support the ASR feasibility project which began this fiscal year and will carry over into FY17.

The District was also very active in pursuing concepts that may provide both recharge enhancement and flood control benefits. Activities included multiple meeting with area legislators, quarry operators, permittees, and Onion Creek neighborhood representatives.

The City Austin also provided a presentation at the May 26, 2016 Board meeting to present the preliminary findings of possible Onion Creek flood mitigation measures that were developed with input from the District.

5. Implement education and outreach initiatives targeted at affected constituents in the newly annexed area to increase awareness of the District's role in regional groundwater management and planning and its research, monitoring efforts, management strategies, and well permitting/registration programs by making data accessible through publications, website improvements, social media presence, public awareness campaigns, and/or other related outreach events and initiatives.

Lead Team: Education & Outreach

This goal was achieved.

To increase awareness of District programs and roles, staff applied a multi-faceted approach. Activities related to this goal include:

- A new monthly digital newsletter began circulation in October. Feedback and metrics show that the frequent updates in the mobile-friendly, digital format have been highly popular. Subscribers receive regular updates on permitting, aquifer science, events, and programs. Each monthly eNews was opened/accessed over 1,000 times.
 - The website was overhauled and updated to increase accessibility and content management.
 - Social media posts increased distribution of announcements and news and received high view rate.
 - Maps of scientific research results, expanded territory and shared jurisdiction, Director Precinct redistricting, and expanded management zones were produced by District staff and are available through the District website, viewable at the District, and/or in District publications.
 - The 2016 Well Water Check-up was showcased as an open house event that provided an opportunity for well owners, particularly those in the newly annexed area a chance to meet staff and have their water analyzed for free. Over 2,000 postcards were mailed to homeowners in the shared territory in neighborhoods that have a high density of Trinity wells to advertise the event and expand the District's presence and profile.
 - General program overview advertisements were placed in the 2016 Football Programs of San Marcos, Hays, Lehman, Austin, Travis, Bowie, Crockett, and Akins High Schools.
6. Initiate rulemaking to develop rule concepts and identify rule changes needed to: 1) implement new legislation, 2) refine the regulatory approach for permitting and regulation of wells in the Shared Territory and 3) establish a regulatory framework for innovative alternate water supply projects (i.e. ASR and desalination).

Lead Team: Regulatory Compliance

This goal was achieved.

In an effort to continue implementing provisions of H.B. 3405, which became effective in June 2015, the Regulatory Compliance team worked on updates to the rules in two phases:

Phase I: These changes were adopted on July 16, 2015 and focused on rules to implement new statutory requirements and to promulgate provisions needed to implement Temporary Permitting and conversion to Regular Permits. Topics areas affected by these rules include:

- Exemption Criteria:
- Limited Production Permits:
- Permit Applications and Administratively Complete Checklist:
- Permits for Existing Wells (in jurisdiction after 2015 annexation):
- Permit Conditions and Requirements:
- Maximum Allowable Withdrawals for Management Zones
- City of Austin Water Use Fee

Phase II: These changes were adopted on April 28, 2016 and focused on improving management strategies that will protect existing wells and preserve the long-term availability of water supplies from the Trinity Aquifer. The principles objectives of these rules were:

- Defining “unreasonable impacts” for permitting purposes;
- Outlining guidance and requirements for aquifer testing, notice, and monitoring requirements for large-scale groundwater projects;
- Establishing a policy and permitting framework for a science-based evaluation of the potential for unreasonable impacts to existing wells and the aquifer and requirements to avoid or mitigate for such impacts.

The updated District Rules are available online and were adopted July 16, 2015. In preparation for developing a framework for innovative alternate water supplies, staff has developed preliminary concepts for guiding and regulating ASR Systems within the District. Those concepts make concerted efforts to integrate our ASR rules with those of TCEQ.

Item 4

Routine Business

a. Consent Agenda

(Note: These items may be considered and approved as one motion. Directors or citizens may request any consent item be removed from the consent agenda, for consideration and possible approval as a separate item of Regular Business on this agenda.)

- 1. Approval of Financial Reports under the Public Funds Investment Act, Directors' Compensation Claims, and Specified Expenditures greater than \$5,000.**
- 2. Approval of minutes of the Board's September 8, 2016 regular Meeting.**
- 3. Approval of District support of the Amicus Brief filed in support of the Lone Star Groundwater Conservation District.**

**IN THE COURT OF APPEALS FOR THE STATE OF TEXAS
NINTH JUDICIAL DISTRICT AT BEAUMONT, TEXAS**

**RICHARD TRAMM, SAM W. BAKER, M. SCOTT WEISINGER,
JIM STINSON, JOHN D. LEYLE, JACE HOUSTON, ROY McCOY, JR.,
RICK MOFFATT, W.B. WOOD, KATHY TURNER JONES AND
LONE STAR GROUNDWATER CONSERVATION DISTRICT,
Appellants**

v.

**CITY OF CONROE, TEXAS, QUADVEST, L.P., WOODLAND OAKS
UTILITY, L.P., CRYSTAL SPRINGS WATER CO. INC.,
EVERETT SQUARE INC., E.S. WATER CONSOLIDATORS, INC.,
UTILITIES INVESTMENT CO., INC.,
AND T&W WATER SERVICE COMPANY,
Appellees**

**On Appeal from the 284th District Court, Montgomery County, Texas
Hon. Lamar McCorkle, Presiding -- Trial Court No. 15-08-08942-CV**

**BRIEF OF AMICI CURIAE
GONZALES COUNTY UNDERGROUND WATER CONSERVATION
DISTRICT AND OTHER DISTRICTS IN SUPPORT OF APPELLANTS**

**GREGORY M. ELLIS,
State Bar No. 06562500
Attorney at Law
2104 Midway Ct.
League City, TX 77573
(713) 705-4861—Phone
(512) 319-6698--Fax
Greg.Ellis@gmservices.info
ATTORNEY FOR AMICI CURIAE
GONZALEZ COUNTY UNDERGROUND
WATER CONSERVATION DISTRICT, ET AL**

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
INTRODUCTION	1
I. Effect of Texas Water Code §36.251	4
II. Appellees’ Claims Against Directors Barred by Statutory Immunity Under §36.066(a).....	5
III. Effect of “Redundant Remedies” Doctrine on Appellees’ UDJA Claim.....	12
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE	19
APPENDIX	
Exhibit 1 – House Research Organization Bill Analysis for HB 3163 (5/11/2015)	
Exhibit 2 – House Bill 3163 Senate Amendments: Section-by-Section Analysis	
Exhibit 3 – House Research Organization Bill Analysis for HB 2294 (4/27/95)	

INDEX OF AUTHORITIES

CASES

<i>Bonham v. Flach</i> , 744 S.W.2d 690 (Tex. App. – San Antonio 1988, no writ).....	11
<i>Cain v. Progressive</i> , 448 S.W.3d 550 (Tex. App. – Houston [14 th Dist.] 2014, no pet.)	8
<i>City Of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009)	7, 9
<i>Cobb v. Harrington</i> , 190 S.W.2d 709 (Tex. 1945)	14, 15
<i>Coinmach Corp. v. Aspenwood Apts.</i> , 417 S.W.3d 909 (Tex. 2013)	13, 16
<i>Edwards Aquifer Authority v. Chemical Lime</i> , 291 S.W.3d 392, 405 (Tex. 2009)	3, 13, 14, 15
<i>First Nat. Bank v. J.E. Mitchell Co.</i> , 727 S.W.2d 360 (Tex. App. – Amarillo 1987, writ ref, n.r.e.).....	16
<i>Hunter v. Fort Worth Capital Corp.</i> , 620 S.W.2d 547 (Tex. 1981)	11
<i>In re T.M.</i> , 33 S.W.3d 341 (Tex. App. – Amarillo 2000, no pet.)	8, 9
<i>J.C. Penney's Life Ins. Co. v. Heinrich</i> , 32 S.W.3d 280 (Tex. App. – San Antonio 2000, pet. denied).....	16
<i>Mensa-Wilmot v. Smith International, Inc.</i> , 312 S.W.3d 771 (Tex. App. – Houston [1 st Dist.] 2009).....	5
<i>Mission Consolidated ISD v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008)	9, 15

<i>North Alamo Water Supply v. Dept. Of Health,</i> 839 S.W.2d 455 (Tex. App. – Austin 1992, writ denied).....	8
<i>PPG Industries v. JMB/Houston Centers,</i> 146 S.W.3d 79 (Tex. 2004).....	8
<i>Prairie View A&M University v. Chatha,</i> 381 S.W.3d 500 (Tex. 2012)	9, 15
<i>Strayhorn v. Raytheon,</i> 101 S.W.3d 558 (Tex. App. – Austin 2003, pet. denied)	12, 13
<i>Templeton v. Dreiss,</i> 961 S.W.2d 645 (Tex. App. – San Antonio 1998, pet. denied).....	16
<i>Tex. Dept. of Public Safety v. Salazar,</i> 304 S.W.3d 896 (Tex. App. – Austin 2009, no pet.).....	12
<i>Texas Dept. Parks & Wildlife v. Miranda,</i> 133 S.W.3d 217 (Tex. 2004)	4, 9
<i>Texas Employment Commission v. Child, Inc.,</i> 738 S.W.2d 56 (Tex. App. – Austin 1987, writ denied).....	12
<i>Texas Liquor Control Board v. Canyon Creek,</i> 456 S.W.2d 891 (Tex. 1970)	14, 15
<i>Texas Rice Land v. Denbury Green Pipeline,</i> 363 S.W.3d 192 (Tex. 2012)	14
<i>TNRCC v. IT-Davy,</i> 74 S.W.3d 849 (Tex. 2002).....	8
<i>Travis County v. Pelzel & Associates,</i> 77 S.W.3d 246 (Tex. 2015).....	11
<i>Washington v. City of Houston,</i> 874 S.W.2d 791 (Tex. App. – Texarkana 1994, no writ)	11

STATUTES

77 th Leg., R.S., ch. 1321, 2001 Tex. Gen. Laws 3246 §5	6
Act of May 29, 1995, 74 th R.S.,ch. 933, 1995 Tex. Gen. Laws 4673, 4686	15
Act of June 16, 2001, 77 th Leg., R.S., ch. 1321, 2001 Tex. Gen. Laws 3246 §5	6
Act of May 31, 2015, 84 th R.S.,ch. 464, 2015 Tex. Gen. Laws 1778.....	5, 6, 7, 8, 11
Act of June 15, 2015, 84 th Leg., R.S. ch. 464, 2015 Tex. Gen. Laws 1779 §2	5
TEX. CIV. PRAC. & REM. CODE Chapter 37	2, 3, 8, 12, 13, 14, 15, 16, 17
TEX. CIV. PRAC. & REM. CODE §37.009	16
TEX. WATER CODE §36.066	7, 11
TEX. WATER CODE §36.066(a)	3, 5, 6, 7, 9, 10, 11
TEX. WATER CODE §36.066(g)	15, 16
TEX. WATER CODE §36.251	3, 4, 5, 8, 10, 12, 13, 15, 16, 17
TEX. WATER CODE §36.251(a)	4
TEX. WATER CODE §36.254	3, 13, 14, 15, 16, 17

IN THE COURT OF APPEALS FOR THE STATE OF TEXAS
NINTH JUDICIAL DISTRICT
AT BEAUMONT, TEXAS

RICHARD TRAMM, SAM W. BAKER, M. SCOTT WEISINGER,
JIM STINSON, JOHN D. LEYLE, JACE HOUSTON, ROY McCOY, JR.,
RICK MOFFATT, W.B. WOOD, KATHY TURNER JONES AND
LONE STAR GROUNDWATER CONSERVATION DISTRICT,
Appellants

v.

CITY OF CONROE, TEXAS, QUADVEST, L.P., WOODLAND OAKS
UTILITY, L.P., CRYSTAL SPRINGS WATER CO. INC.,
EVERETT SQUARE INC., E.S. WATER CONSOLIDATORS, INC.,
UTILITIES INVESTMENT CO., INC.,
AND T&W WATER SERVICE COMPANY,
Appellees

**BRIEF OF AMICI CURIAE GONZALES COUNTY UNDERGROUND
WATER CONSERVATION DISTRICT, BARTON SPRINGS-EDWARDS
AQUIFER CONSERVATION DISTRICT, BRAZORIA COUNTY
GROUNDWATER CONSERVATION DISTRICT, COASTAL BEND
GROUNDWATER CONSERVATION DISTRICT, COASTAL PLAINS
GROUNDWATER CONSERVATION DISTRICT, LOWER TRINITY
GROUNDWATER CONSERVATION DISTRICT AND
MID-EAST TEXAS GROUNDWATER CONSERVATION DISTRICT
IN SUPPORT OF APPELLANTS**

INTRODUCTION

The following is an amicus curiae brief filed in support of the respective Briefs
filed by the Lone Star Groundwater Conservation District (“Lone Star”), and by its

Board of Directors (“Directors”) (collectively, “Appellants”). In so doing, the amici curiae – who are also groundwater conservation districts – intend to both summarize and supplement the arguments set forth in those Briefs in the hopes of furthering the Court’s understanding of the issues at stake in the present lawsuit. The underlying facts are set forth in those Briefs and adopted herein.

In the simplest terms, ours is a case where certain Montgomery County landowners (“Appellees”) chose to bring a lawsuit – including claims under the Uniform Declaratory Judgment Act (“UDJA”) – attacking certain regulatory actions supposedly taken by the Appellants. Appellees saw fit to sue not only Lone Star itself but also its Directors, alleging against both that in carrying out their official duties the District and the Directors acted in an *ultra vires* manner – i.e. in excess of their statutory and legal authority.

In response to Appellees’ claims, Appellants filed their Pleas to the Jurisdiction, which set out numerous grounds establishing why the Trial Court lacked jurisdiction to hear Appellees’ lawsuit. After the Plaintiffs filed multiple amended Pleadings, the Trial Court ultimately denied Appellants’ Pleas to the few remaining claims, prompting the present interlocutory appeal. In this brief, the amici curiae address three issues relevant to Appellees’ claims against both the Directors and the District.

First, the amici curiae address the Appellees' argument that their 11th hour amendment of their pleadings to include a claim under §36.251 of the Water Code should somehow be dispositive of this entire interlocutory appeal. In so doing, the amici curiae address 1) the procedural fairness of considering such belated amendments on appeal; 2) the related effect such belated filing had on the parties' ability to establish whether Appellees had complied with §36.251's exhaustion requirements; and 3) the effect of the immunity granted under §36.066(a) on Appellees' ability to likewise name the Directors to such lawsuit.

The second issue addressed by the amici curiae is the effect of the Texas legislature's 2015 amendment of §36.066(a) of the Texas Water Code to immunize board members of groundwater conservation districts from suit for precisely the type of "official actions" alleged herein by Appellees. Although the reach of such immunity-from-suit is indeed broad, it does set forth three specific exceptions. Thus, although §36.251 does permit suit against directors, §36.066(a) makes clear that such suits are permissible only where one of its three express exceptions are alleged.

Finally, Appellees have argued that despite the existence of a potential remedy under §36.251, the "redundant remedy" doctrine does not bar them from also filing a UDJA claim, because of the language of §36.254), as interpreted by the Texas Supreme Court's decision in the *Chemical Lime* case. As shown below, however, although §36.254 does indeed contain permissive language re "other legal or

equitable remedies,” the Texas Supreme Court has repeatedly and expressly stated that declaratory relief qualifies as neither, but is instead *sui generis*. Moreover, it is to be recalled that all statutes purporting to waive governmental immunity must be strictly construed.

I. Effect of Texas Water Code §36.251

At page 17 of their response Brief, Appellees assert that their belated amended petition adding a claim under §36.251(a) of the Water Code should somehow be dispositive of the entire interlocutory appeal. The amici curiae hardly agree.

In the first place, while §36.251 does indeed grant Appellees a path to challenge rules adopted by the District, subsection (c) thereof makes clear that such a “suit may only be filed after all administrative appeals to the district are final.” Appellants not only deny that Appellees exhausted any such administrative appeals, but that Appellees’ 11th hour amendment – of their Third Amended Petition, filed on March 2, 2016 – to include a §36.251 claim prevented a hearing on the exhaustion issue before the Trial Court. Basic issues of procedural fairness are obviously raised where Appellees seek – on appeal – to benefit from pleadings so recently amended that the opposition lacked opportunity to adequately respond.

Relatedly, Amici curiae would note that the Texas Supreme Court has stated that “plea to the jurisdiction” procedure mirrors that of summary judgment. *Texas Dept. Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). Under

summary judgment procedure, any amendments to pleadings must occur seven days prior to the hearing to prevent unfair “surprise,” unless the court expressly grants leave. *Mensa-Wilmot v. Smith International, Inc.*, 312 S.W.3d 771, 778-79 (Tex. App. – Houston [1st Dist.] 2009). To the extent Appellees failed to obtain leave from the Trial Court, or failed to file their amended pleadings containing the §36.251 claim more than seven days before the hearing, those pleadings should be disregarded for the purposes of the current interlocutory appeal.

Last, to the extent Appellees claim that §36.251 provides a potential avenue for waiving immunity as to the Directors, see the discussion below regarding its interaction with the explicit immunity granted to District Directors generally under §36.066(a).

II. Appellees’ Claims Against Directors Barred by Statutory Immunity Under §36.066(a)

Appellees filed their Original Petition on August 31, 2015, asserting – *inter alia* – claims against the Lone Star Directors in their official capacity. However, just two months earlier, the Texas legislature enacted House Bill No. 3163, which amended §36.066(a) of the Texas Water Code to immunize board members of a groundwater conservation district from all such suits, effective June 15, 2015. Act of June 15, 2015, 84th Leg., R.S. ch. 464, 2015 Tex. Gen. Laws 1779 §2. Lone Star’s own enabling legislation makes clear that the District is covered by all the

protections provided by the Water Code. Act of June 16, 2001, 77th Leg., R.S., ch. 1321, 2001 Tex. Gen. Laws 3246 §5.

More specifically, the 2015 language added to §36.066(a) reads as follows:

A [groundwater conservation] district board member is immune from suit and immune from liability for official votes and official actions. To the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations, this subsection provides immunity for those actions.

The H.B. No. 3163 bill analysis prepared by the House Research Organization indicates that the legislation was intended to extend protection to board members who are necessarily engaged with “complicated issues of water law” and in balancing “the private property rights of those applying for permits, those already producing groundwater, and those wishing to conserve their groundwater for future use,” tasks which are complicated by “differing viewpoints and expectations, methods of groundwater modeling, and interpretations of technical data and legislative intent.” A copy of the H.B. No. 3163 bill analysis is attached hereto as Exhibit 1. Frankly, a review of Appellees’ various petitions in this suit indicates that they *precisely* exemplify the kind of “unhappy-landowner” lawsuit from which H.B. No. 3163 was intended to provide immunity so that qualified individuals will continue to agree to serve in such difficult and complicated roles.

Moreover, although Appellees have alleged in their various petitions that the Directors acted in an *ultra vires* manner, this allegation has no effect on the

Directors' eligibility for immunity under §36.066(a), for three reasons. In the first place, the language of §36.066(a) expressly encompasses "official votes and official actions," and the Appellees' petitions make clear the Directors are being sued in their official capacities. Indeed, the very essence of an *ultra vires* lawsuit is that it concerns actions taken by government officers in their official capacity, but allegedly in excess of their statutory authority. See *City Of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (holding that an *ultra vires* "suit is, for all practical purposes, against the state").

Furthermore, H.B. No. 3163's amendments to §36.066 limit the statutory waiver of immunity to three specific instances: 1) actions that do not conform to laws relating to conflicts of interest, 2) abuse of office, or 3) constitutional obligations. Accordingly, the case law surrounding *ultra vires* claims no longer applies to groundwater conservation district directors, save to extent such fall into these enumerated categories. In establishing the scope of the immunity granted directors via H.B. No. 3163, the legislature was unquestionably free to add *ultra vires* acts to the list of permissible lawsuits, but clearly chose not to do so. In interpreting statutes Texas courts are required to presume that every word of a statute was included or excluded for a reason; in amending §36.066 to grant immunity to directors the Texas legislature did not see fit to include *ultra vires* acts as an exception thereto. *Cain v. Progressive*, 448 S.W.3d 550, 553 (Tex. App. – Houston

[14th Dist.] 2014, no pet.). As to those three exceptions-to-immunity expressly set out in H.B. No. 3163 – i.e. as to acts failing to comply with applicable laws relating to conflicts of interest, abuse of office, and constitutional obligations – Appellees have not (and cannot) plead that any Director’s actions complained of in their suit implicate those exceptions.¹ Therefore, Appellees’ claims against the Directors are barred by statute, and must be dismissed for lack of jurisdiction.

Finally, Appellees have chosen to bring their suit against the Directors largely upon two legislatively-created causes of actions, i.e. the UDJA and under §36.251 of the Water Code. Texas courts have long recognized that it is the legislature that retains authority over statutory (as opposed to common-law) causes of action, and may define the parameters thereof. See *PPG Industries v. JMB/Houston Centers*, 146 S.W.3d 79, 103 (Tex. 2004); *North Alamo Water Supply v. Dept. Of Health*, 839 S.W.2d 455, 459 (Tex. App. – Austin 1992, writ denied); *In re T.M.*, 33 S.W.3d 341, 347 n.5 (Tex. App. – Amarillo 2000, no pet.). It is likewise recognized that the legislature alone has the power to waive sovereign immunity. See *TNRCC v. IT-Davy*, 74 S.W.3d 849, 853-54 (Tex. 2002) (“We have consistently deferred to the Legislature to waive sovereign immunity from suit, because this allows the

¹ Although Appellees’ wrongful taking claim cites to the Texas Constitution, Appellees have brought that claim solely against the District.

Legislature to protect its policymaking function.”). Accord, *Heinrich*, 284 S.W.3d at 370.

Finally, given that Appellees are asserting that §36.066(a) should be interpreted as *not* immunizing the Directors from the present lawsuit, the amici curiae would point out that any purported waiver of immunity should be strictly construed in favor of retention of immunity. See *Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012); and *Mission Consolidated ISD v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008).

To recap, in amending §36.066(a), the Texas legislature made clear its intent that immunity is not waived for groundwater conservation district board members when facing suits concerning actions taken in their “official capacity,” such as the present suit brought by Appellees. Moreover, given that the specific claims pursued by Appellees are solely statutory causes of action, the legislature unquestionably possesses the power to determine who may or may not be held liable thereunder. *In re T.M.*, 33 S.W.3d 341, 347 n.5. For all these reasons, and because §36.066(a) grants the Directors immunity not merely from liability alone, but also “from suit,” this Court is thereby deprived of subject matter jurisdiction over the Directors. *Texas Dept. Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

In their Response Briefs, however, Appellees argue that §36.066(a) does not immunize the Directors from the present lawsuit. First, Appellees allege that any

grant of immunity under §36.066(a) impermissibly conflicts with §36.251 of the Water Code, which holds that interested parties are “entitled to file a suit against the district or its directors...” (emphasis added). The answer to this supposed conflict is simple: on its face, §36.066(a) makes clear that it does not impose an *absolute* bar to lawsuits against district board members, but instead expressly stipulates that its protections are applicable only “[t]o the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations...” Thus, the §36.251-granted right to bring suit against district board members unquestionably exists, but is restricted by §36.066(a) to those instances where the members’ official votes or actions violate laws relating to conflicts of interest, abuse of office, or constitutional obligations. As discussed above, Appellees’ claims do not qualify under these three exceptions.

Next, Appellees argue that the immunity granted under §36.066(a) is intended only to bar the imposition of *personal liability* to district board members. This argument is a non-starter, for two reasons. First, the language of §36.066(a) itself makes no such reference to “personal liability;” that phrase appears only in the accompanying Bill Analysis, which was drafted and distributed to the House of Representatives prior to their consideration of the Bill on the House Floor. See Exhibit 1. What Appellees fail to realize is that the bill was subsequently amended by the Senate, and that Amendment made it clear the bill was not just providing

immunity for personal liability but providing a limit for all liability (save and except for the three specific exceptions). See “House Bill 3163 Senate Amendments: Section-by-Section Analysis” Exhibit 2. Indeed, the actual text of §36.066(a) states that it grants immunity from both liability and from suit “for official votes and official actions.” Were the Legislature’s intent only to shield district board members from personal financial “liability,” the additional grant of “immunity-from-suit” would be unnecessary. *Travis County v. Pelzel & Associates*, 77 S.W.3d 246, 248 (Tex. 2015).

Second, Texas law is clear that public officials or employees may be sued in their individual (i.e. personal) capacity only for *unofficial* acts that are not within the scope of their *official* duties. See *Washington v. City of Houston*, 874 S.W.2d 791, 797 (Tex. App. – Texarkana 1994, no writ); and *Bonham v. Flach*, 744 S.W.2d 690, 692-93 (Tex. App. – San Antonio 1988, no writ). Accordingly, to hold that, in enacting H.B. No. 3163, the Texas legislature meant to protect district board members from a nonexistent threat (i.e. *personal* liability from official actions), is to improperly presume that the legislature intended to perform a useless act. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981). Last, since strictly “personal liability” arises only as regards actions far removed from the intended functions of district board members, it is odd indeed for Appellees to argue that – in amending §36.066 – the Legislature somehow intended to shield from liability only

those board members who were unquestionably *not* performing their intended duties, rather than those who were.

III. Effect of “Redundant Remedies” Doctrine on Appellees’ UDJA Claim

In enacting §36.251 of the Water Code – which allows judicial challenges by any party “affected by and dissatisfied with any provision or with any rule or order made by a [groundwater conservation] district” such as Lone Star – the Texas legislature provided Plaintiffs with a *direct* method to challenge Lone Star’s alleged actions, as opposed to bringing a UDJA claim (presuming Appellees complied with §36.251’s exhaustion requirement). Accordingly, what this means is that the UDJA itself cannot constitute the requisite “legislative waiver” of Lone Star’s sovereign immunity, because of the existence of specific statutory remedies.

Rather, Texas law makes clear that where, as here, “a statute provides a method for attacking an agency order, a declaratory judgment action directed at that order will not lie.” *Texas Employment Commission v. Child, Inc.*, 738 S.W.2d 56, 58 (Tex. App. – Austin 1987, writ denied); *Strayhorn v. Raytheon*, 101 S.W.3d 558, 572 (Tex. App. – Austin 2003, pet. denied); and *Tex. Dept. of Public Safety v. Salazar*, 304 S.W.3d 896, 906 n.7 (Tex. App. – Austin 2009, no pet.). As noted in these cases, the rationale behind this rule is that “a party is generally not entitled to redundant remedies.” This is especially so where the driving consideration for the UDJA lawsuit is merely the recovery of attorney’s fees. *Strayhorn*, 101 S.W.3d at

572; *Coinmach Corp. v. Aspenwood Apts.*, 417 S.W.3d 909, 926 (Tex. 2013). Accordingly, because §36.251 of the Texas Water Code provides Appellees an avenue to obtain the relief they likewise seek under the UDJA, the “redundant remedy” doctrine bars any such relief against all Appellants.

Appellees, however, insist a contrary result is mandated by *Edwards Aquifer Authority v. Chemical Lime*, 291 S.W.3d 392, 405 (Tex. 2009). Although Appellees’ briefs bandy about *Chemical Lime* like holy writ, the holding in question consists of a single paragraph at the opinion’s conclusion, which the nominal opposing party apparently failed to even brief. Moreover, the stakes at issue in *Chemical Lime* were significantly lowered by the Texas Supreme Court’s strong hint that the attorney’s fees previously awarded under the UDJA be reassessed by the trial court, now that its initial award of such declaratory judgment had been reversed. In sum, Appellants request that this Court conduct its own inspection of *Chemical Lime*’s actual text, and context.

In *Chemical Lime*, a manufacturer was initially successful in bringing a UDJA action against a groundwater conservation district at the trial level, and was likewise awarded its attorney’s fees under the UDJA. The conservation district argued that the UDJA action was improper because an equivalent remedy was available under §36.251 of the Water Code. The Supreme Court, however, pointed to §36.254 of the Water Code, which generically provided that the provisions of Chapter 36 “do

not affect other legal or equitable remedies that may be available.” The *Chemical Lime* court then invited the conservation district to explain why §36.254 did not permit Chemical Lime’s UDJA action to go forward, but the district apparently elected not to do so. *Id.*, 291 S.W.3d at 405.

In place of the *Chemical Lime* litigant district’s silence on the issue, the amici curiae would here offer two distinct grounds for holding Appellees’ UDJA claim improperly redundant. First, to the extent that *Chemical Lime* expressly relied upon the language of §36.254, the amici curiae would note that §36.254 makes no explicit reference to declaratory relief, but instead states only that it does not affect “other legal or equitable remedies” that may be available. Unfortunately, in construing that phrase to include declaratory relief, the Texas Supreme Court apparently failed to recollect that the court itself has repeatedly stated that “an action for declaratory relief is neither legal nor equitable, but sui generis” in nature. See *Texas Liquor Control Board v. Canyon Creek*, 456 S.W.2d 891, 895 (Tex. 1970); and *Cobb v. Harrington*, 190 S.W.2d 709, 713 (Tex. 1945). Moreover, in construing §36.254, the courts are required to presume that the Texas legislature (circa 1995) was fully aware of these prior Supreme Court definitions, in stipulating what types of additional remedies were not foreclosed by that subchapter. See *Texas Rice Land v. Denbury Green Pipeline*, 363 S.W.3d 192, 198-99 (Tex. 2012). That is to say, in enacting §36.254, the Texas legislature chose to define such “unforeclosed

remedies” in a manner directly contrary to the Texas Supreme Court’s definition of declaratory relief.

In short, upon closer examination, the precise language of §36.254 makes it far from clear that the Legislature intended §36.254 to expand the limited waiver-of-immunity (created under §36.251) to also include essentially identical relief under the UDJA. As noted earlier, any purported waiver of immunity must be strictly construed in favor of retention of that immunity. *See Chatha*, 381 S.W.3d at 513; and *Mission*, 253 S.W.3d at 655. When such a strict-construction standard is applied to §36.254, the prior Supreme Court definitions in *Canyon Creek* and *Cobb* make clear that §36.254 does not permissively open the door to UDJA actions against groundwater conservation districts. Nor should the brief discussion in *Chemical Lime* be seen as mandating any different result as its scope is limited only to the smaller question of fee-availability, rather than the broader issue of waiver-of-immunity.

Secondly, in arguing against §36.254 as permitting suit under the UDJA, the amici curiae would note that all relevant portions of Chapter 36 of the Water Code were enacted as a whole by the 74th Legislature in 1995, via H.B. 2294. In so doing, the Legislature strictly limited the recovery of attorney’s fees – in lawsuits by or against a district – solely to those instances where the **district** was the prevailing party. See §36.066(g) of the Water Code. As noted at page 4 of the House Research

Organization’s accompanying bill analysis – attached hereto as Exhibit 3 – the one-sided nature of such fee provisions was hardly accidental, but was instead expressly intended to benefit districts.

In contrast, under the §37.009 of the UDJA, a wholly apposite scheme of attorney fees availability applies, where the court is guided solely by amorphous standards of what is “equitable and just.” Under these fluid UDJA standards, any party may potentially collect attorney’s fees, including losing parties. See *Templeton v. Dreiss*, 961 S.W.2d 645, 671 (Tex. App. – San Antonio 1998, pet. denied); *First Nat. Bank v. J.E. Mitchell Co.*, 727 S.W.2d 360, 363 (Tex. App. – Amarillo 1987, writ ref, n.r.e.); and *J.C. Penney’s Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 290 (Tex. App. – San Antonio 2000, pet. denied). In sum, although §36.251 and the UDJA both exist to provide declaratory relief, a suit under the UDJA exposes groundwater conservation districts to attorney fee liability in a manner contrary to the Legislature’s intent in enacting Chapter 36.

Accordingly, given that §36.066(g) makes specifically clear that in all suits brought against a district, attorney’s fees are recoverable solely by the district, the general “non-exclusive remedy” language of §36.254 is simply insufficient to trump the “redundant remedies” doctrine barring UDJA relief. See *Coinmach*, 417 S.W.3d at 926, where the Supreme Court – in holding a UDJA action redundant – noted the unavailability of attorney’s fees under the alternate statutory remedy. *Amici curiae*

would further note Appellees' failure to identify any unique relief available to them under the UDJA, *other than* the supposed availability of attorney's fees. In sum, then, Appellees' UDJA suit serves no other purpose save that which would flout a central purpose of the legislature's enactment of Chapter 36, i.e. shielding districts from exposure to attorney's fees. When such apposite outcome is viewed in conjunction with the dubious language of §36.254 itself, it is clear that a properly strict interpretation of §36.254 should not expand §36.251's limited waiver of immunity to permit Appellees' pursuit of redundant remedies under the UDJA.

CONCLUSION

Ultimately, this a case where the Appellants, in their respective Pleas to the Jurisdiction submitted to the Trial Court, carefully laid out how various factors cumulatively served to make jurisdiction improper as to the ever-changing claims alleged by Appellees. As fellow groundwater conservation districts, the amici curiae have an unquestionable common interest in assuring that their ability to carry out the statutory duties assigned to them – concerning the inevitably controversial balancing of public interests and private rights, in a finite resource – is not unnecessarily hamstrung by litigation, especially in light of the Legislature's clear intent to shield them from that litigation. Appellants' Pleas to the Jurisdiction represented an attempt to both invoke and ascertain the scope of the immunities and protections the Legislature has bestowed upon our fellow district Lone Star, yet were wrongly

decided by the Trial Court. Accordingly, the amici curiae request that this Court give careful consideration to the arguments set forth in both the present brief, and those submitted by Appellants.

Respectfully submitted,

GREGORY M. ELLIS,
Attorney at Law
2104 Midway Ct.
League City, TX 77573
(713) 705-4861—Phone
(512) 319-6698--Fax
Greg.Ellis@gmservices.info

/s/ Gregory M. Ellis

Gregory M. Ellis
State Bar No. 06562500

ATTORNEY FOR AMICI CURIAE
GONZALES COUNTY UNDERGROUND
WATER CONSERVATION DISTRICT,
BARTON SPRINGS-EDWARDS
AQUIFER CONSERVATION DISTRICT,
BRAZORIA COUNTY GROUNDWATER
CONSERVATION DISTRICT,
COASTAL BEND GROUNDWATER
CONSERVATION DISTRICT,
COASTAL PLAINS GROUNDWATER
CONSERVATION DISTRICT,
LOWER TRINITY GROUNDWATER
CONSERVATION DISTRICT AND
MID-EAST TEXAS GROUNDWATER
CONSERVATION DISTRICT

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it was prepared on a computer in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. In reliance on the word count feature of the program used to create the brief, I also certify that the brief complies with the word-count limitation in Rule 9.4(i) as it contains **3,871** words, excluding any parts exempted by 9.4(i)(1).

/s/ Gregory M. Ellis

Gregory M. Ellis

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been sent on this the 12TH day of September, 2016, to the parties listed below via the method indicated:

MARTIN, EARL & STILWELL LLP
1400 Woodloch Forest Dr. #590
The Woodlands, Texas 77380
James H. Stilwell
james@meslawfirm.com

☐ first class mail
☐ certified mail, return receipt requested
☐ facsimile
☒ electronic mail
☒ electronic service, via ProDoc
☐ hand delivery

SLEDGE LAW & PUBLIC STRATEGIES, PLLC
919 Congress Avenue, Suite 460
Austin, Texas 78701
Brian Sledge
bsledge@sledgelaw.com
Shauna Fitzsimmons
sfitzsimmons@sledgelaw.com

☐ first class mail
☐ certified mail, return receipt requested
☐ facsimile
☒ electronic mail
☒ electronic service, via ProDoc
☐ hand delivery

**Attorneys for Appellant Lone Star
Groundwater Conservation
District**

GRAVES, DOUGHERTY, HEARON &
MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
David P. Lein
dlein@gdhm.com
Robin A. Melvin
rmelvin@gdhm.com

☐ first class mail
☐ certified mail, return receipt requested
☐ facsimile
☒ electronic mail
☒ electronic service, via ProDoc
☐ hand delivery

Attorneys For Appellants
Richard J. Tramm,
Sam W. Baker,
M. Scott Weisinger, P.G.,
Jim Stinson, P.E.,
John D. Bleyl, P.E.,
Jace Houston,
Roy McCoy, Jr.,
Rick Moffatt,
and W.B. Wood,
In their Official Capacities as
Directors of the Lone Star
Groundwater Conservation
District

LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
Michael V. Powell
mpowell@lockelord.com
Jason R. Marlin
jmarlin@lockelord.com
Amanda L. Cottrell
acottrell@lockelord.com

☐ first class mail
☐ certified mail, return receipt requested
☐ facsimile
☒ electronic mail
☒ electronic service, via ProDoc
☐ hand delivery

VIADA & STRAYER
17 Swallow Tail Court
The Woodlands, Texas 77381
Ramon G. Viada III
rayviada@viadastrayer.com

☐ first class mail
☐ certified mail, return receipt requested
☐ facsimile
☒ electronic mail
☒ electronic service, via ProDoc
☐ hand delivery

**Attorneys for Appellee
The City of Conroe, Texas**

SPROUSE SHRADER SMITH PLLC
701 S. Taylor, Suite 500
Amarillo, Texas 79101

Marvin W. Jones

marty.jones@sprouselaw.com

C. Brantley Jones

brantley.jones@@sprouselaw.com

- ☐ first class mail
- ☐ certified mail, return receipt requested
- ☐ facsimile
- ☒ electronic mail
- ☒ electronic service, via ProDoc
- ☐ hand delivery

**Attorneys for Appellees
Quadvest, L.P.,
Woodland Oaks Utility, L.P.,
Crystal Springs Water Co. Inc.,
Everett Square Inc.,
E.S. Water Consolidators, Inc.,
Utilities Investment Co., Inc.
and T&W Water Service Company**

/s/ Gregory M. Ellis

APPENDIX

EXHIBIT 1

House Research Organization Bill Analysis for HB 3163 (5/11/2015)

SUBJECT: Providing groundwater district directors immunity from personal lawsuits

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 7 ayes — Keffer, Ashby, Burns, Frank, Larson, Lucio, Nevárez

1 nay — Kacal

3 absent — D. Bonnen, T. King, Workman

WITNESSES: For — Gregory Ellis, Mesa Underground Water Conservation District; Ty Embrey, Clearwater Underground Water Conservation District, Panola County Groundwater Conservation District, Middle Trinity Groundwater Conservation District, Real Edwards Conservation and Reclamation District; Paul Pape, Bastrop County; Tom Glaa; (*Registered, but did not testify*); Robby Cook, Hemphill County Underground Water Conservation District; Shauna Fitzsimmons, Upper Trinity Groundwater Conservation District, Prairiclands Groundwater Conservation District, North Texas Groundwater Conservation District, Barton Springs-Edwards Aquifer Conservation District; Michele Gangnes, League of Independent Voters of Texas; Ken Kramer, Sierra Club-Lone Star Chapter; Judith McGeary, Farm and Ranch Freedom Alliance; Mike McGuire, Rolling Plains Groundwater Conservation District; Joe Morris, Aqua Water Supply Corp.; Claudia Russell, Brush Country Groundwater Conservation District; Stacey Steinbach, Texas Alliance of Groundwater Districts; Robert Turner, Texas Sheep and Goat Raisers Association, West Texas Ground Water Management Alliance; Todd Votteler, Guadalupe-Blanco River Authority; David Weinberg, Texas League of Conservation Voters; C.E. Williams, Panhandle Groundwater Conservation District)

Against — None

On — Kelly Mills, Texas Commission on Environmental Quality

BACKGROUND: Under Water Code, sec. 36.066 a groundwater conservation district may sue and be sued in the name of the district by and through its board.

HB 3163
House Research Organization
page 2

Water Code, sec. 36.060 entitles a groundwater conservation district director to receive fees for each day spent performing the duties of a director.

DIGEST:

CSHB 3163 would protect groundwater conservation district board members from personal liability lawsuits by providing a member with immunity from suit and liability for official votes and official actions.

The bill also would provide that, for liability purposes only, a groundwater conservation district director would be considered a district employee under the Tort Claims Act, even if the director was a volunteer and did not receive fees.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2015.

**SUPPORTERS
SAY:**

CSHB 3163 would protect groundwater conservation district directors from personal liability lawsuits. Groundwater conservation districts are the preferred method of groundwater management in Texas. District directors are charged with complicated issues of water law and they must balance the private property rights of those applying for permits, those already producing groundwater, and those wishing to conserve their groundwater for future use. Further complicating these issues are differing viewpoints and expectations, methods of groundwater modeling, and interpretations of technical data and legislative intent.

Groundwater conservation district boards sometimes are made up of appointed volunteers who become public servants and engage in what can be a thankless job. These board members deserve protection from personal liability lawsuits that could impact their livelihood.

The bill would not have an impact on accountability since it would not protect the board as a whole from being sued. Since groundwater conservation district directors are either elected or appointed, any questionable act in an official capacity would result in removal by the



HB 3163
House Research Organization
page 3

election or the appointment process.

**OPPONENTS
SAY:**

CSHB 3163 could lower accountability of groundwater conservation district directors by providing blanket immunity from personal lawsuits. Immunity from personal lawsuits would eliminate a level of assurance that local groundwater conservation district board members were acting in good faith on behalf of the constituents they serve.



EXHIBIT 2

House Bill 3163 Senate Amendments: Section-by-Section Analysis

House Bill 3163
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

SECTION 1. Section 36.060, Water Code, is amended by adding Subsection (e) to read as follows:

(e) For liability purposes only, a director is considered a district employee under Chapter 101, Civil Practice and Remedies Code, even if the director does not receive fees of office voluntarily, by district policy, or through a statutory exception to this section.

SECTION 2. Section 36.066(a), Water Code, is amended to read as follows:

(a) A district may sue and be sued in the courts of this state in the name of the district by and through its board. A district board member is immune from suit and immune from liability for official votes and official actions. All courts shall take judicial notice of the creation of the district and of its boundaries.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

SENATE VERSION (CS)

SECTION 1. Same as House version.

SECTION 2. Section 36.066(a), Water Code, is amended to read as follows:

(a) A district may sue and be sued in the courts of this state in the name of the district by and through its board. A district board member is immune from suit and immune from liability for official votes and official actions. To the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations, this subsection provides immunity for those actions. All courts shall take judicial notice of the creation of the district and of its boundaries.

SECTION 3. Same as House version.

CONFERENCE

EXHIBIT 3

House Research Organization Bill Analysis for HB 2294 (4/27/95)

SUBJECT: Creating new Water Code chapters for groundwater districts

COMMITTEE: Natural Resources — favorable, with amendments

VOTE: 8 ayes — Counts, Yost, Combs, Corte, King, R. Lewis, Puente, Walker
0 nays
1 absent — Stiles

WITNESSES: For — Gregory Ellis, Harris-Galveston Coastal Subsidence District; C.E. Williams, Panhandle Ground Water Conservation District #3; Allan Lange, Lipan-Kickapoo Water Conservation District; Lee Arrington, South Plains Underground Water Conservation District; Richard Bowers, North Plains Ground Water Conservation District; Scott Holland, Irion County Water Conservation District; Dennis Clark, Emerald County Water Conservation District

Against — None

BACKGROUND: In 1949 the state authorized the creation of underground water conservation districts for the "conservation, preservation, protection, recharging, and prevention of waste" of underground water.

Underground water districts can be created by the Legislature under Texas Constitution Art. 16, sec. 59; districts can be formed when a number of area landowners file a petition with TNRCC through a procedure based on Water Code Subchapter B of Chapter 52, or TNRCC can designate an area as a "critical groundwater area" and create a district, subject to local voter approval.

TNRCC supervises all water districts. Water Code Chapter 50 governs some of the administrative and financial procedures for all water districts, Chapter 51 provides for the creation and operation and financing of water control and improvement districts, and Chapter 52 provides for the creation, operation, powers, duties and financing mechanisms of underground water conservation districts.

HB 2294
House Research Organization
page 2

DIGEST:

HB 2294, as amended, would reorganize and amend the Water Code chapters concerning groundwater districts, and create two new chapters. Both of these new chapters would be located in Title 2 (State Water Administration) of the Water Code. Chapter 52 of the Water Code, governing underground water conservation districts (commonly called groundwater districts) would be repealed.

Groundwater district provisions found in Chapters 50, 51 and 52 would be consolidated into a new Water Code Chapter 36.

Provisions governing the responsibilities of state agencies concerning the designation of groundwater management areas, critical groundwater areas and the creation of new districts would be consolidated into a new Water Code Chapter 35.

HB 2294 as amended, would also make some substantive changes to the current statutory provisions governing water districts. Substantive changes would include:

- The definition of underground water would be changed from "water percolating below the surface of the earth and that is suitable for agricultural, gardening, domestic, or stock raising purposes, but does not include defined subterranean streams or the underflow of rivers" to "water percolating below the surface of the earth."
- Subchapter K would provide that two or more districts or portions of districts could consolidate into one district, if the board of each district passed a resolution containing the terms and conditions of the consolidation. A consolidated district would be governed as one district. District elections would have to be held to approve such a consolidation unless the districts do not issue bonds or levy taxes, or the consolidation would not result in any additional taxing or bonding authority.
- Sec. 36.158 would allow groundwater districts to make grants as approved by the district board.
- Secs. 36.066 and 36.102 would allow districts to collect attorney fees, expert testimony costs, or other court costs in any suit in which the district prevailed.

- Sec. 36.205 would provide districts with the specific authority to set administrative fees and would require districts to collect fees for services provided outside the district boundaries.

- Sec. 36.102 would allow districts to set civil penalties up to \$5,000. Penalties could only be awarded through a civil suit.

Sec. 36.068 would remove current requirements regarding retirement account investments and provide that such investments would come under Government Code, Chapter 810, the Public Employee Retirement Act.

Secs. 36.155 and 36.156 would remove specific statutory limitations on handling district funds and replace them with references to Government Code, Chapters 2256 and 2257, the Public Funds Investment Act and Public Funds Collateral Act.

Throughout Chapter 36 separate and specific requirements concerning the posting of notices for meetings and hearings would simply call for the districts to comply with the Texas Open Meetings Act.

**SUPPORTERS
SAY:**

HB 2294 would reorganize state statutes concerning underground water conservation districts and make several needed changes. HB 2294 would clarify the differences among water districts, which differ widely because surface water and groundwater are treated very differently under Texas law. Surface water belongs to the state, which grants rights to use it, while in Texas groundwater historically has been subject to the "right of capture" by landowners, who are not required to have state permits for use.

Although groundwater districts have administrative duties similar to other water districts, they are unique because they are regional regulatory authorities that manage a privately owned resource. Groundwater districts are regulatory in nature as opposed to surface water supply districts, like river authorities and municipal utility districts, which commonly sell water, build pipelines and operate sewage treatment plants.

These differences made HB 2294 necessary. The laws governing groundwater districts are currently located in Title 4 of the Water Code, and every time the Legislature amends Chapter 50 to address a problem with water supply districts, the change also applies to groundwater districts, even when there is no intent to do so. As a result the past five sessions the Legislature has had to amend Chapter 52, which governs groundwater

districts, to correct mistakes and inadvertent consequences of bills enacted pertaining to other types of water districts. This is bothersome and a waste of time and taxpayer money, and it creates confusion about the powers and duties of groundwater districts.

Groundwater districts also waste valuable time rushing to get exempted from statutory requirements that do not fit the purposes of groundwater districts and may have unintended adverse consequences.

Differences between districts make it very hard to pass sensible or equitable laws that apply to all districts and are acceptable to all districts. Notification provisions for a neighborhood water supply district, for example, would not work for a multi-county groundwater district. HB 2294 would remove the root of this confusion by giving groundwater districts their own chapter under a different title of the Water Code.

Allowing two or more districts or portions of districts to consolidate into one district would solve a current problem. In some parts in the state two groundwater districts cover the same area. Permitting districts to consolidate would allow one district to cede land to the other, thereby removing the burden of double taxation from district residents.

Groundwater districts should be able to make grants, as approved by the district board, for projects beneficial for the district. This authority would allow greater cooperation with other local governments in areas such as water conservation.

Allowing districts to collect attorney fees, expert testimony costs, or other court costs in suits in which the district prevailed, would finally allow districts to take enforcement actions against some of the violators of district rules. Currently it can cost more to conduct an enforcement suit than is collectible in penalties, and those who know this violate the rules with impunity. Allowing additional costs could also cut down on nuisance suits.

Letting districts collect fees for services provided outside of district boundaries would allow districts to give technical help to water users outside their boundaries to promote water conservation without using district taxpayer money to do so. Currently, districts do not have any way to be reimbursed for their services if they help someone outside their boundaries, even if that help would ultimately benefit the district.

Districts should be allowed to set higher civil penalties because the injunctive relief allowed under current law is not enough to prevent violations — it can only cure them.

Current requirements regarding retirement account investments by districts are unnecessarily restrictive. HB 2294 as amended, would provide that such investments would be made under the Public Employee Retirement Act, which provides prudent investment guidelines.

OPPONENTS
SAY:

Defining groundwater as water percolating below the surface of the earth. would include water specifically exempted from the current definition (subterranean streams or the underflow of rivers). It also states that all water percolating below the surface would be groundwater — not just water "suitable" for certain purposes. This change would make it much more difficult for the state to claim authority over a body of water that it believed to be an underground river or stream.

Sec. 36.158 would allow groundwater districts to make grants as approved by the district board, but there are no limitations on use of grants. Grants should only be made if they are restricted to the purposes of the district.

Districts should not be allowed to collect attorney's fees if they are only voluntarily intervening in someone else's lawsuit.

The bill should be amended to better define "waste" to exclude permitted discharges.

NOTES:

The committee amendments would make several technical and conforming changes to the bill as well as some substantive ones including:

- allowing the commission to designate a separate groundwater reservoir despite an appreciable (rather than measurable) effect of withdrawing water from a separate subdivision;
- clarifying that administrative remedies would have to be exhausted before a declaratory action or any other suit may be filed against a district
- allowing districts to provide copies of their rules in any format requested and

- clarifying that a district could perform a survey without being required to engage a professional registered engineer.

SB 1465 by Armbrister, almost identical to HB 2294 as filed, was referred to the Senate Natural Resources Committee on March 21.

HB 1104 by Yost, which would consolidate most of the administration provisions of the Water Code relating to water districts into one new chapter, making administrative provisions uniform for all water districts, was reported favorably from the House Natural Resources Committee on April 10. The Senate companion to HB 1104, SB 626 by Armbrister, was placed on the Regular Order of Business Calendar on April 18.

Also on today's House calendar is HB 2189 by Harris, making numerous changes to the authority of water districts and their boards.

Item 4

Routine Business

b. General Manager's Report.

Note: Topics discussed in the General Manager's Report are intended for administrative and operational information-transfer purposes. The Directors will not deliberate any issues arising from such discussions and no decisions on them will be taken in this meeting, unless the topic is specifically listed elsewhere in this as-posted agenda.

1. Standing Topics.

- i. Personnel matters and utilization**
- ii. Upcoming public events of possible interest**
- iii. Aquifer conditions and status of drought indicators**

2. Special Topics.

Note: Individual topics listed below may be discussed by the Board in this meeting, but no action will be taken unless a topic is specifically posted elsewhere in this agenda as an item for possible action. A Director may request an individual topic that is presented only under this agenda item be placed on the posted agenda of some future meeting for Board discussion and possible action.

- i. Update on Team activities and highlights**
- ii. Update on regulatory and enforcement activities**
- iii. Update on District grant projects and other Aquifer Science Team projects**
- iv. Update on activities related to area roadway projects**
- v. Update on the HCP/ITP application and the associated draft EIS**
- vi. Update on activities related to the Travis County PGMA**
- vii. Update on interim legislative activity**

Item 5

Board Discussions and Possible Actions

- a. Discussion and possible action related to related to the District's process to conduct a contested permit case.**

4-9.4. HEARING PROCEDURES.

- A. A hearing must be conducted by:
 - 1. A quorum of the Board;
 - 2. An individual to whom the Board has delegated in writing the responsibility to preside as a hearings examiner over the hearing or matters related to the hearing; or
 - 3. The State Office of Administrative Hearings (SOAH), if requested by either the Board or requested and paid for by an applicant or protestant, under the provisions of Section 4-9.16.
- B. Except as provided by Subsection (C), the Board President, a hearings examiner designated under Subsection 4-9.4(A)(2) above, or the SOAH Administrative Law Judge serving as a hearings examiner shall serve as the presiding officer at the hearing.
- C. If the hearing is conducted by a quorum of the Board and the Board President is not present, the Directors conducting the hearing may select a Director to serve as the presiding officer.
- D. The presiding officer may:
 - 1. Convene the hearing at the time and place specified in the notice;
 - 2. Set any necessary additional hearing dates;
 - 3. Designate the parties regarding a contested application;
 - 4. Establish the Order for presentation of evidence;
 - 5. Administer oaths to all persons presenting testimony;
 - 6. Permit the receipt of and rule on the admissibility of evidence consistent with Subchapter D, Chapter 2001, Texas Government Code;
 - 7. Examine and allow cross-examination of persons presenting testimony;
 - 8. Ensure that information and testimony are introduced as conveniently and expeditiously as possible without prejudicing the rights of any party;
 - 9. Prescribe reasonable time limits for testimony and the presentation of evidence;
 - 10. Recess any hearing from time to time and place to place;
 - 11. Issue subpoenas, require depositions, or order other discovery consistent with Subchapter D, Chapter 2001, Texas Government Code;
 - 12. Determine how to apportion among the parties costs related to a contract for the services of a presiding officer and the preparation of the official hearing record; and
 - 13. Exercise any other appropriate powers necessary or convenient to effectively carry out the responsibilities of the Presiding Officer.
- E. The District may allow any person, including the General Manager or a District employee, to provide comments at a hearing on an uncontested application.
- F. The presiding officer may allow testimony to be submitted in writing and may require that written testimony be sworn to. On the motion of a party to the hearing, the presiding officer may exclude written testimony if the person who submits the testimony is not

available for cross-examination by phone, a deposition before the hearing, or other reasonable means.

- G. If the Board has not acted on the matter in the hearing, the presiding officer may allow a person who testifies at the hearing to supplement the testimony given at the hearing by filing additional written materials with the presiding officer not later than the tenth day after the date of the hearing, to any person who provided comments on an uncontested hearing matter or any party to a contested hearing. A person who receives additional written material under this Subsection may file a response to the material with the presiding officer not later than the tenth day after the date the material was received.
- H. The presiding officer, at the presiding officer's discretion, may issue an Order at any time before Board action under Section 4-9.9 that:
 - 1. Refers parties to a contested hearing to an alternative dispute resolution procedure under Section 4-9.15 on any matter at issue in the hearing;
 - 2. Determines how the costs of the procedure shall be apportioned among the parties; and
 - 3. Appoints an impartial third party as provided by Section 2009.053, Government Code, to facilitate that procedure.
- I. In general, the burden of proof is on the moving party by a preponderance of the evidence, except in an enforcement proceeding, the General Manager has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent in an enforcement proceeding has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. The permit applicant bears the burden of proof by a preponderance of the evidence in an application proceeding, including a proceedings under Sections 4(e) through (h) of H.B. 3405.

Item 5

Board Discussions and Possible Actions

- b. Discussion and possible action related to the City of Dripping Springs TPDES permit application to authorize direct discharge of treated wastewater to Onion Creek in the contributing zone of the Barton Springs segment of the Edwards Aquifer.**

Item 6

Director's Reports

Directors' Reports. *(Note: Directors' comments under this item cannot address an agenda item posted elsewhere on this agenda and no substantive discussion among the Board Members or action will be allowed in this meeting. Communications reported under this item may be used to support Performance Standard 4-1 of the District's Management Plan related to demonstration of effective communication with District constituents.)*

Directors may report on their involvement in activities and dialogue that are of likely interest to the Board, in one or more of the following topical areas:

- Meetings and conferences attended or that will be attended;
- Conversations with public officials, permittees, stakeholders, and other constituents;
- Commendations; and
- Issues or problems of concern.

Item 7

Adjournment