Johnson Radcliffe &Petrov L.L.P.

Public Law Report

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Basics of Public Official Liability: *Can Community Service Make Me Liable?*

By Andrew P. Johnson

[Note: This is the first in a series of articles on the potential liability of individuals who serve their communities – as elected public officials or appointed volunteers – for acts and omissions in the ordinary course of business, as well as in connection with the issuance of public securities.]

Whether public officials are liable for their actions is an important issue at every level of government service, from the President of the United States to the directors of a water board. From President Nixon (the Pentagon Papers) and President Clinton (Paula Jones) to a local water board terminating service to delinquent customers, the issues are very similar.

In each case, the guiding principle is the same: The public interest in shielding officials from litigation and personal financial liability, for damages caused by their actions while carrying out public business, outweighs the potential harm of those actions.

When faced with potential claims, public officials enjoy two types of immunity: "absolute" and "qualified."

Certain officials have been given absolute immunity due to the importance of their function in government. These include legislators, judges, public officials on the witness stand (but not as complainting witnesses), some administrative review boards and panels, and prosecutors.

The general tests for whether the office qualifies for absolute immunity are: (1) whether a common law basis for immunity exists, (2) whether, without the immunity, and unreasonable risk of litigation exists, and (3) whether alternatives to damage suits exist to control wrongful conduct by the official.

The Supreme Court of the United States recognizes the value of protecting government officials from *liability from suit* in addition to being a mere defense to liability. The Texas Supreme Court has also dealt with this issue on several occasions in what is known as

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Legislature Passes Comprehensive Bill Regarding Water Planning, Management

By Alan P. Petrov

After much haggling and many late night sessions, Senate Bill 1, relating to the development and management of water resources of the state, passed both the House and Senate and now awaits the Governor's signature.

Though somewhat less extensive than the version originally introduced, SB 1, as passed, is nearly 100 pages in length and provides a comprehensive framework for water planning, development and management in Texas. Due to the length of the bill, a full explanation of every aspect of SB1 is beyond the scope of this newsletter. However, this article will summarize some key points.

Article 1 of SB1 relates to state water planning and requires the Texas Water Development Board (TWDB) to adopt a state water plan that provides for the orderly development, management and conservation of water resources by Sept. 1, 2001, with an update every five years thereafter.

The comprehensive state water plan also, must include provisions for the preparation and response to drought conditions and is to be developed from regional water plans devised within regional water planning areas. These regional water planning areas are to be designated by the TWDB no later than Sept. 1, 1998.

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Mutual Housing Associations Promote Pride, Stability

By Ross J. Radcliffe

One method to develop individual responsibility and community pride in a multifamily project is through the use of a non-profit corporation – such as a mutual housing association (MHA) – to take ownership of such properties.

In addition, an MHA offers residents the opportunity to govern and manage

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Legislature Amends Public Information Act

The Texas Legislature recently passed House Bill 951, amending the Texas Public Information Act. The Governor is expected to sign this legislation, which would then become effective Sept. 1, 1997.

The most obvious change to the Public Information Act by HB 951 relates to certain records maintained by law enforcement agencies. It provides for the release of certain information maintained by those agencies, information which previously had been withheld from disclosure by the Texas courts. While this was the major change noted by the news media, several other changes contained in the bill should be of interest to all governmental agencies.

Specifically, HB 951 also included changes relating to deadlines for the release of public information and for seeking an opinion from the Texas Attorney General on an open-records request. Under prior law, public information was required to be produced for inspection or duplication within 10 calendar days after the date of the request for such information.

If the governmental agency was unable to comply with this deadline, the officer for public information was required to certify that fact in writing to the requester and set a date and hour within a reasonable time when such information would be made available. Pursuant to HB 951, this 10-calendar-day deadline has been revised to 10 business days.

Likewise, under prior law, a governmental body that sought an opinion from the Texas Attorney General's Office regarding a request for information was required to file a written request for an opinion not later than 10 calendar days from the date the governmental body received the request for information. HB 951 also changed that deadline to 10 business days.

In doing so, however, the legislature specified that the term "written request," when referring to a request made to a governmental body for public information, includes a request made in writing that is sent by electronic mail or facsimile.

THE LIGISLATURE SPECIFIED THAT THE TERM 'WRITTEN REQUEST,' WHEN REFERRING TO A REQUEST MADE TO A GOVERNMENTAL BODY FOR PUBLIC INFORMATION, INCLUDES A REQUEST MADE IN WRITING THAT IS SENT BY ELECTRONIC MAIL OR FACSIMILE.

Changes contained in HB 951 relate to the charges a governmental body may make for providing public information.

Under both the prior law and the amended version, the Texas General Services Commission is required to adopt rules for use by governmental bodies in determining charges for providing copies of public information.

However, under prior law, local governmental agencies could not charge a rate different from that set by the General Services Commission unless the local governmental entity first filed with the commission a request for a variance.

As amended by HB 951, the Public Information Act now allows local governments to charge up to 25 percent more than the rate established by the General Services Commission without having to file for a variance.

Such an amount might still be insufficient to recoup a governmental entity's expenses for providing copies. This would be especially true for entities whose records are maintained by an outside law firm that charges for copies at a rate higher than that approved by the General Services Commission.

The Public Information Act continues to provide that all governmental entities are entitled to recover their actual costs of providing copies.

Where such costs exceed the rates established by the General Services Commission by more than 25 percent, such entities should still consider filing a request for variance with the General Services Commission. A variance allows for the charging of the actual costs incurred. (SEE BELOW) ■

To Recoup Actual Cost for Copies, Seek Variance from GSC

As amended by HB 951, the Public Information Act now allows local governments to charge up to 25 percent more (or 12.5 cents) for copies than the rate established by the General Services Commission to recover their actual costs without having to file for a variance.

If actual costs are more than 25 percent higher, the agency may still file for a variance from the GSC.

An application to the GSC for such a variance must contain the following information:

1. A statement identifying the subsections of the General Services Commission Rules for which an exemption is sought;
2. The reason the exemption is requested;
3. A copy of the proposed charges;
4. Supporting documentation, such as invoices, contracts, and
5. The name, title, work address and phone number of a contact person at the public entity.

If there is good cause to grant the exemption – for example, if the request is duly documented, reasonable and in accordance with generally accepted accounting principles – the exemption shall be granted. ■

Comprehensive Water Plan

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No later than 60 days after the designation of a regional planning area, the TWDB is required to designate representatives within each region to serve as the initial coordinating body for planning. This coordinating body hen will designate representatives to serve on the regional water planning group to ensure adequate representation from various interest groups.

SB1 further sets forth specific procedures to be followed by the regional planning groups in developing regional water plans. Once adopted, the regional water plans are to be submitted to the TWDB by Sept. 1, 2000, so that that they may be incorporated into the State water plan.

Management, Transfers

Article 2 of SB1 focuses on water management, marketing and transfers. This portion of SB 1 amends several sections of Chapter 11 of the Texas Water Code relating to the acquisition of water rights, the delivery and interbasin transfer of water and water supply contracts. One such amendment places several new restrictions on interbasin transfers of water. However, transfers to certain coastal basins have been exempted from the new restrictions.

In addition, Chapter 15 of the Texas Water Code is revised in several sections relating to the Texas Water Bank.

Through the Water Bank, the TWDB will 1) act as a clearing house for water marketing information, 2) prepare and publish a manual on structuring water transactions, 3) accept and hold donations of water rights to meet in stream water quality, fish and wildlife habitat or bay and estuary inflow needs and 4) take such other actions as necessary to facilitate water transactions.

Article 3 amends Chapter 11 of the Texas Water Code by adding new sections relating to enforcement of water rights, including provisions for both civil and administrative penalties for the unauthorized diversion, impoundment or use of surface water.

The new sections also give the TNRCC's water master or the water master's deputy the right to issue field citations (a type of "water traffic ticket") for such violations.

Article 4 of SB1 focuses on surface water and ground water supply. This portion of the bill contains numerous revisions to those sections of the Texas Water Code relating to water rights, permitting and permits for the storage of water in underground aquifers. In addition, several revisions are made to Chapter 35 of the Texas Water Code relating to the designation and delineation of priority ground water management areas and Chapter 36, relating to the creation and operation of ground water management districts.

Among the new requirements contained in the amendments to Chapter 36 for ground water management districts are requirements that such districts adopt a management plan that is consistent with regional water plans for the area and that such districts' management plans be submitted to the TWDB for review and certification.

Use of Funds for Fees

Another significant amendment to Chapter 36 allows ground water management districts to use funds obtained from permit fees for any purpose consistent with the district's certified water management plan, including making grants, loans or contractual payments to achieve, facilitate or expedite reductions in ground water pumping, or the development or distribution of alternative water supplies.

This revision to Chapter 36 appears to give districts such as the Harris-Galveston Coastal Subsidence District new authority to fund the design and construction of water-supply and distribution systems.

SB1 next addresses financial assistance for water needs and conservation in Article 5 of the bill. Specifically, SB1 establishes a new water financial assistance bond program to be administered through a new board fund known as the Texas Water Development Fund II. A new Subchapter L is added to Chapter 17 of the Texas Water Code, setting forth the conditions for issuance of water financial assistance bonds and the administration of the Texas Water Development Fund II program.

Small Communities

Article 6 of SB 1 is entitled "Small Communities Assistance" and amends several sections of Chapter 13 of the Texas Water Code relating to water utility rate regulations and the granting of certificates of public convenience and necessity for the provision of water utility service.

The revisions allow the TNRCC to place conditions on new investor-owned water utility systems in order to ensure their continued ability to provide adequate service to customers.

For example, under one amendment in Article 6, a person may not even begin construction on an investor-owned public drinking water system unless 1) the TNRCC has approved the plans and specifications for the system and 2) the prospective system owner or operator has demonstrated the financial, managerial and technical capabilities to ensure future operation of the system in accordance with applicable laws and regulations.

Water Model

Article 7 of SB 1 entitled "Water Data Collection and Dissemination" requires the TNRCC to obtain and develop an updated water availability model for all Texas river basins no later than Dec. 31, 2001.

Lastly Article 8, entitled "Interim Committee on Water Resource Development and Management," establishes a committee of five members each from the Senate and House to review the implementation of SB 1 and develop recommendations to assist Texas communities with their water supply and wastewater infrastructure needs. ■

Mutual Housing Associations

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their own housing community. The residents' right to live a lifetime in the affordable housing project encourages community stability. In addition, resident participation typically results in safer communities.

The MHA board of directors is a mix of residents and community leaders. In fact, membership in the resident councils and other committees gives residents a significant voice in management of the property where they live.

An MHA combines the privileges of residence in an affordable housing community with the responsibility for control of such housing. Therefore, and MHA is an excellent transition from public housing or other multifamily rental housing to home ownership.

Residents of an MHA project do not obtain fee simple ownership in their units but have ownership through their membership in the MHA, which has title to the property. To rent a unit in an MHA project, applicants are screened to determine their interest in the mutual-housing concept.

Applicants are told that their choice to not become a member will result in annual leases with current market rents – as opposed to below market rates, a right to lifetime occupancy, and other rights enjoyed by resident members.

Typically, prior to purchasing a membership, residents are provided training about the organizational structure of the MHA, including various committee structures, property maintenance requirements, policies, and the costs associated with the ownership of the property.

The membership fee is refundable with interest and can be paid in installments. This membership fee, if it is not prohibitive in amount and is payable in installments, does not violate the fair housing laws as stated by the Fair Housing Division of the U.S. Department of Housing and Urban Development (HUD).

Unlike a cooperative-type housing project, membership in an MHA does not entitle the resident to the use of a particular unit. Memberships cannot be transferred, but both residents and nonresidents can hold memberships. Typically, an MHA seeks the involvement of representatives from business, affordable-housing advocates, and representatives from state and local governments as members and directors.

Overall, the MHA structure is a viable alternative to home ownership for providing long-term, affordable housing.

Since and MHA is an exempt organization under Internal Revenue Code §501 (c)(3), tax-exempt financing through the issuance of bonds by a housing finance corporation is available in addition to conventional financing. With HUD's determination that the MHA structure qualifies as home ownership under various HUD programs, the MHA structure may become a preferred method of revitalizing many more multi-family projects. ■

Humorous Legislation

In case you were wondering about bills on which we reported last time, the following are now laws in Texas:

- **The cast-iron Dutch oven is now your state's official cooking implement.**
- **After heated debate, picante sauce beat out barbecue sauce to become your state's official sauce.**
- **The rodeo is now your state's official sport.**
- **The guitar is now your state's official instrument.**
- **Waxahachie is now your state's Crape Myrtle Capital.**

New Law Allows Meeting By Video Conference

Effective Sept. 1, 1997, the Texas Open Meetings Act will allow the meetings of governmental bodies to be conducted by video conference call.

Senate Bill 839, as passed by the Legislature, formally legalizes such meetings but, at the same time, sets forth precise conditions for meetings by video conference call. Specially, under the new law, a meeting may be held by video conference call only if a quorum of the governmental body is physically present at one of the locations of the meeting.

The notice for the video conference meeting must meet all of the notice requirements of the Open Meetings Act and must specify the location where a quorum of the governmental body will be physically present, as well as each location where a member will be participating via video conference call. Each of the meeting locations must be open to the public during the open portions of the meeting.

THE NOTICE FOR THE VIDEO CONFERENCE MEETING MUST MEET ALL OF THE NOTICE REQUIREMENTS OF THE OPEN MEETING ACT…

In addition, each portion of the video conference meeting required to be open to the public must be visible and audible to the public at each location of the meeting. The governmental body is also required to make a tape recording of the meeting available to the public.

Lastly, SB 839 requires the Department of Information Resources to specify by rules certain minimum standards for the audio and video signals for such video conference call meetings. ■

Various Bills Address Housing

Various bills that passed the Legislature this session affect the housing industry.

HB 2798, filed by Rep. Kenny Marchant (R-Dallas), raises the Private Activity Bond volume cap from 28 percent to 31.5 percent for single-family programs and from 5 percent to 7.5 percent for multifamily programs. This victory for housing interests translates into approximately an additional $32 million for single-family programs and $23 million to multifamily programs. The bill also allocates 11 percent of the state ceiling for reservations by issuers of qualified student-loan bonds, which had never been done previously.

Infill Development

SB 1249, authored by Sen. Rodney Ellis (D-Houston), makes changes in the Texas Property Tax Code that will help Housing Finance Corporations and non-profit organizations in their effort to develop affordable housing. The legislation proposes to shorten the statute of limitations for challenging the property owner of a tax foreclosure and to prohibit many suits to overturn the foreclosure. These provisions protect the buyer from title disputes and thereby enable more companies to provide the title insurance needed for development.

The bill also makes it possible for the taxing entity to sell the property to a non-profit or any other party for less than both market value and the amount of the tax-deficiency judgments against the property.

Urban redevelopment programs also received a boon with the passing of HB 3263. This bill, filed by Rep. Harold Dutton (D-Houston) and clarifying existing law, contains provisions for the authorization of an interlocal agreement between taxing units, which allows for the disposal of tax foreclosed property at less than market value.

The changes in both the Ellis and Dutton bills are advantageous to communities in two ways. First, they advance the development of abandoned properties and second, they return the property to the tax roll, thereby increasing the tax base of the community. Any hesitation by some taxing units to sell properties at an amount less than the taxes due should be removed.

Sen. Kenneth Armbrister (D-Victoria) backed SB 1852, which creates the Texas Affordable Housing Task Force. The task force, to be composed of 11 members, will evaluate regulations and policies relating to housing and make recommendations to increase the availability of affordable housing throughout the state. A report by the task force will be presented no later than Dec. 31, 1998. ■

EDC Bill Passes

Rep. Fred Hill (R-Richardson) passed his HB 1410, which relates to projects and reports of economic development corporations. A section was added to the Development Corporation Act of 1979 to require the board of directors of such a corporation to submit a report, not exceeding one page, stating the corporation's development objectives and fiscal status. If the corporation fails to submit this report, an administrative penalty of up to $200 can be assessed. ■

No New Water Taxes

As reported in last quarter's newsletter, various bills had been filed during the legislative session representing different attempts to generate revenues for the state from water and sewer utility systems.

SB 1340, filed by Sen. Buster Brown (R-Lake Jackson) would have increased from $11,000 to $25,000 the maximum annual waste-treatment inspection fee that the Texas Natural Resource Conservation Commission (TNRCC) could charge waste discharge permittees.

In addition, Rep. Ron Lewis (D-Mauriceville) sponsored HB 1802 which would have authorized the TNRCC to assess a fee, of up to $1.00 per connection per month, to be collected from each public water supply system is Texas.

HB 1802 also would have imposed a similar fee on industrial, irrigation and electric-power water users and holders of water rights. At one point during the debate on tax reform, HB 4, Rep. Tom Craddick's (R-Midland) major tax bill, also included a provision imposing a gross receipts tax on all revenues collected by public water and sewer systems. Then at another point when passage of HB 1802 seemed unlikely, its provisions were included in an amendment to the House version of SB 1.

Johnson, Radcliffe and Petrov is happy to report to our clients who own and operate public water and sewer systems that non of these bills became law during this legislative session. ■

Petrov on AWBD Panel

At press time, Alan P. Petrov was planning his participation in a Legislative Update Seminar at the annual Association of Water Board Directors Conference in Corpus Christi.

The panel discussion was set for 8:30 a.m., Saturday, June 28, at the Corpus Christi Convention Center.

Other panel members include Patsy Waldrop, White Petrov McHone; Joe B. Allen, Vinson & Elkins; Neil Thomas, Fulbright & Jawoski; and David Corbin, Brown and Gay Engineers. ■

Vaught Places First in Mock Trial Meet

Congratulations to Allen R. Vaught, the firm's law clerk, who passed in South Texas College of Law's Abraham, Watkins, Nichols & Friend Mock Trial Competition.

South Texas College of Law boasts more mock trial championships than any other law school in the nation.

Mr. Vaught is a third-year law student at South Texas. He graduated from Baylor University in 1995 with a degree in Accounting.

In his capacity as law clerk, he primarily assists the firm's attorneys with document drafting and legal research. ■

Public Official Liability

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qualified immunity.

Positions that have qualified immunity are school board trustees, city council members, water board directors and elected county officials. Some appointed officials, such as directors of non-profit corporations, industrial development corporations and housing finance corporations, do not, however, have the same statutory and common law immunities from suit.

Tests of Good Faith

In Texas, there are two tests of good faith the public official must pass before qualified immunity is earned: "objective" and "subjective."

The first test of objective good faith is failed if an official knew or should have reasonably known that the action he/she took within the sphere of official responsibility would violate an individual's statutory or constitutional rights. In other words, if an official knows (or should have known) what the rules are and collates them to damage of another, he/she may not have immunity from litigation.

A public official can fail the test of subjective good faith is he/she acts with malicious intent to cause the deprivation of an individual's clearly established statutory or constitutional rights. Cases in Texas show that as long as public official act in good faith, damages will not be awarded against them. In 1994, the Court of Appeals found that a water board had exercised good faith in terminating service to a customer and found no personal liability.

On the other hand, in 1991, an appeals court upheld a ruling holding water board directors personally liable for damages in denying a developer utility capacity. The evidence showed that, not only had the directors spoken with contempt regarding the developer's project, but the board also had failed to live up to its previous commitments regarding the projects. The developer was treated in a discriminatory manner, as well.

Here the court found the directors to be acting in bad faith and with a willful and malicious intent. The court assessed punitive damages, not only against the water authority, but also against the directors individually. (Incidentally, much of the evidence of this conduct was obtained from recordings of the discussions of the directors at public meetings!)

Spending Public Money

Another area that causes concern is the expenditure of public funds. Are there limits, and if so, what are they?

There are constitutional prohibitions against spending public money for non-public purposes, and court decisions, as well as attorney general opinions, have given some direction.

For the expenditure of funds to be valid, three general criteria must be met: (1) advancement of public purpose, (2) receipt of adequate consideration; and (3) retention of sufficient control to ensure accomplishment of the public purpose.

While these guides are not precise, they are clearly structured to give public officials some latitude in determining what goals are beneficial to the constituents of the body and how that benefit will be received by the constituents.

Examples cover a broad range, from sending Metro buses to the Olympics to city funding of Presidential libraries. Another possibility includes the use of funds by a special district to ensure the delivery of municipal services at the levels required by law after annexation by a municipality, whether by negotiation or litigation.

Texas law allows taxpayers to file suit to prevent improper expenditures of public funds. However, if the money is already spent, a taxpayer does not have standing to bring suit to recover such public funds.

In summary, public officials enjoy some protection from litigation, even if their actions cause damage to another, so long as they act fairly and without malice toward others in their sphere of power.

However, as two presidents of the United States have learned, the immunity they and others enjoy extends only to actions in the discharge of official duties and not to political or personal pursuits. This is so even if they are in office at the time. ■

Important Checklist For Public Officials

There are four primary protections for a public official to avoid litigation even with qualified immunity in place.

Educate Yourself

Know the rules that govern your area of public service, hire consultants who deal in that area of the law, and follow their advice.

Do Not Micromanage

Governing bodies are designed to make policy, not supervise every pipe laid in the ground, every traffic ticket written, or every child disciplined. Plan the menu, but don't cook every meal. That's why you have hired employees, managers and outside consultants.

Buy Liability Insurance

If you are unable to self-insure your position, buy public officials liability insurance in reasonable amounts. Premiums are affordable today compared to just a few years ago, and coverage is available for almost every need.

In addition, unowned automobile insurance is available to protect the public body when officials are involved in accidents while on public business.

Inquire About Indemnification

To the extent insurance does not protect a public official and to the extent the immunities from suit (including the limitation of damages under the Texas Tort Claims Act for certain personal injuries, death or property damage) do not fully protect a public official, the Tort Claims Act specifically allows public entities to indemnify public officials. This protection, of course, does not protect you where any other immunity does not protect you, such as intentional, malicious, grossly negligent or criminal acts or omissions.

Except for limited positions and circumstances, you *do* have qualified immunity. However, that immunity can be lost if you fail to observe both objective and subjective good faith in the discharge of your duties. ■

Legislation Affects Water Districts in Number of Ways

Several bills passed this legislative session have a direct impact on water districts and their boards of directors.

Per Diem Option

In an apparent attempt to provide relief to state employees and other persons receiving all or part of their income from state funds – such as teachers and other employees of school districts – Sen. Gonzalo Barrientos (D-Austin) secured passage of SB 1316.

The Texas Constitution prohibits persons who receive all or part of their income from state funds from also receiving compensation for service as a director of a water district. Under SB 1316, water district directors will be able to choose an alternative to receipt of their fee of office and reimbursement expenses. In an effort to work around the Constitutional prohibition, SB 1316 provides that directors may choose to receive a simple per diem of $100. The total per diems a director may receive under this provision, however, may not exceed $6,000 per year.

Should a director choose to receive the per diem option, he or she is required to file with the district a general description of duties performed for such per diem.

This bill probably does not solve the problem of compensation to state employees, including teachers, that it was designed to solve. If there is doubt, perhaps an attorney general's opinion on the issue could be requested.

Signing of Contracts

Other legislation provides water districts greater flexibility in the execution of contracts and other official documents. Specifically, Section 49.054 of the Texas Water Code currently provides that the president of the board of directors is the chief executive officer of the district and shall execute all documents on behalf of the district.

However, HB 2688 as passed by the Texas Legislature and sent to the Governor for signature, will allow the board of directors of a water district to, by resolution, authorize its general manager or other employees to execute a document or documents on behalf of the district.

Certain types of water districts also have been provided authority to repair or maintain streets within the district. Specifically, SB 1878, as passed, permits a municipal utility district operating under Chapter 54 of the Texas Water Code – that has been in existence for at lest 10 years – to repair or maintain a street within the district in certain circumstances.

Repairs may be made where it is necessary to "prevent" the condition of a street from adversely affecting the control, storage, preservation and distribution of the state's storm and flood waters, adversely affecting the control, abatement or change of any shortage or harmful excess of water or otherwise impending a district's ability to accomplish its purposes."

UNDER OTHER PASSED LEGISLATION, SB 1175, A DIRECTOR OF A MUNICIPAL UTILITY DISTRICT OPERATING UNDER CHAPTER 54 OF THE TEXAS WATER CODE MAY NOW BE SUBJECT TO A RECALL ELECTION.

In addition, such a district may issue bonds for the purpose of repairing or maintaining streets within the district, if the bonds have been authorized by a majority vote of the residents of such district.

Under other passed legislation, SB 1175, a director of a municipal utility district operating under Chapter 54 of the Texas Water Code may now be subject to a recall election. Under this new provision, 10 percent of the qualified voters of a municipal utility district may initiate a recall election of a district board member by filing a petition with the general manager or attorney for the district, demanding the removal of a director.

If the petition is determined to be valid and in compliance with the requirements of the new law, then – if the director whose removal is sought does not resign within five days after the presentation of the petition to the district's board of directors – the board is required to order and hold a recall election not less than 30 or more than 60 days after the petition has been presented to it.

If the majority of votes cast at the recall election favor the removal of the director, the board must immediately declare the director's office vacant and call an election to replace the recalled director. A director removed by recall may not be a candidate in the election to fill the newly created vacancy, nor may the board appoint such director to fill an unexpired term.

On the plus side, a recall petition may not be filed against a director within six months after the director takes office, and a director may not be subject to more than one recall election during any one term of office.

Candidacy

In other election-related legislation, a new section 49.072 has been added to the Texas Water Code relating to a water district director's eligibility to continue serving as a board member if he or she files to become a candidate for any other office.

Under current law, a water district director may continue serving in such capacity even if he or she has filed to become a candidate for another elected office, unless the elected office is in the Texas Legislature. In fact, the director could be elected to and hold two offices, provided that such offices do not violate the constitutional and common law prohibitions against holding two offices of emolument or holding two incompatible offices.

However, effective Sept. 1, 1997, HB 331 provides that a person serving as a director of a district who becomes a candidate for another office is no

Legislation Affects Water Districts

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longer qualified to serve as director.

As most water district directors will remember, during 1995, the Legislature adopted a new Chapter 49 to the Texas Water Code, significantly revising all of the general administrative provisions relating to water districts.

'Clean-up', Clarification

As with any major revision to a code, certain "clean up" and clarification will always be necessary in subsequent legislative sessions. Accordingly, the Legislature this session passed SB 1865 to make several clarifications and modifications to Chapter 49.

While many amendments are contained in SB 1865, a few of the more significant modifications include (1) a revision to make it clear that repair and renovation projects, as well as construction projects, must be competitively bid; (2) the addition of a definition to the section of Chapter 49 authorizing firefighting activities by water districts (that definition now defines firefighting activities to include emergency medical services); (3) the elimination of the local government code requirement that water districts publish annual financial requirements; and (4) a revision of the truth in taxation requirements as it applies to water districts.

Failed to Pass

Many other bills regarding water districts did not make it through the legislative process. Rep. Fred Bosse's (D-Houston) bill requiring directors to complete six hours of training prior to their one-year service date was left to die a slow death in the House Natural Resources Committee.

Sen. Jon Linday's (R-Houston) attempt to create the North Harris County Regional Water Authority with SB 1909 also died in the House. Many of the central issues of that bill were embroiled in the annexation debate. ■

Calendar of Events

JULY

1	Texas Rural Water Association (TRWA), EPA Regional Workshop, Denton
15	Joint Course of the Association of Water Development Board (AWBD), Training Course of the Public Funds Investment Act and TRWA, Public Funds Investment Training, Galveston
15-17	TRWA, Technical Conference, Galveston
16-18	Association of Local Housing Finance Agencies (ALHFA), "Affordable Housing Finance: Putting the Deal Together and Bringing it All Home," Seattle, WA
18	National League of Cities Leadership Development Program, "The Practice of Political Leadership in Small Cities," Boise, ID
23	TRWA, EPA Regional Workshop, Weslaco
24	TRWA, Wastewater Workshop, Weslaco
24-27	Association of Mayors, Council Members, and Commissioners (AMCMC) Institute, Waco Convention Center
30	TRWA, EPA Regional Workshop, Uvalde

AUGUST

1	TRWA, Wastewater Workshop, Uvalde
6	TRWA, EPA Regional Workshop, Abilene
14	TRWA, EPA Regional Workshop, Waco
14-16	National League of Cities 5th Annual Leadership Summit, Colorado Springs, CO
20	TRWA, Wastewater Workshop, Fort Davis
21	TRWA, EPA Regional Workshop, Fort Davis
22	Federal Reserve Bank and Texas A&M University, "Market Solutions to Water Allocation in Texas," San Antonio (Call JR&P for information)
26	TRWA, EPA Regional Workshop, Plainview

SEPTEMBER

11	TRWA, Wastewater Workshop, McKinney

OCTOBER

2-3	Texas Association of Local Housing Finance Agencies Annual Conference, El Paso
5-7	Government Finance Officers Association of Texas Fall Conference, Galveston
29-Nov.1	Texas Municipal League (TML) Annual Conference and Exhibition, Fort Worth

Association of Water Board Directors (AWBD)
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Association of Local Housing Finance Agencies (ALHFA)
202/857-1197
Texas Rural Water Association (TRWA)
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Texas Municipal League (TML)
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Texas Association of Local Housing Finance Agencies (TALHFA)
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Texas Legislature Amends Public Funds Investment Act

In 1994, Orange County, California, went bankrupt attempting to leverage its finances through exotic, interest-rate-sensitive investments. To ensure that what happened in California would not happen here, the Texas Legislature revised the Texas Public Funds Investment Act to place new safeguards on the investment of public funds by governmental agencies.

After the passage in 1995 of the Public Funds Investment Act revisions, local governments – such as municipalities, water districts, housing authorities, counties and school districts – had to modify substantially their investment policies to conform to the new act.

HB 2799 ADDS TWO PROVISIONS THAT NOW MUST BE INCLUDED. THEY ARE (1) A METHOD TO MONITOR THE MARKET PRICE OF INVESTMENTS ACQUIRED WITH PUBLIC FUNDS, AND (2) A REQUIREMENT FOR SETTLEMENT OF ALL TRANSACTIONS, EXCEPT INVESTMENT POOL FUNDS AND MUTUAL, ON A DELIVERY VS. PAYMENT DATE BASIS.

This legislative session, HB 2799 was introduced to clarify further and amend the Public Funds Investment Act. As finally passed and sent to the governor. HB 2799 will require local governments once again to amend their investment policies.

The bill contains several technical modifications, but the most substantial revision of the act can be summarized as follows:

The current Public Funds Investment Act requires the governing body of an investing entity to adopt a written investment policy.

In addition to the existing provisions that are required in the written investment policy, HB 2799 adds two provisions that now must be included. They are (1) a method to monitor the market price of investments acquired with public funds, and (2) a requirement for settlement of all transactions, except investment pool funds and mutual funds, on a delivery vs. payment date basis.

THE ACT PREVIOUSLY DID NOT CONTAIN ANY DEFINITION EXPLAINING WHAT WAS MEANT BY THE TERM 'PERSONAL BUSINESS INTEREST.' THE AMENDMENTS CONTAINED IN HB 2799 CLARIFY AND DEFINE THIS TERM.

Another substantive change relates to the annual review of a governmental entity's investment policy and strategies.

The existing act requires this annual review, and HB 2799 strengthens this provision by stating that the governing body of the local government must adopt a written instrument declaring that it has conducted such review and setting forth any changes made to either the investment policy or the investment strategies.

Additionally, this legislation clarifies the section of the Public Funds Investment Act dealing with potential personal\business interest conflicts. The act had provided that an investment officer who had a personal business relationship with an entity and was seeking to sell an investment to the local government would be required to file a statement disclosing that personal business interest.

However, the act previously did not contain any definition explaining what was meant by the term "personal business interest." The amendments contained in HB 2799 clarify and define this term.

Specifically, a "personal business relationship" now is defined as (1) ownership of 10 percent or more of the voting stock or shares of the business organization or ownership of $5,000 or more of the fair market value of the business organization, (2) receipt of funds from the business organization exceeding 10 percent of the investment officer's gross income for the previous year, or (3) acquisition from the business organization, during the previous year, of investments with a book value of $2,500 or more for the personal account of the investment officer.

In an apparent response to complaints by the banking and investment community, HB 2799 also revised the requirements for a written acknowledgement from persons attempting to sell investments to local governments to the effect that such persons had received and reviewed the local government's investment policies and that their business organization has in place procedures and controls to preclude imprudent investment activities.

While maintaining the general requirement for a written acknowledgement of receipt and review of the local government's investment policies, HB 2799 substantially amends the language required to be contained in such acknowledgments.

Additional Training

Further, the bill imposes additional training requirements on investment officers. While each governmental entity's investment officer has been required to receive formal training, the prior act did not set forth any conditions of the training, nor did it require any subsequent training after attendance at one initial course.

As amended by HB 2799, the act now requires that each investment officer attend at least one course every two years, covering not less than 10 hours of instruction relating to his/her investment responsibilities.

This training must be by an independent source approved by the governing body of the local government or by a designated investment committee advising the investment officer, as

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TWDB Announces New Financial Assistance Program for Public Water Systems

In February 1997, the Texas Water Development Board (TWDB) adopted rules to administer the new Drinking Water State Revolving Fund (DWSRF).

The DWSRF was established to provide loans at lower than market interest rates to finance water supply projects for compliance with primary and secondary drinking-water regulations established pursuant to the Federal Safe Drinking Water Act. This new financial assistance program will be available to all drinking-water supply systems owned by political subdivisions, such as municipalities and water districts, as well as Texas Non-Profit Water Supply Corporations.

According to a U.S. EPA survey released in January, public water systems in Texas will need $12.36 billion in capital improvements during the next 20 years to comply with current and future requirements of the Federal Safe Drinking Water Act. These EPA estimates include costs for building or replacing treatment plants, adding or replacing water mains and pumping stations and building water storage tanks. However, the estimates do not include costs for operation and maintenance or the costs of obtaining water rights or developing new water resources.

EPA: PUBLIC WATER SYSTEMS IN TEXAS WILL NEED $12.36 BILLION IN CAPITAL IMPROVEMENTS DURING THE NEXT 20 YEARS. . .

Also in January, the TWDB mailed a DWSRF information form to potential loan applicants. The information form describes a potential applicant's existing water facilities, additional facility needs, the nature of projects being considered to meet those needs and project cost estimates. The TWDB hopes to use this information in connection with the Texas Natural Resource Conservation Commission to prioritize projects according to need and to identify applicants for loans from the first-year capitalization grant of the new DWSRF.

The TWDB's goal is to have the new loan program in operation in time for applications beginning in the fall of 1997. ■

Public Funds Investment Act

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provided for in the investment policy of the local government.

In addition, the act contains an extra oversight provision relating to the duties of the local government's independent auditor. Specifically, HB 2799 states, "if the local government invests in other than money market mutual funds, investment pools or accounts offered by its depository bank in the form of certificate of deposit, or money market accounts or similar accounts, the reports prepared by the Investment Officer must be formally reviewed at least annually by an independent auditor and the results of the review must be reported to the governing body."

HB 2799 also contains numerous other technical modifications and clarifications, any one of which may impact a particular governmental entity's investment policy. Accordingly, all governmental entities should have their investment policies thoroughly reviewed by their attorneys and financial advisors to ensure compliance with the new act. ■

Texans May End 150-Year Ban On Home Equity Loans

A bill passed in this session of the Texas Legislature could end this state's 150-year-old constitutional ban on home equity loans.

In fact, voters in Texas will have the opportunity to vote this November on whether they wish to have the ability to acquire a loan using the value of their homesteads as collateral. Currently, Texas is the only state that still does not allow these loans.

The Legislation that passed, HJR 31, filed by Rep. Pete Patterson (D-Brookston), is still considered to be conservative by many in the banking community in that it contains many safeguards for homeowners. For example, a homeowner would only be able to borrow up to 80 percent of the fair market value of the home. Should a foreclosure become necessary, the case would be reviewed by a state judge and a court order issued before the actual foreclosure could take place, protecting homeowners from non-judicial foreclosure, currently available to the lender with 21 days written notice.

Another safeguard in favor of the borrower is that, if a deficiency exists between the amount of the loan and the sale price of the homestead at foreclosure, the lender may not hold the borrower personally liable for the balance.

Home equity loans would not be extended to agricultural homesteads, except for dairy farms.

However, the loans could be used for any purpose except securing credit card debt. Prior to this legislation, home equity loans could not only be extended to borrowers for home improvement and payment of taxes. (Reverse mortgages also could become available for homeowners over 55 years of age.)

A home equity loan can be paid off in advance without penalty. Repayment may not be accelerated because of a decrease in the market value of the home, nor can the repayment be accelerated because of the borrower's default against other debt not secured by the homestead.

This legislation is a boon for the banking community, as well as for citizens of Texas who have wanted the option of home equity loans for such purposes as financing a college education or payment of medical bills. ■

Much Activity, Little Progress on Annexation

Annexation was a hot topic this session with many lawmakers eager to reform annexation law. Although many senators and representatives introduced legislation in an attempt to do so, very little was accomplished on this front.

One of the culprits was the divisiveness of suburban legislators. During the session, legislators eager to curb a municipality's annexation powers often found themselves at odds with each other over issues such as payment in lieu of annexation and self-determination in the subsidence question.

No one doubts that the annexation issue will continue to loom over the proceedings of the next legislative session in 1999. By then, suburban legislators will have had the opportunity to channel their efforts into a more focused agenda, in order to take advantage of their growing political influence.

The seeds of their burgeoning power became apparent early in this session when Sen. Michael Galloway (R-The Woodlands) bulldozed opposition to pass his Kingwood disannexation bill. Although the bill did not pass the House, the singular accomplishment of getting the bill out of the Senate was a red flag to municipal officers everywhere, indicating a willingness to fight on the part of the citizens of the extraterritorial jurisdiction.

Another indication of the Kingwood backlash was the success of legislation that would prohibit a municipality from holding city elections until all voters inside the city limits are eligible to participate. Earlier this year, Kingwood residents were denied this right when the City of Houston held elections while the annexation of Kingwood was still being reviewed by the Justice Department.

With the 75th Legislative Session now behind them, the citizens of Texas can be assured that, although not every potential annexation reform was actualized, an important step was taken. Community leaders were able to identify the points of most vicious contention, as well as the points of most subtle, but important, concern.

During the next two years, these concerns will provide the blueprint from which, one hopes, will come more useful dialogue on annexation. ■

Meet Johnson, Radcliffe & Petrov: Marian Henderson, Senior Legal Assistant

Marian Henderson, with Johnson, Radcliffe & Petrov for 10 years, is the firm's longest-serving staff member.

Ms. Henderson is a graduate of East Texas State University in Commerce, with a B.B.A. in Office Management. She did postgraduate work in paralegal studies at El Centro Community College in Dallas.

Ms. Henderson began working with Andrew Johnson in 1984 and moved with him to Reynolds, Allen & Cook. When Johnson opened his office as a sole practitioner in 1987, she joined him as secretary, legal assistant, bookkeeper and office manager.

Ms. Henderson is the firm's senior legal assistant, having worked with water districts and housing finance corporations in every aspect of the practices, including creation, administration, operation and issuance of bonds.

She is a member of the Legal Assistants Division of the State Bar of Texas, the Houston Legal Assistants Association and the Legal Assistants Division of the National Association of Bond Lawyers.

In addition, she is serving a four-year elected term as a director of the utility district in which she lives, Harris County MUD 217. ■

PICTURE NOT AVAILABLE

Marian Henderson

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Sachie Canales, Editor

Johnson, Radcliffe & Petrov provides counsel primarily to government entities, including municipalities, public non-profit corporations, and special districts, water supply corporations and related real estate interests with a variety of needs, ranging from public finance to litigation, contract negotiation, elections and administrative proceedings.

The diverse experience of the firm's partners, in regulatory, environmental, real estate development, finance and litigation matters, offers the ability to meet the varied needs of such clients.

The articles in this publication are not intended to provide specific legal advice for any individual situation nor are they intended to describe every legislative change affecting governmental entities. Rather, they are intended as general information only. For individual advice, please contact your attorney or other professional advisor.

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