

## Two Important Constitutional Amendments Approved

BY KAYE C. CORPREW

### PROPOSITION 11 - FEES FOR TEACHERS AND ADMINISTRATORS

A Constitutional Amendment was approved by the voters at the November 6, 2001, election that will allow school teachers, retired school teachers, and retired school administrators to receive compensation for serving as a member of a governing body of a school district, city, town, or local governmental district including water districts.

Teachers, retired teachers and retired school administrators may currently serve on these governing bodies, but the Constitution prohibits them from receiving any fees of office (per diem) normally provided for by political subdivisions. In many rural areas and small towns, the number of qualified people willing and

able to serve on governing bodies is limited. Allowing education professionals to be compensated for serving on local government boards, such as water districts, will increase the pool of qualified people for such offices.

### PROPOSITION 19 - TEXAS WATER DEVELOPMENT FUND II

Texas voters approved the proposed Constitutional Amendment at an election on November 6, 2001, to authorize the Texas Water Development Board to issue additional general obligation bonds in an amount not to exceed \$2 billion. The TWDB issues bonds to pay for water supply projects, water quality enhancement projects, flood control projects, state participation in water and wastewater facilities, and project for economically distressed areas.

SEE BALLOT PROPOSALS ON PAGE 3

## Build Now, Finance Later

### Use Reimbursement Bonds for projects that can't wait

BY RYAN J. JOHANNES

Imagine that your entire capital reserve fund is about to be sucked into a giant emergency sewer line failure repair or water well failure. Or, your nonprofit needs to purchase land or invest capital before bonds can be issued. These are occasions where your bond counsel, by following strict rules in the Internal Revenue Code (Code), can enable an issuer, nonprofit or developer to finance or reimburse unexpected, or even planned expenditures, by the issuance of tax exempt bonds after the expenditure.

These rules do not apply where you have a contract with a developer for purchase or reimbursement for facilities, or where you are paying off a separate loan for the expenditure.

This technique applies when you need (or want) to use cash for a purpose you would like to finance with bonds to recoup your cash.

In order to properly reimburse expenditures rather than refund them with the proceeds of the bond issue (which could be determined to be your only available advance refunding), the Treasury regulations of the Code require the issuer adopt a declaration, such as an official resolution, stating that it is the issuer's official intent to reimburse the expenditure in the future with an obligation such as a bond. In the past, conduit issuers called this resolution an "inducement resolution." The regulations call these "official intent" or "reimbursement resolution."

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## Robin Bobbitt Joins JRP

Robin Bobbitt joined Johnson Radcliffe Petrov as an Of Counsel member in June, 2001, and as full partner in January 2002. The firm's name was changed to Johnson Radcliffe Petrov & Bobbitt PLLC. Ms. Bobbitt's practice is concentrated in the areas of public law/public finance. She has worked with and been associated with utility districts since 1978 and her practice includes the representation of municipal utility districts, water supply corporations and other governmental entities.

She has served as general counsel and bond counsel in Harris, Fort Bend, Brazoria, Montgomery, Travis, Sabine and Waller counties. Ms. Bobbitt also currently serves as general counsel to the North Harris County Regional Water Authority. Her experience includes work with public and private entities on many issues including construction, financing and operations of public facilities, annexation and de-annexation matters, creation and dissolution of districts, interlocal agreements, standby fee applications and controversies, water law issues, election law matters, legislation/lobbying matters, to name a few.

She represents entities before the Texas Natural Resource Conservation Commission,

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## Eliminating Ad Valorem Taxes on Multifamily Housing

Section 11.182 of the Texas Property Tax Code exempts owned by a Community Housing Development Organization (CHDO) from being subject to the payment of ad valorem taxes. CHDOs are defined under Federal law as part of the Cranston-Gonzalez National Affordable Housing Act at 24 CFR 92.2. As with all other exemptions from property taxes in Texas, the CHDO exemption applies to the action or status of the owner of the property and does not run merely to the property itself.

Among the criteria for qualification are:

- having a board that includes at least one-third of its members being residents of a low income neighborhood, other low income community residents, or an elected representative of such neighborhood organization,
- Receive determination from the IRS that they are a 501(c)(3) organization,
- Having one year's experience in serving the community regarding housing (this requirement can be satisfied for newly formed organizations through the experience of their directors)

- Showing adequate organizational capability.

The Texas Department of Housing and Community Affairs (TDHCA) as well as certain local agencies designate CHDOs in the State. To date more than 230 organizations have received CHDO designation in Texas.

The most commonly-used structure for a 501(3)(c) organization owning and operating charitable multifamily housing is to have legal title of such a project held by a limited liability company (LLC) with the 501(c)(3) as its sole member, and financed through tax exempt bonds issued by a local housing finance corporation. The new rules for CHDOs by the TDHCA now allow the LLC to apply for CHDO exemption on its own, thus making qualifying the project for the exemption from ad valorem tax with the county appraisal district easier.

The CHDO determination for a 501(c)(3) is good for three years. Thereafter the organization must apply to be recertified. The basis

for recertification is the same as for the initial designation. This will be no problem as long as the organization maintains its 501(c)(3) status, low income board representation and operates as a nonprofit. The risk of not being recertified is similar to the risk of the bonds remaining tax-exempt. In either case, if the borrower fails to operate in a manner consistent with its charitable purpose, it could jeopardize the bonds issued to finance the project.

Obtaining CHDO status for the 501(c)(3) also helps the organization achieve financing commitments for the acquisition of multifamily housing. Several institutional lenders, including Allstate, Charter/Mac and the Nuveen Funds have given full credit for the CHDO exemption in their underwriting. The FHA also gives full credit for the CHDO exemption. Fannie Mae generally does not give credit but is willing to do so under certain circumstances. Moody's Investors Service does give credit for real estate tax exemption in Texas, provided that certain criteria are met. [JRPB](#)

## Recent Legislation Affects CHDOs

In the 2001 Session, the Texas Legislature passed two bills affecting the exemption of real property owned by Community Housing Development Organizations (CHDOs). HB 1392 and HB 3383 effectively strengthen the CHDO's property exemption.

HB 1392 strengthens the exemption in two ways. First, in place of the current law requirement that the local appraisal district determine that a CHDO's property qualify for an exemption each year, the local appraisal district will make a one-time determination that the property qualifies. This determination will remain in effect until the organization no longer qualifies as a CHDO or it disposes of the property. The Act provides that the appraisal district can require the CHDO to resubmit an application if it believes that the property or organization no longer qualifies for the exemption. The Act now allows a CHDO to apply for a preliminary determination from the appraisal district prior to closing as to the qualification of

the project.

HB 3383 imposes certain requirements on CHDO's benefiting from the tax exemption, but in so doing clarifies what a CHDO must do to maintain its status and reaffirms Legislative intent to maintain the CHDO exemption on a long-term basis. The act requires that a CHDO spend 40% of the amount of the exempted taxes each year for specified purposes and spend 90% of its "cash flow" (net of expenses) for these same purposes.

For those projects that are not exempt, the meeting of these requirements need not have a significant impact on a residential project's net operating income. A CHDO must spend the 40% of the exemption and 90% of "cash flow" for capital improvement projects, for rent reductions, or for social, educational or economic development services, all for the benefit of eligible persons in the project or in the county in which the project is located. For a new residential

project, the amount of rent reductions necessary to meet the low income requirements for either 20% or 40% of the units in the development is likely to exceed 40% of the amount of the tax reduction by a large margin.

For an existing residential project, the annual amount of "capital improvement projects," as determined by GAAP is likely to come close to or exceed the 40% expenditure requirement. Proof of meeting these expenditures would come from an independent accountant's audit, which must be submitted to the Texas Department of Housing and Community Affairs and to the local appraisal district.

The requirement for a CHDO to spend 90% of "cash flow" for these purposes would often require CHDO and bond documents to operate somewhat differently but should not affect debt service coverage. The Act

## Legislation Overview for 2002

BY KAYE C. CORPREW

Over 1500 bills were enacted by the 77th Texas Legislature in 2001. Of those 1500 Acts, Senate Bill 1444 will have the most impact on water districts. Other bills which have become or will become effective as a result of the 77th Session and that affect political subdivisions in general, amend the Public Funds Investment Act, the Tax Code, the Election Code, and the Open Meetings Act. A few of the more interesting revisions are discussed in this article, all of which became effective September 1, 2001, unless otherwise noted.

### Revisions to Water Laws

#### DIRECTORS FEES

The maximum fees of office for a day of service that a director of a municipal utility district or other general law district now earn have increased from \$100 to \$150. The annual cap of \$6,000 has not changed.

#### TRUTH IN TAXATION

Taxation procedures have been amended to provide that certain sections of the Tax Code do not apply to maintenance, debt service, or contract taxes levied and collected by water districts. The affected sections of the Tax Code that are no longer applicable to water districts require

certain political subdivisions to:

- (i) calculate the effective tax rates and rollback tax rates;
- (ii) use direct mailing or newspaper publication of notices regarding effective and rollback tax rates;
- (iii) hold public hearings (and newspaper notice thereof) if a district adopts a tax rate that exceeds the lower of the rollback tax rate or 103 percent of the effective tax rate;
- (iv) adopt the tax rate before the later of September 30 or the 60th day after the date the certified appraisal roll is received by the taxing unit.

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## Electrical Deregulation - Does it Help?

BY KAYE C. CORPREW

Welcome to change. As of January 1, 2002, all electrical customers, including water districts and water supply corporations, now have the option of choosing their supplier of electricity and electrical services. As industry and consumers have experienced in recent history, service deregulation such as telephone, trucking, airlines, and pipeline transportation has brought forward many opportunities and challenges, and some pitfalls. All of us in some way have had first-hand experiences with the choices that

deregulation has caused. For example, how many times have you changed long distance carriers? Through choices, we can possibly lower our costs, but we may have to alter our behavior patterns in order to accomplish lower costs. Haven't you found that the only real way to reduce phone charges is to make your calls at midnight? Electric deregulation should offer similar challenges and changes.

On October 12th JRP offered a panel of Houston-Galveston Area Council (H-GAC)

The Act exempts a CHDO from meeting these spending requirements with regard to any project

- acquired by December 31, 2001,
- required to make a payment in lieu of taxes to the school district in which the project is located,
- subject to rent restrictions by the bond issuer, or
- has fewer than 36 units.

We understand that some HFCs are adopting rent controls in order to come within the exemption from the expenditure requirements of the new laws. Time will tell if this works.

The next Legislature should be interesting as city and appraisal district organizations arm to gut this exemption. Stay tuned [JRPB](#)

and Texas Conference of Urban Counties (TCUC) representatives. JRP clients and invitees got to talk face-to-face with H-GAC and TCUC officials. This type of forum can greatly facilitate understanding and can bring

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#### BALLOT PROPOSALS FROM PAGE 1

\$50 million of the bonds will be used for the water infrastructure fund created by Senate Bill 2. The purpose of that fund is to finance water development projects that will encourage the conservation and development of the water resources of the State. [JRPB](#)

#### BOBBITT JOINS FROM PAGE 1

the Texas Water Development Board, and the cities of Houston, Austin and Missouri City.

Robin serves on the Board of Directors of the Holy Trinity Episcopal School Greater Houston and is an avid golfer. She is a member of the Association of Water Board Directors (AWBD) - Texas Advisory Council, is a recipient of the AWBD Visions Award and serves as general counsel to AWBD. She holds a bachelor's degree from Southwest Texas State University and received her J.D. from South Texas College of Law. [JRPB](#)

#### CHDO LEGISLATION FROM PAGE 2

defines "cash flow" to be what is normally thought of as net operating income less "expenses required in satisfaction of requirements of lenders, including reserve requirements" and "employee compensation." Presumably, the bond documents would hold project cash flow in a lender reserve and allow for its release based upon a prescribed waterfall. Any unrestricted release to the CHDO presumably would be subject to its having first met the 90% expenditure requirement. For projects with large amounts of net cash flow, a CHDO might decide, subject to the approval of the lender or credit enhancer, to pay taxes in a given year and be released from the restrictions.

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**GRANTING OF EASEMENTS**

Granting of easements may now be required by a district or water supply corporation as a condition for service. An application for service may be required to grant a permanent recorded easement to allow the district to serve the application as well as the district's purposes in providing system-wide services. Additionally, as a condition of service to a new subdivision, a district or water supply corporation may require a developer to provide permanent recorded easements to and throughout the subdivision adequate for service for the subdivision's anticipated service demands when the subdivision is fully occupied.

**SEPTIC SERVICES**

A district may now prohibit the installation of new private on-site wastewater holding or treatment facilities. A district that prohibits such installation shall agree to pay the owner of the tract the costs of connection if the distance along a public right-of-way or utility easement from the nearest point of the district's system to the boundary line of the tract is 300 feet or more.

**CHANGE ORDERS AND COMPETITIVE BIDS**

Contracts for the procurement of services are not required to be competitively bid as are construction contracts. Furthermore, the competitive bid requirements do not apply to contracts for services or property for which there is only one source or for which it is otherwise impracticable to obtain competition.

Change orders in construction contracts may be authorized by a board of directors as long as all change orders to the contract do not increase the price of the contract by more than 10 percent of the original contract price. Additional change orders may be issued only as a result of unanticipated conditions encountered during construction, repair, or renovation or changes in regulatory criteria or to facilitate project coordination with other political entities.

Repairs to district facilities are not required to be advertised or competitively bid if the scope or extent of the repair work cannot be readily ascertained or if the nature of the repair work does not lend itself to

competitive bidding.

**RECREATIONAL FACILITIES & STREET LIGHTING**

Recreational facilities and street lighting powers are granted to all districts governed by Chapter 49 of the Water Code. The recreational facility powers were previously granted only to municipal utility districts. Levee improvement districts, water control and improvement districts and others now have the ability to provide recreational facilities. Districts, however, may not issue bonds supported by ad valorem taxes to finance recreational facilities. Districts are also authorized to purchase, install, operate and maintain street and security lighting. Previous law granted this power only to municipal utility districts that were required by a city to provide lighting. The definition of "recreational facilities" is expanded to include "landscaping, parkways, greenbelts, sidewalks, trails, and public right-of-way beautification projects."

**SENATE BILL 2**

Senate Bill 2, relating to water matters, is a sequel to Senate Bill 1 which was adopted in the 1997 legislative session. Among other things, the bill:

creates the Texas Water Advisory Council, a 13-member group charged with making recommendations to the Legislature on state water issues;

ratifies the creation or creates 15 groundwater conservation districts and makes numerous changes to the laws governing groundwater districts;

creates the Water Infrastructure Fund, as a fund in the state treasury, to be administered by the Texas Water Development Board ("TWDB"), to provide funding for the implementation of water projects recommended through the state and regional water planning process;

creates the Rural Water Assistance Fund, which is intended to provide financial assistance to smaller, rural water suppliers and is to be administered by the TWDB; and creates the Joint Committee of Water Resources which shall conduct an interim study and make recommendations to the Legislature regarding

- (i) increasing the efficient use of existing water resources,
- (ii) developing sufficient long-term financing strategies,
- (iii) improving existing water conveyances systems,
- (iv) water marketing,

(v) determining the appropriate role of environmental and wildlife concerns in water permitting and water development, and

(vi) protection of the natural condition of beds and banks of the state-owned watercourses.

**TNRCC RENEWED**

The TNRCC Sunset Review (House Bill 2912) proved to be generally favorable to the operation and function of the Texas Natural Resource Conservation Commission (TNRCC), which is perpetuated for another 12 years. The TNRCC is renamed the Texas Commission on Environmental Quality (effective January 1, 2004); however, the functions of the TNRCC are largely unchanged. The TNRCC is provided with greater flexibility in the utilization of water and wastewater fee revenue. The Bill mandates a permitting program for class B sludge. The TNRCC is required to implement "performance based permitting," which involves examining a permittee's compliance history when granting or renewing permits. (Staggered effective dates; generally September 1, 2001)

**INVESTMENT OFFICER TRAINING REDUCED**

The Public Funds Investment Act is amended to reduce the required number of hours of investment training by the investment officer of a water district to six hours within the first year of assuming such duties and to four hours within each two-year period thereafter. The Board may appoint any officer of the Board or contract with a person to serve as the investment officer for the district. Any organization that provides training under the Public Funds Investment Act shall submit a report to the comptroller. (Effective May 14, 2001.)

**New Legislation Affecting All Political Subdivisions**

Delinquent tax collection procedures have been amended to provide that the penalty for delinquent taxes may not exceed the amount of the compensation specified in the contract with the taxing unit's delinquent tax attorney. The previous limit was 15 percent.

**ELECTION DATES - FEWER EXCEPTIONS**

Texas law provides four uniform election

## OVERVIEW FROM PAGE 4

dates which certain exceptions permitting political subdivisions to hold elections on other days. Senate Bill 79 changes the designated uniform election dates and eliminates several of the exceptions. The first Saturday in February rather than the third Saturday in January and the second Saturday in September rather than the second Saturday in August are now uniform election dates. The first Saturday in May and the first Tuesday after the first Monday in November remain uniform election dates. Under prior law, there was an exception to the uniform date requirement for elections to approve bonds or maintenance taxes. Senate Bill 79 narrows this exception so that it is no longer available to water districts. Thus all water district elections must be held on uniform

## ELECTRIC DEREGULATION FROM PAGE 3

important issues forward. JRPB will continue to engage other knowledgeable sources to convey more light upon the deregulation issue, to assist its clients with key decisions, and to provide leadership in those areas that benefit water district and water supply corporations.

In current time, the advent of electric deregulation offers the possibility of immediate savings in the calendar year 2002. As with all possibilities, there can be downsides as well. The options available to small commercial users, such as water districts and water supply corporations, are:

- I. Purchase electricity through an aggregator, such as H-GAC Energy Purchasing Corporation or Texas CUC Aggregation Project, Inc. (TCAP);
- II. Negotiate the purchase of electricity directly with electrical suppliers;
- III. Negotiate the purchase of electricity with the local service provider to maximize efficient use under current and post-deregulation rates and schedules; or
- IV. Do nothing.

Economics should drive the user's decision as to which option to choose. As with all economic decisions, the reward and risk analysis should provide the proper guidance. These options may offer lower operating costs, operational challenges (selective peak load operations) or contractual obligations (term requirements or possible penalties) that some users may feel

dates.

## PAY FOR ELECTION JUDGES AND CLERKS

Prior law provided that pay for election judges and clerks could not exceed \$6.00 per hour. The Election Code has been amended to remove this cap on compensation and provides that the authority holding the election may fix the compensation. The hourly rate must be at least the federal minimum hourly wage.

## OPEN MEETINGS ACT

The Open Meetings Act regarding consultations with attorneys has been amended to state that a governmental body may use a telephone conference call, video conference call, or communications over the Internet to conduct a public consultation with its attorney in an open meeting of the governmental

are too binding. As with all contracts, caution and clarity are needed. Notwithstanding the positives and negatives, electric service deregulation requires thought and attention, and may offer substantial cost reduction to many small commercial power users.

One other consideration that political subdivisions may want to consider in the future

body or a private consultation with its attorney in a closed meeting of the governmental body. The bill does not exempt such consultations from the requirements of the Texas Open Meetings Act. Each part of a public consultation must be audible to the public at the location of the meeting. These provisions do not authorize the members by telephone conference call, video conference call, or communications over the Internet. (Effective May 7, 2001.)

The Public Funds Investment Act is amended to provide that letters of credit of the United States or its agencies and instrumentalities are now authorized investments to the same extent as obligations of the United States or its agencies or instrumentalities.

is the aggregation of electricity for their residents. A water district, acting alone or through an aggregator, can negotiate the purchase of electricity and energy services on behalf of its residents.

Contact your water district attorney to evaluate your situation and develop a plan for the new deregulated system.

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## REIMBURSEMENT BONDS FROM PAGE 1

### PLAN AHEAD

This statement must contain several specific elements to be considered an official intent. First, the statement must be in a reasonable form. This can be in any form as long as it is appropriate for the organization such as a resolution, an action by the appropriate representative of the organization or specific legislative authorization for the obligation for the particular project. Secondly, this official statement must describe the project for which the original expenditure to be reimbursed is paid and the maxim amount of the obligation expected to be issued by the organization. All that is required of this description is to identify the name of the project or the purpose of the fund from which the original expenditure was made (e.g. parks and recreation fund).

On the date of this declaration, the issuer must have a reasonable expectation that it will reimburse the original expenditure with the proceeds of the bond. Official intents

issued as a matter of course or in amounts that are much larger than are expected to be used for the project (blanket declarations) will not be considered to be reasonable. A pattern of failures to reimburse actual expenditures is considered to be evidence of unreasonableness, rendering your official intents useless in the future .

### PAY BACK IN A TIMELY WAY

Also, in order to be considered a reimbursement bond, the expenditure from the proceeds of the bonds for the reimbursement must be made within 180 months of the original expenditure or the date the project was placed in service, but not more than three years. This time period can be extended to five years if a licensed architect or engineer certifies that at least 5 years are necessary to complete the project. Additionally, the expenditure to be reimbursed must be a capital expenditure, a cost of issuance for a bond, extraordinary working capital, a grant, a qualified student loan, a qualified mortgage loan or a qualified veteran's mortgage loan.

There are several exceptions to the official intent rules. These include the costs of issuance of any bond that does not exceed 5% of the proceeds or \$100,000, whichever is less, or up to 20% of the issue price of the bonds if that amount is used for preliminary expenditures. Preliminary expenditures include architectural, engineering, surveying, soil testing, reimbursement bond issuance and similar cost that are incurred prior to the commencement of the acquisition or construction of the project.

For more information on reimbursement bonds contact Ryan Johannes.

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## Johannes Receives LL.M.

Ryan J. Johannes recently completed his thesis and was awarded a Master of Laws degree in taxation law from the University of Houston Law Center. Congratulations to Ryan on this significant accomplishment.

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## Public Law Report

Volume 4, Number 1

Published quarterly for clients and other interested persons by Johnson Radcliffe Petrov & Bobbitt PLLC.

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desktopimaging.com

Johnson Radcliffe Petrov & Bobbitt provides counsel primarily to government entities, including municipalities, public non-profit corporations and special districts, water supply corporations and related real estate interests, developers, and non-profit corporations with a variety of needs, ranging from public finance to litigation, contract negotiation, elections and administrative proceedings. The diverse experience of the firm's attorneys 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. Rather, they are intended as general information only. For individual advice, please contact Johnson Radcliffe Petrov & Bobbitt or another professional advisor.

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