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Committee on Natural Resources

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October 11, 2011

The Honorable Greg Abbott  
Attorney General of Texas  
Attn: Opinion Committee  
P.O. Box 12458  
Austin, Texas 78711-2548

FILE # ML-46838-11  
I.D. # 46838

**RQ-1003-GA**

Re: Request for an Attorney General's Opinion Regarding the Legal Authority of a County Commissioners Court to Enact a Groundwater Management Ordinance Pursuant to Texas Water Code, Section 35.019 or Texas Local Government Code, Section 232.0032; and the Validity of the Same in Certain Circumstances.

Dear General Abbott:

I respectfully request an Attorney General Opinion concerning the authority of a county commissioners court to enact a groundwater management ordinance pursuant to Texas Water Code, Section 35.019, specifically its ability to enact such an ordinance outside of a priority groundwater management area ("PGMA") as well as its ability to enact such an ordinance where the process of forming a groundwater district has been initiated and/ or further created.

Texas Water Code, Section 36.0015 provides that groundwater conservation districts are the preferred method of groundwater management, and the Texas Legislature has provided two very limited exceptions when a county rather than a groundwater district has authority regarding groundwater management. First, Texas Water Code, Section 35.019(a) provides that:

The commissioners court of a county in a priority groundwater management area<sup>1</sup> may adopt water availability requirements in an area where platting is required if the court determines that the requirements are necessary to prevent current or projected water use in the county from exceeding the safe sustainable yield of the county's water supply.

<sup>1</sup> Texas Water Code, Chapter 35, creates a process by which the Texas Commission on Environmental Quality may designate an area that is experiencing or is expected to experience critical groundwater problems as a "priority groundwater management area" and prompt the creation of a water conservation and reclamation district under Section 59, Article XVI, Texas Constitution.

Second, Texas Local Government Code, Section 232.0032 allows counties to require a water availability certification for plat applications for new subdivisions that rely on groundwater. No other statutes appear to allow a county commissioners court to exercise authority to adopt water availability requirements via development ordinance or otherwise.

Given the very limited authority of a county to impose groundwater availability requirements on developments, the question presented in this opinion request is whether a county which is only *partially* designated as a PGMA may adopt a groundwater availability ordinance in the *entire* county, or if such a groundwater availability ordinance may only apply in the *portion of the county* designated as a PGMA. Although Texas Water Code, Section 35.019(a) provides that "the commissioners court of *a county in a priority groundwater management area* may adopt water availability requirements in an area where platting is required," (emphasis added) the statute is not crystal clear regarding the scope of authority if only a partial county is included in a PGMA.

An example of the context in which the question arises is in Travis County. Although only the southwestern portion of Travis County is included in the Hill Country PGMA,<sup>2</sup> a groundwater availability ordinance proposed by Travis County ("Travis County's Proposed Groundwater Ordinance")<sup>3</sup> appears to apply county-wide. For instance, the proposed definition of "Local Groundwater" to be added to Section 82.002, Travis County Code "means groundwater from an aquifer underlying Travis County." Additionally, the remainder of Travis County's Proposed Groundwater Ordinance imposes various new requirements on "Local Groundwater," which is not clearly limited to the area in southwestern Travis County that is subject to the Hill Country PGMA.

Further, although Section 82.212 of Travis County's Proposed Groundwater Ordinance appears to be authorized by Texas Local Government Code, Section 232.0032 regarding water availability certification, the proposal appears to go beyond the grant of authority in statute, or the TCEQ rules that implement the statute in 30 Texas Administrative Code, Chapter 230. In fact, newly proposed Section 82.212(a) expressly states that Travis County's Proposed Groundwater Ordinance includes requirements in *addition to* TCEQ rules. Unless Travis County is relying on authority conferred under Texas Water Code, Section 35.019 relating to groundwater availability ordinances in PGMA areas, it does not appear that Travis County has a clear legal basis to adopt an ordinance that goes beyond Texas Local Government Code, Section 232.0032.

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<sup>2</sup> See attached Exhibit 1; also found at [http://www.tceq.texas.gov/assets/public/permitting/watersupply/groundwater/maps/pgma\\_areas.pdf](http://www.tceq.texas.gov/assets/public/permitting/watersupply/groundwater/maps/pgma_areas.pdf)

<sup>3</sup> See attached Exhibit 2.

Thus, unless Texas Water Code, Section 35.019 allows a county which is only partially covered by a PGMA to enact a groundwater availability ordinance in areas of the county outside of the PGMA, it appears that Travis County would be exceeding its statutory authority if Travis County's Proposed Groundwater Ordinance is enacted. Likewise, according to Travis County, several other counties appear to have undergone or appear to be considering some enactment of groundwater ordinances although the legal authority to do is questionable.<sup>4</sup>

Furthermore, where TCEQ has already begun the process by which a groundwater district would be created in the portion of Travis County that is covered by the Hill Country PGMA, it is not clear whether Travis County is precluded from proceeding with Travis County's Proposed Groundwater Ordinance, either based on law or based on equitable grounds. If Travis County adopts a groundwater management ordinance that is later usurped by groundwater district rules and regulations, landowners could be disadvantaged during the period of time when Travis County's ordinance is in effect.

Assuming that a groundwater management ordinance is properly and legally adopted under Texas Water Code, Section 35.019 in an area covered by a PGMA, but the PGMA process is successful and a groundwater district is created, it seems logical that rules and regulations of the groundwater district would trump the ordinance. Otherwise, territory that was previously subject to a PGMA over which a county enacted a groundwater management ordinance would be subject to double-regulation by both the county and the groundwater district. Issues may also arise if the county ordinance and groundwater district rules are inconsistent. Finally, as previously mentioned, Texas Water Code, Section 36.0015 provides that groundwater conservation districts are the preferred method of groundwater management rather than county regulation of the same. In the context of Travis County's Proposed Groundwater Ordinance, TCEQ has already begun the hearing process regarding establishment of a groundwater district in southwestern Travis County.<sup>5</sup> If Travis County's Proposed Groundwater Ordinance is enacted, and in the very near future the PGMA process is successful and a groundwater district covers southwestern Travis County, a conflict of laws issue could arise and place the landowners in southwestern Travis County in an untenable position with regard to double groundwater regulation.

Lastly, Senate Bill 332 which was passed by the 82<sup>nd</sup> Texas Legislature and is effective on September 1, 2011 codifies and clarifies in newly enacted Texas Water Code, Section 36.002 a landowner's ownership of and right to produce groundwater, qualified only by groundwater

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<sup>4</sup> See also, [http://www.co.travis.tx.us/tmr/groundwater\\_availability/committee\\_meetings.asp#110411](http://www.co.travis.tx.us/tmr/groundwater_availability/committee_meetings.asp#110411). Specifically, meeting materials for the April 11, 2011 meeting include PDFs of different ordinances for Bandera, Comal, Gillespie, Hays, Kerr, and Kendall counties.

<sup>5</sup> See *Groundwater Conservation District Creation Recommendation for the Hill Country Priority Groundwater Management Area: Travis and Comal Counties*, State Office of Administrative Hearings Docket No. 582-10-5643.

district regulations. Although Senate Bill 332 expressly states the types of regulatory measures that a groundwater district, the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District may exercise in relation to a landowner's vested groundwater rights, no exception is made that would allow a county commissioners court to enact a groundwater management ordinance. Thus, in light of the new law that has become effective less than six short weeks ago, it is important to determine whether the new statute relating to groundwater rights that is codified in Texas Water Code, Section 36.002 precludes or limits the authority of a county commissioners court. Finally, as previously mentioned, Texas Water Code, Section 36.0015 provides that groundwater conservation districts are the preferred method of groundwater management rather than county regulation of the same, which is consistent with the provisions of Senate Bill 332.

Questions presented:

Accordingly, I request your interpretation and guidance concerning the meaning and applicability of Texas Water Code, Section 35.019; Texas Local Government Code, Section 232.0032;

Specifically, I seek guidance on the following questions:

- 1) Whether a county commissioners court may enact a groundwater management ordinance under Texas Water Code, Section 35.019 or Texas Local Government Code, Section 232.0032 applicable to the whole county? Particularly,
  - a. Whether a county-wide groundwater management ordinance would also apply to areas within the county that have not been designated as a PGMA created under Texas Water Code, Chapter 35?
  - b. Whether a county commissioners court may also enact water availability requirements with respect to surface water, in addition to groundwater?
- 2) Whether a county commissioners court may enact a groundwater management ordinance pursuant to Texas Water Code, Section 35.019 after TCEQ has initiated a process to create a groundwater district pursuant to Texas Water Code, Sections 35.008-35.009?
- 3) Whether a groundwater management ordinance adopted by a county commissioners court pursuant to Texas Water Code, Section 35.019 continues to be a valid ordinance if a groundwater district is created to cover the same territory to which the ordinance applies, assuming that the ordinance was valid when it was created?

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- 4) Whether a county commissioners court may enact a groundwater management ordinance that unduly restricts the sale and/or use of a landowners vested property rights in groundwater, as recognized in Texas Water Code, Section 36.002?

Thank you for your time and attention to this matter. Please let me know if I can provide any additional information or further assistance.

Very truly yours,

A handwritten signature in black ink that reads "Allan B. Ritter". The signature is written in a cursive, flowing style.

Allan B. Ritter, Chair  
House Committee on Natural Resources

cc: The Honorable Troy Fraser, Texas Senate  
The Honorable Kirk Watson, Texas Senate  
The Honorable Paul Workman, Texas House of Representatives  
The Honorable Doug Miller, Texas House of Representatives  
The Honorable Sam Biscoe, Travis County Judge