

UW Brazos Valley Farm, LLC
7670 Woodway Drive, Suite 200
Houston, Texas 77063

August 1, 2024

Alan Day
112 West 3rd Street
Hearne, Texas 77859

Re: UW Brazos Valley Farm LLC (“UW BVF”) comments on Proposed Amendments to Brazos Valley GCD (“BVGCD” or “District”) Rules for August 8, 2024 Hearing

Mr. Day,

UW BVF appreciates the opportunity to provide comments on the proposed amendments to the District’s rules in advance of the August 8, 2024 hearing. We understand that the impetus for these amendments is a concern about the eligibility of certain BVGCD directors and any corresponding impact on the Board’s quorum in certain actions. We appreciate the District’s diligence in complying with these procedures and this effort to adhere to a high standard of governance. The District’s proposed amendment to Rule 8.3(j) provides an additional layer of procedural certainty beyond the *de facto* officer doctrine¹ and is a well-considered and appropriate ratification² that reinforces confidence in District actions.

For clarification purposes, UW BVF offers the two following minor additions for the District’s consideration.

[Pursuant to Section 36.114\(b\) of the Texas Water Code, the District by rule shall determine whether a hearing on a permit or permit amendment application is required.](#)
[Pursuant to Section 36.114\(c\) of the Texas Water Code, the Board can by rule delegate to the General Manager the authority to act on applications for which a hearing is not required.](#)

[The General Manager is, therefore, authorized to grant and issue the following administratively complete permit applications and permit amendment applications](#)

¹ The acts of a public officer exercising his official duties in good faith are considered valid “despite the invalidity of his appointment,” including circumstances where “the officer was not eligible.” *Rivera v. City of Laredo*, 948 S.W.2d 787, 794 (Tex. App.—San Antonio 1997, writ denied); Op. Tex. Att’y Gen. No. DM-269 (1993) (*de facto* doctrine “validates acts of persons exercising official duties in good faith although they did not properly hold office as a matter of law”). Where a director acts “under color of a known election or appointment” that is “void because the officer was not eligible,” their official acts “would have the same legal effect” as if that director was eligible. See *Forwood v. City of Taylor*, 208 S.W.2d 670, 673 (Tex. App.—Austin 1948), aff’d, 147 Tex. 161, 214 S.W.2d 282 (1948); *Howard v. State*, 704 S.W.2d 575, 581 (Tex. App.—Beaumont 1986, no pet.). A *de facto* public official, such as an ineligible BVGCD director, can count towards any required quorum of the governing body. See, e.g., *Jackson v. Maypearl ISD*, 392 S.W.2d 892, 895 (Tex. App.—Waco 1965, no writ).

² Under Texas law, a later-dated rule can serve to ratify an action conducted without authorization if the means of authority used for ratification could have been exercised in the first instance. *Laird Hill Salt Water Disposal, Ltd. v. E. Tex. Salt Water Disposal, Inc.*, 351 S.W.3d 81, 89 (Tex. App.—Tyler 2011, pet. denied); *Bowers Steel, Inc. v. DeBrooke*, 557 S.W.2d 369, 371–72 (Tex. App.—San Antonio 1977, no writ); *Thermo Products Co. v. Chilton ISD*, 647 S.W.2d 726, 733 (Tex. App.—Waco 1983, writ ref’d n.r.e.) (applying ratification principles to governmental body).

without further notice, public hearing, nor action by the Board, and **the General Manager is deemed to have acted on and issued, and the Board hereby ratifies the General Manager's prior issuance of . . .**

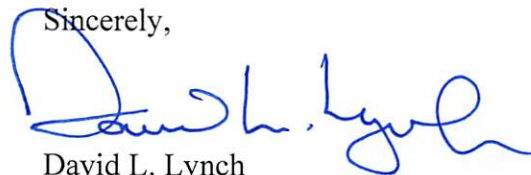
These changes reflect the District's authority under Chapter 36 to "determine whether a hearing on the permit or permit application is required" and, for applications for which a hearing is not required, to "delegate[] to the general manager the authority to act on the application." Tex. Water Code § 36.114(b)-(c). No provision of Chapter 36, BVGCD rules, or any other source of law requires the District to hold a hearing on permit applications for which no contested case hearing request was received. Through the proposed amendments to Rule 8.3(j), the District aims to (1) remove hearing requirements for permit and permit amendment applications that did not receive any written contested case hearing request and were properly noticed between January 1, 2021, and July 1, 2024, and (2) delegate approval authority for these applications to the General Manager. Because Chapter 36 grants BVGCD this authority, the District's proposed rule can ratify, as necessary, past actions on the types of permit and permit amendment applications at issue.

The first proposed addition in bold, double underline would clarify the second source of the District's authority for this rule, which authorizes the Board to delegate to the General Manager the power to act on permit applications for which a hearing is not required. The second proposed addition in bold, double underline would clarify that, for any instance where the Board's quorum involved the participation of the Board members of concern, the General Manager, not the Board, is deemed to have acted on the permit application at issue. This deemed action would reinforce the General Manager's action in issuing the permits, rather than leaving open consideration of the Board's action.

In addition to the above, we note that the District is also re-adopting the rulemaking dated September 13, 2023, and believe it would be appropriate to reset the dates listed in Rule 8.5(b)(3), which had relied on the date of the previous rulemaking. We request that the District amend the starting date in Rule 8.5(b)(3) to August 8, 2024, and adjust the subsequent dates accordingly. This change conforms to the date of the District's new rulemaking and would benefit all permittees.

UW BVF thanks BVGCD for the opportunity to submit comments on the District's proposed rules. We appreciate the District's commitment to procedural integrity as it carries out its important function of managing the area's groundwater resources. A representative of UW BVF will attend the August 8, 2024 hearing and will be available to answer questions or provide further detail on the foregoing comments, at the District's request.

Sincerely,



David L. Lynch
Manager

cc: Monique Norman, BVGCD Counsel
Paulina Williams, Baker Botts
Doug Caroom, Bickerstaff
Ed & Eddie McCarthy, McCarthy & McCarthy
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