CAUSE NO. 24-002626-CV-472

TEXAS A&M UNIVERSITY SYSTEM,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff	§	
	§	
Vs.	§	
	§	
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT AND ALAN DAY, GENERAL MANAGER OF BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	**BRAZOS COUNTY, TEXAS**
	§	
Defendants,	§	**472 JUDICIAL DISTRICT**

CITY OF BRYAN, CITY OF COLLEGE STATION AND BRAZOS COUNTY'S RESPONSE TO INTERVENORS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT

On November 8, 2024, Intervenors UW Brazos Valley Farm LLC, Cula d'Brazos LLC, RH20 LLC, L. Wiese Moore LLC, Clifford A. Skiles III, and James C. Brien (collectively, the "UW Intervenors") filed a traditional motion for summary judgment on Plaintiff Texas A&M University System's ("Plaintiff's") mandamus action, as failing as a matter of law, and in favor of UW Intervenors' declaratory judgment claim. Intervenors, the City of Bryan, the City of College Station, and Brazos County (collectively, the "Brazos County Entities") file this response to UW Intervenors' motion for summary judgment.

I. INTRODUCTION/SUMMARY

Given the short time frame to prepare a response (shortened further by the Thanksgiving holiday), the lack of a decision and supporting facts from the Brazos Valley Groundwater Conservation District ("BVGCD") that UW Intervenors disputed applications have not been approved by BVGCD, and the pending pleas to the jurisdiction, the Brazos County Entities' response the UW Intervenors' motion will be abbreviated. The Brazos County Entities believe

that the Court, and the parties, would benefit from knowing whether BVGCD has determined that the actions taken during the identified meetings of the BVGCD Board are invalid due to the lack of a quorum, and if so, the legal and factual bases for that determination before having to respond to UW Intervenors' motion for summary judgment on their claims that their permits are "valid.."

The Court should review the two components of the motion (Plaintiff's claims versus UW Intervenors' clams) separately. With regard to Plaintiff's petition for mandamus, UW Intervenors' theories regarding the "*de facto* officer" doctrine and quo warranto are simply inapplicable. Plaintiff is not collaterally attacking any action by the Brazos Valley Groundwater Conservation District ("BVGCD"). Plaintiff has not alleged that BVGCD's prior actions are invalid and such an allegation is not necessary for Plaintiff's claim. Instead, Plaintiff is simply asking that BVGCD follow its duly enacted rules and send Plaintiff's request for a contested case hearing to the State Office of Administrative Hearings ("SOAH") for evaluation. Whether Plaintiff's request for hearing conforms to BVGCD's rules is a question first for SOAH, where the legal theories and facts can be developed) and then for the BVGCD Board.

UW Intervenors' declaratory judgment claims, on the other hand, are not yet ripe for review as explained in the Brazos County Entities Plea to the Jurisdiction To date, BVGCD has neither unambiguously determined that its prior actions were invalid nor articulated any legal or factual basis for such a determination. Presumably, BVGCD will clear up the ambiguity and provide the basis for its determination after it holds a preliminary hearing and, pursuant to District Rule 14.3(c), determines whether "any person requesting the contested case hearing has standing to make that request and whether a justiciable issue related to the application has been raised." Until BVGCD makes that determination, the issues related to the validity of BVGCD's prior action on applications are not ripe.

If the Court addresses the substance of UW Intervenors' motion with regard to UW Intervenors' claims, the Court should deny the motion because UW Intervenors have failed to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Under Texas law, the *de facto* officer doctrine does not apply to public officers acting without any legal basis to hold the office, such as individuals claiming to hold office in direct contravention of statutory or constitutional provisions, such those individuals whose eligibility has been "vacated" under Texas Water Code § 36.051, or is in contravention of the dual-office holding provision of the Texas Constitution (Tex. Const. Art. XVI, Sec. 40). Additionally, even if the *de facto* officer doctrine applies to vacancies created by Texas Water Code § 36.051, UW Intervenors provide no allegation, or factual support, that Article XVI, Section. 40 was not the basis for BVGCD's conclusion that its directors were ineligible to serve and that a quorum did not exist (if in fact BVGCD has made such a conclusion). Without an allegation that Article XVI, Section 40 does not apply and supporting facts, UW Intervenors' motion for summary judgment fails.

II. ARGUMENT AND AUTHORITY

A. Plaintiff's Cause of Action

To succeed on its traditional motion for summary judgment on Plaintiff's cause of action, UW Intervenors must disprove at least one element of Plaintiff's cause of action as a matter of law. *Painter v. American Drilling I, Ltd*, 561 S.W3d 125, 130 (Tex. 2018)

In this case, Plaintiff seeks a writ of mandamus from the Court directing BVGCD to perform its mandatory duty (under Texas Water Code § 36.4051, and BVGCD Rules 14.2, 14.3, 14.35, 14.4, and 14.5) to schedule a preliminary hearing to hear Plaintiff's requests for contested case hearing and determine whether Plaintiff has standing to make its requests and whether justiciable issues related to the applications have been raised. BVGCD Rule 14.3(c). Additionally, Plaintiff seeks an injunction preventing the BVGCD General Manager from administratively

issuing permits based on the disputed permit applications prior to the BVGCD ruling on Plaintiff's hearing request. Plaintiff's suit is based on BVGCD's rules and Chapter 36 of the Texas Water Code. Plaintiff's lawsuit does not collaterally attack any decision of the BVGCD Board because the only BVGCD Board decision at issue is the Board's non-discretionary duty to refer Plaintiff's request to SOAH for a preliminary hearing.

UW Intervenors' motion for summary judgment argues that Plaintiff's cause of action should be denied because Plaintiff has not proven that the disputed permit applications are invalid based on UW Intervenors' theories regarding the "*de facto* officer" doctrine and quo warranto. These theories, however, are simply inapplicable to Plaintiff's suit for a writ of mandamus. Plaintiff is not collaterally attacking any action by BVGCD, or alleging that any of BVGCD's prior actions are invalid. The validity of invalidity of the disputed applications is not an element of Plaintiff's cause of action. Instead, Plaintiff is simply asking that BVGCD follow its duly enacted rules and send Plaintiff's request for a contested case hearing to the State Office of Administrative Hearings ("SOAH") for evaluation. Whether Plaintiff's request for hearing conforms to BVGCD's rules is a question first for SOAH, once BVGCD refers Plaintiff's request, and then for the BVGCD Board in its rulings after the preliminary hearing.

UW Intervenors' motion for summary judgment on Plaintiff's cause of action fails because UW Intervenors have not challenged whether BVGCD has a mandatory duty to schedule a preliminary hearing to hear a request for a contested case hearing. Tex. Water Code §§ 36.4051 and 36.416; BVGCD Rule 14.3(b) ("The board shall schedule a preliminary hearing to hear a request for contested case hearing filed in accordance with rules adopted under Section 36.416."). Additionally, UW Intervenors have not challenged the validity of BVGCD's rules authorizing Plaintiff to file a request for hearing.

UW Intervenors admit that BVGCD has a non-discretionary duty to send hearing requests to SOAH for a preliminary hearing. UW Intervenors argue, however, that this duty only extends to "timely" requests for hearing and that Plaintiff's request is not timely. To reach this conclusion, UW Intervenors assert that the "*de facto* officer" doctrine mandates that Plaintiff's hearing request is untimely under BVGCD Rule 8.3(j)(2)(c). The reality of the matter is, however, that BVGCD has not ruled on the timeliness of Plaintiff's hearing request because the ruling will come after the preliminary hearing.

B. UW Intervenors' Cause of Action

1. Legal Standard

To succeed on its traditional motion for summary judgment on its causes of action, UW Intervenor must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c), *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 865 (Tex. 2018). To meet this burden, UW Intervenors much conclusively prove all essential elements of their claim. *MMP, Ltd. V. Jones*, 710 S.W.59, 60 (Tex. 1986). Only if UW Intervenors establish their right to summary judgment as a matter of law, does the burden shift to the non-movants to present evidence that raises a genuine issue of material fact. *See Wal-Mart Stores, Inc v. Xerox State & Local Sols., Inc.* 663 S.W.3d 569, 583 (Tex. 2023). In deciding whether to grant UW Intervenors' motion for summary judgment on their claims, the Court should indulge every reasonable inference and resolve any doubt in the non-movant's favor. *Limestone Prods. Dist., Inc. v. McNamar*a, 71 S.W.3d 308, 311 (Tex. 2002).

2. UW Intervenors' claims are not ripe

UW Intervenors seek summary judgment on their requests for a declaratory judgment that their permits are "valid." As set out in the Brazos County Entities' Plea to the Jurisdiction, UW

Intervenors' claims are not ripe for judicial consideration because UW Intervenors have not given the BVGCD Board the opportunity to finally determine whether the Board's prior actions were invalid (and the legal and factual bases for such determination) and to determine whether Plaintiff's requests for contested case hearing are timely and valid. UW Intervenors' claims are barred, at least for now. The Court should not rule on UW Intervenors' claims until SOAH has been given the opportunity to develop the facts and the BVGCD Board to review the facts and apply the law regarding validity of the disputed applications and Plaintiff's request for hearing.

Hearing UW Intervenors' motion for summary judgment is particularly inappropriate at this time case because BVGCD has not clearly explained the basis for its decision. The parties do not clearly know which BVGCD directors are alleged to have caused the lack of quorum at the meetings where the disputed applications were considered, or what other offices they may have held and when they took such office. These are facts that need to be first disclosed by BVGCD in a ruling after a preliminary hearing held on Plaintiff's hearing request, and then explored through discovery and trial, if necessary, in this Court

3. As matter of law the *de facto* officer doctrine does not apply to BVGCD Board vacancies resulting from the application of Texas Water Code § 36.051(b)

Assuming that the Court disagrees with the Brazos County Entities and concludes that UW Intervenors' claims are ripe and that BVGCD determined that its prior actions are invalid because of the ineligibility of certain directors rendering prior BVGCD permit hearings invalid because of a lack of quorum, UW Intervenors' motion for summary judgment on the claims fail because the *de facto* officer doctrine does not apply to vacancies resulting from the application of Texas Water Code § 36.051 (a possible basis for director ineligibility), which requires that ineligible directors "vacate" their positions.

According to UW Intervenors, the permit hearings at which UW Intervenors' permit applications were considered by the BVGCD Board were valid meetings because the *de facto* officer doctrine applies as a matter of law and the presence of the potentially ineligible Directors has to be considered when determining quorum for the meeting. In reaching this conclusion, the UW Intervenors misapply the *de facto* officer doctrine and fail to conclusively establish that "the Directors were *de facto* officers acting under color of law."

As a matter of law, the *de facto* officer doctrine does not apply to BVGCD Board Members who are disqualified from serving pursuant to Texas Water Code 36.051(b).

> "A member of a governing body of another political subdivision is ***ineligible*** for appointment or election as a director. A director is ***disqualified and vacates*** the office of director if the director is appointed or elected as a member of the governing body of another political subdivision.
>
> Tex. Water Code § 36.051(b) (emphasis added).

The *de facto* officer doctrine, as described by UW Intervenors, is a common law doctrine designed to promote public policy by validating acts taken by individuals who have the appearance of holding the office under some "color of an appointment" but whose appointment to office suffers from some procedural defect. *Cox v. Houston & T.C. Ry. Co.*, 68 Tex. 226, 230, 4 S.W. 455, 457 (1887). The doctrine, however, does not extend to validate acts of a purported public officer who is not acting under color of an appointment because the appointment or continued holding of the office is expressly foreclosed by statute or constitutional provision. In other words, the common law doctrine does not prevail over clear statutory or constitutional language depriving the officer of appearance of validity – the Legislature's determination of public policy controls.

In *Irwin v. State*, 177 S.W.2d 970 (Tex.Crim.App.1944), the court refused to hold that city policemen who conducted searches while purporting to be deputy sheriffs were *de facto* deputies. The court concluded that policemen and deputy sheriffs hold "offices of emolument" within the

meaning of article XVI, section 40 of the Texas Constitution, which prohibits certain kinds of dual-officeholding, and that to call the policemen de facto deputies would "nullify, and would render without force or effect, the express provisions of Sec. 40 of Art. XVI.... This we are unwilling to do." *Irwin*, 177 S.W.2d at 974; *see also Pruitt v. Glen Rose Ind. Sch. Dist*., 126 Tex. 45, 49, 84 S.W.2d 1004, 1007 (Comm'n App. 1935); *Odem v. Sinton Indep. Sch. Dist.*, 234 S.W. 1090, 1092 (Tex. Comm'n App. 1921) (also holding that an officer disqualified from office pursuant to Article XVI, Sec. 40 of the Texas Constitution "could not hold or exercise both offices in either a de jure or de facto capacity.").

This same rationale has been applied to reject as a *de facto* officer, an individual who "held over" in an office in contravention of Article IV, Section 12 of the Texas Constitution, which provides that if the Texas Senate does not take action on a recess appointment, the appointment "is considered to be rejected by the Senate when the Senate session ends." Op. Tex. Att'y Gen. No. JM-423 (1986) (to apply the *de facto* officer doctrine "in this instance would negate part of article IV, section 12 through application of a common law doctrine."). The request in JM-423 was with regard to a member of the board of the State Dental Examiners. As stated by the Attorney General in his opinion, if the holdover member "was the decisive vote in a case, . . . the decision in that case would be subject to attack." *Id.* at 6.

Additionally, the *de facto* officer doctrine has not been extended to individuals purporting to act as public officers in clear contradiction to statutory provisions. *Faubion v. State,* 282 S.W. 597, 598 (Tex.Crim.App.1926) (notary public who did not qualify by taking oath and making bond within legally prescribed time not de facto officer, because when appointment became void "nothing that she did ... could in any manner resuscitate it. She acted without color of a valid appointment...."). The statutory provision in *Faubion* stated that "if the party fails to qualify . . .

within the limited time the appointment shall be ***void***." Article 6016, Texas Complete Statutes 1920 (emphasis added).

Similar reasoning has been used to determine that certain judges were not *de facto* judges when their claim to the office was "void" as opposed to merely "voidable."

> The rulings of a judge who lacks authority may be declared void or voidable depending on the underlying reason for their lack of authority. If a judge lacks the constitutional and statutory qualifications to be a judge, or if the judge is constitutionally or statutorily disqualified from hearing a case, then the underlying proceedings are deemed void. It is as if the proceedings never occurred—the actions of the judge are a nullity. However, if the reason for the lack of judicial authority is a violation of statutory procedure, then the underlying proceedings are deemed voidable.
>
> *In re State ex rel. Wice*, 668 S.W.3d 662, 672 n. 43 (Tex. Crim. App. 2023), *citing Davis v. State*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997).

The prohibition of dual office holding contained in Texas Water Code § 36.051(b) is clear – no member of another political subdivision is eligible for appointment to the BVGCD Board, and any Board member that is appointed or elected as a member of the governing body of another political subdivision *is* ***disqualified and vacates*** the office of director. This is self-implementing statutory disqualification language similar in force and effect as the language in Article IV, Section 12 of the Texas Constitution (appointment "rejected" at end of Senate session) and former Article 6012 (failure to timely qualify rendered appointment "void."). To apply the *de facto* officer doctrine to these provisions would negate the statutory provision through the application of a common law doctrine. Also, the defect in the qualification of directors under Section 36.051(b) is not a curable procedural error, such as failing to post a bond or take the oath of office. The Legislature clearly does not want members of other political subdivisions serving as directors on groundwater conservation boards. The Court should not second-guess the Legislature on this policy decision by allowing a common law doctrine to supersede the statute.

The Legislature, however, recognized the sound public policy of providing for certainty of groundwater district decisions that might be challenged after the fact. Chapter 36 of the Water Code contains an express validation provision. Tex. Water Code § 36.124 (validating acts after the passage of three years). Because the statute contains a validation or repose provision, there is no need for the Court to impose a different provision through application of the common law.

The cases cited by UW Intervenors support the Brazos County Entities' view that the *de facto* officer doctrine does not apply to officers whose "color of title" is negated by statutory or constitutional prohibitions. In the oldest Texas case cited by UW Intervenors, the Texas Supreme Court clearly distinguished between situations when the *de facto* officer doctrine might apply (election had been irregular, officer failed to take the oath of office, or the law under which the election later declared unconstitutional) versus situations when the doctrine would not apply (when there was a statute expressly depriving the individual of validity). *Cox v. Houston & T.C. Ry. Co.*, 68 Tex. 226, 230, 4 S.W. 455, 457 (1887).

The Court in *Cox* was presented with the question regarding the validity of a survey performed by the surveyor of Jack County who was holding himself out as the surveyor of Hardeman County in contradiction to statute. As noted by the Court in *Cox*, public acquiescence to the individual does not make the individual a *de facto* officer when such a position would be contrary to a statute because the public was "bound to know" the law. *Cox v. Houston & T.C. Ry. Co.*, 4 S.W. at 458. The statutory provision here, Texas Water Code § 36.051(b) expressly deprived those directors that had or took positions on the governing bodies of other political subdivisions of the "color of appointment."

The other cases cited by UW Intervenors do not question this holding of the Supreme Court. *Forwood v. City of Taylor*, 209 S.W.2d 434 (Tex. Civ. App. –Austin) *aff'd on other grounds*, 147

Tex. 161, 214 s.W.2d 282 (1948) (composition of commission not controlled by statute); *Vick v. City of Waco*, 614 S.W.2d 861, 863 (Tex. App. – Waco, writ ref'd n.r.e) (statutory provision disqualifying commissioners did not dictate that commissioner "vacate" position); *Orix Capital Markets, LLC v. Am. Realty Tr., Inc.* 356 S.W.3d 748, 754 (Tex. App. – Dallas 2011, pet. denied) (judge held to be a *de facto* judge because statutory qualification provision did not require resignation); *Jackson v. Maypearl Indep. Sch. Dist.*, 392 S.W.2d 892, 895 (Tex. App.—Waco 1965, no writ) (statute prohibiting appointment of related persons did not require that the officer "vacate" to position or declare the acts of the person wrongfully appointed to be void).

Based on the foregoing, UW Intervenors' motion for summary judgment based on the *de facto* officer doctrine fails because UW Intervenors have failed to establish that the doctrine applies to BVGCD Board vacancies resulting from the application of Texas Water Code § 36.051(b). UW Intervenors have failed to establish all essential elements of their claim that their disputed applications were validly approved.

4. UW Intervenors motion for summary judgment failed because they have not shown that the affected directors were disqualified under Texas Constitution Article XVI, Section 40

Even if the *de fact* officer doctrine applies to vacancies created by Texas Water Code § 36.051(b), which the Brazos County Entities assert is not supported by caselaw, UW Intervenors motion for summary judgment still fails because the vacancies could have been created by the dual office holding prohibition of Article XIV, Sec 40 of the Texas Constitution. Neither the Court nor the parties know for certain the basis for BVGCD's conclusion that the disputed permit applications were not validly approved, if in fact BVGCD has reached such a conclusion. To be able to prevail on its motion for summary judgment, therefore, UW Intervenors must negate any possible theory supporting a conclusion that the disputed permit applications were not validly

approved. UW Intervenors have the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment in the movant's favor as a matter of law. TEX. R. CIV. P.166a(a), (c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

As explained previously, the *de facto* officer doctrine does not apply to officers who disqualified from office pursuant to prohibition on dual office holding set out in Article XVI, Section 40 of the Texas Constitution because when the Constitution prohibits the holding and exercise of two such offices, a person "cannot hold both offices in either a de jure or de facto capacity." *Pruitt v. Glen Rose Indep. Sch. Dist. No. 1*, 84 S.W.2d at 1007; *Odem v. Sinton Indep. Sch. Dist.*, 234 S.W. at 1092. Under Article XVI, Section.40, "[n]o person shall hold or exercise at the same time, more than one civil office of emolument." UW Intervenors' motion for summary judgment contains no allegation or evidence to support a conclusion that the office of a member of the board of directors of BVGCD and the other office causing the disqualification of a director are not "civil offices of emolument." Without an allegation and some evidence to support this conclusion, UW Intervenors have not met their burden to show that no genuine issue of material fact exists, and the Court must deny their motion for summary judgment on the basis of the *de facto* officer doctrine.

III. CONCLUSION AND PRAYER

UW Intervenors' motion for summary judgment on its claim is not ready for consideration by this Court. Because BVGCD has not disclosed the legal and factual bases for its conclusion that actions taken a prior BVGCD Board meetings were not valid because of a lack of a quorum (if the BVGCD Board has made such a conclusion), neither the parties nor the Court can know the appropriate legal standard and necessary supporting facts that apply to the claim. Once the bases for BVGCD's conclusion are revealed, and the parties are provided an opportunity for discovery on the facts, then motions for summary may be appropriate.

UW Intervenors reliance on the *de facto* officer doctrine to support its motion is misplaced. As a matter of law, the doctrine does not apply to Board vacancies created by application of Texas Water Code § 36.051(b) or Article XVI, Section 40 of the Texas Constitution, and UW Intervenors have not alleged facts that would negate the application of either of these provisions as a basis for a conclusion that subject meetings did not occur because of a lack of quorum.

For the reasons set forth in this response, the Brazos County Entities respectfully ask the Court to deny Intervenors' Motion for Summary Judgment in full and grant the Brazos County Entities such other relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic service system on this the 27th day of November 2024:

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