Jackson Walker LLP

Lynn R. Sherman
(512) 236-2380 (Direct Dial)
(512) 236-2002 (Direct Fax)
lsherman@jw.com

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VIA EMAIL norman.law@earthlink.net

Monique Norman
Brazos Valley Groundwater Conservation District
112 West 3rd Street
Hearne, Texas 77859

Dear Ms. Norman:

The Texas A&M University System (TAMUS) provides this letter to lay out its position on the further handling of its September 5, 2024, request for contested case hearings at the State Office of Administrative Hearings (SOAH). Considering the representations the Brazos Valley Groundwater Conservation District (District) made in its pleading and argument before Judge Wise in the mandamus action, it appeared to be clear that the District would promptly implement TAMUS's hearing request following the Court's ruling that denied the motion for summary judgment filed by UW Brazos Valley Farm LLC and its Landowners. At the moment, however, it is unclear that the District's board intends to honor those representations.

With the Court's rejection of the *de facto* officer doctrine, there is no option other than to process TAMUS's hearing request in accordance with the District's rules that were in place on September 5, 2024. Ratification is not an option. Texas law is clear: as a governmental entity, the District cannot retroactively approve a previous action that violated the Texas Open Meetings Act.[1] A governmental entity cannot ratify what it did not lawfully do in the first place.[2] It can only meet and authorize anew those actions that it previously and improperly attempted to authorize at an invalid meeting.[3]

As a result, the District must post notice and meet again to consider the permit applications with a duly constituted quorum of the board. It is clear that the District understands this. In its

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1 *Lower Colorado River Authority v. San Marcos*, 523 S.W.2d 641, 646–47 (Tex. 1975); *Seale v. Jasper Hospital District*, 1997 WL 606857, at *3 (Tex. App.—Beaumont 1997, pet. denied).

2 *Porth v. Morgan*, 622 S.W.2d 470, 476 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

3 *Seale*, 1997 WL 606857, at *3; see also *Mayes v. City of De Leon*, 922 S.W.2d 200, 204 (Tex. App.—Eastland 1996, writ denied) ("[T]he governing body may of course vote [at a proper meeting] to take the same action as it originally intended to do at the prior meeting. However, that action may not be given retroactive effect.").

written response to the Motion for Summary Judgment filed by UW Brazos Valley Farm LLC and its Landowners in the mandamus action, the District was unequivocal in its statement that, at the time TAMUS submitted its September 5th request for contested case hearings at SOAH, the District believed that it would have to *reschedule* hearings on the applications that were "affected by Director ineligibility" under the Texas Open Meetings Act[4] and are the subject of TAMUS's contested case hearing request. In toto, the District plead as follows:[5]

> *After* adoption of Rule 8.3(j), no hearings were to be held on the types of applications such as the UW Landowners' and, consequently, Texas A&M could not have timely filed a protest "before the permit hearing," in accordance with Rule 14.3.5(a). But *before* Rule 8.3(j) was adopted and took effect, the District believed that it would have had to reschedule hearings on applications affected by Director ineligibility and process those applications in accordance with the District's permitting rules. With that in mind, Texas A&M does appear to have timely satisfied Rule 14.3.5(a) by filing its request for contested case hearing "before the permit hearing" [that would have been rescheduled and held under the then-existing rules]. Consequently, the UW Landowners' 33 permit applications do not satisfy the requirement in Rule 8.3(j)(2)(c) that "the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under [R]ule 14.3.5(a)."

The District's pleading also represented to the Court that, in the event the Court rejected the request of UW Brazos Valley Farm LLC and its Landowners to apply the *de facto* officer doctrine, the District would proceed to process the pending applications. To that end, the pleading expressly stated:[6]

> If the Court agrees with the UW Landowners' authorities and rules that it is appropriate to apply the *de facto* officer doctrine in this circumstance, the District will adhere to the judgment to observe that the UW Landowners' 33 permits are validated. Alternatively, if the Court agrees with Texas A&M's position and determines that the de facto officer doctrine does not apply in this circumstance, the District will not apply this common law remedy and will, instead, process the 33 applications in accordance with the District's permitting rules. Recognizing that there is a disagreement about the interpretation of Rule 8.3(j)(2)(c), the District will also observe the Court's ruling as to whether Texas A&M has a right to a hearing on the 33 permit applications.

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[4] Defendants Brazos Valley Groundwater Conservation District and Its General Manager's Joint Response to Intervenor–Defendants' Motion for Summary Judgment at ¶ 6, *Texas A&M University System v. Brazos Valley Groundwater Conservation District*, No. 24-002626-CV-472, 472nd Judicial District (petition filed on Sept. 12, 2024).

[5] *Id* (citations omitted)(emphasis added).

[6] *Id*. at ¶ 9 (emphasis added).

The Court denied the Motion for Summary Judgment filed by UW Brazos Valley Farm LLC and its Landowners and, consistent with the District's representations to the Court, it is TAMUS's expectation that its request for contested case proceedings will be honored and implemented by the District.

Relative to its September 5th request, it is also TAMUS's expectation that the District will contract with SOAH for the preliminary hearing and further contested case proceedings. We are aware that the District has previously taken the position that the District's board has discretion over whether to conduct the hearings itself or to refer the matter to SOAH. However, this position is not supported by law. In fact, it directly contradicts the Water Code.

Section 36.4051(b) of the Water Code and District Rule 14.3(b) explicitly provide that the "preliminary hearing may be conducted by (1) a quorum of the board; (2) an individual to whom the board has delegated in writing the responsibility to preside as a hearing examiner over the hearing or matters related to the hearing; or (3) the State Office of Administrative Hearings under Section 36.416."[7] Section 36.416, in turn, states: "[i]f requested by the applicant or other party to a contested case, a district **shall contract** with the State Office of Administrative Hearings to conduct the hearing."[8] In isolation the clause "party to a contested case" could conceivably connote that the right to a SOAH referral arises after the District makes its preliminary determinations on standing and justiciability. However, that interpretation cannot be reconciled with the express language in Section 36.4051 and District Rule 14.3 that identifies SOAH as an appropriate forum for the preliminary hearing and invokes the rights and procedures—including the mandate to implement a SOAH referral upon request—set forth in Section 36.416.

Additionally, Section 36.402 provides that Subchapter M (that is, Sections 36.401 through 36.418 of the Water Code) applies to the notice and hearing process used by the District for permit applications "except as provided by Section 36.416[.]" Since Section 36.416 mandates that a referral to SOAH be implemented upon request, a referral to SOAH must be implemented despite any contrary provision in Subchapter M.

Reading the rule and statutory provisions in harmony and giving effect to all of the language as required under principles of statutory construction,[9] the only reasonable interpretation is that a referral to SOAH for the preliminary hearing and further contested case proceedings is required if requested by the applicant or another party. There is no discretion afforded to the District or its board to do otherwise.

Notably, UW Brazos Valley Farm LLC and its Landowners also appear to agree that this is the correct procedural path. In the June 27, 2024 letter sent to the District by UW Brazos Valley Farm LLC and its Landowners, they also explain that when a party requests referral to SOAH that referral is "mandatory" and "encompasses the entirety of the contested case hearing, which begins

[7] Tex. Water Code § 36.4051(b).

[8] Tex. Water Code § 36.416(b) (emphasis added).

[9] *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021); Tex. Gov't Code § 311.021(2).

with the preliminary hearing."[10] UW Brazos Valley Farm LLC and its Landowners also point out that referrals to SOAH allow a third-party professional ALJ to effectively apply his or her procedures and professional expertise to conduct the preliminary hearing and further contested case proceedings.[11] TAMUS is in agreement with UW Brazos Valley Farm LLC and its Landowners on this point, as well.

As a result, the correct and best path forward for the District is to refer the permit applications addressed in TAMUS's September 5th request to SOAH for contested case hearings, including the preliminary hearing. Following the ALJ's issuance of a PFD, the District's board will then make its decision on standing and justiciable controversy as required by Water Code § 36.4051(c).

TAMUS is hopeful the District will move swiftly to contract with SOAH for the preliminary hearing and all further contested case proceedings. TAMUS stands ready to revert to the Court for such relief in the pending mandamus action but is hopeful that the time and expense associated with that can be avoided by all parties and the permit applications will move forward on the correct procedural path without further delay.

Sincerely,

Lynn Sherman

Lynn Sherman

[10] Letter from UW Brazos Valley Farm LLC and its Landowners to the District's General Manager (Jun. 27, 2024) at 1–2.

[11] See *id.* at 1, 3.