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Opinion Committee

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The Honorable John Cornyn
Attorney General – State of Texas
Attn: Opinion Committee Chairperson
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-40967-99
I.D. # 40967

RE:

Dear Attorney General Cornyn:

This is a request for an opinion interpreting Tex. Tax Code Ann. §6.412 as amended by H.B. 79, 76th Leg., R.S. (1999) which became effective June 19, 1999. The specific questions are as follows:

1. Whether current members of appraisal review boards appointed prior to the effective date of June 19, 1999, are made ineligible to continue to serve if they have previously served all or part of three consecutive terms on the appraisal review board?
2. Whether a current member of an appraisal review board appointed prior to the effective date of June 19, 1999, is made ineligible to continue to serve if the member appeared before the board for compensation prior to the effective date?
3. Whether the presence of a legal advisor to the appraisal review board at board meetings for the purpose of providing legal counsel for compensation to the board constitutes an appearance before the board for

compensation? If so, whether a current member of an appraisal review board appointed prior to the effective date of June 19, 1999, is made ineligible to serve if the member provided legal counsel for compensation at board meeting prior to the effective date?

4. Assuming any members of the appraisal review board were made ineligible to continue to serve by H.B.79, what is the effect on the actions taken by the board after June 19, 1999? May such board members continue to act until replaced by a qualified successor?

Background

H.B. 79 changed prior law by declaring certain classes of person to be ineligible to serve on an appraisal review board in counties with a population in excess of 100,000. This opinion request concerns current board members appointed prior to the effective date of the bill who arguably fall into the following two new grounds for ineligibility:

- A. persons who have served all or part of three previous terms as a board member or auxiliary board member on the appraisal review board;
- B. persons who have ever appeared before the appraisal review board for compensation.

This opinion request in part addresses a potentially large number of appraisal review board members throughout the state who, in accordance with prior law, were appointed and sitting as members of the appraisal review board even though they had served all or part of three previous terms.¹ This opinion request also concerns a current member of the appraisal review board who in the past had served as counsel to the appraisal review board under contract for compensation and who attended appraisal review board meetings at which he rendered legal advice.²

Legal Analysis

A. Presumption of Eligibility

Any constitutional or statutory provision which restricts the right to hold public office should be strictly construed against ineligibility. *Dawkins v. Meyer*, 825 S.W.2d 444 (Tex. 1992); *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964); *Sears v. Bayoud*, 786

¹ Prior law stated that a person who had served all or part of three terms in a county with a population of 300,000 or less could be re-appointed as long as that person had not served three previous consecutive terms. In other words, a person could serve three terms, then sit out for a period of time, and then be re-appointed for another three terms. Tex. Tax Code Ann. §6.41(c) (Vernon Supp. 1999).

² The appraisal review board may employ legal counsel. Tex. Tax Code Ann. §6.43.

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S.W.2d 248 (Tex. 1990); *Brown v. Meyer*, 787 S.W.2d 42 (Tex. 1990). See also, *In re Katy Saenz*, 990 S.W.2d 461 (Tex. App.-Corpus Christi, 1999, no writ)(legislative attempts to shorten the term of office of a sitting public official will be strictly construed against shortening a term and require clear and convincing language to accomplish that end).

B. Retroactivity

According to the Code Construction Act, “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” Gov’t Code § 311.022. TEX.CONST. art. 1 § 16. See also: *Houston Indep. Sch. Dist. v. Houston Chronicle Publishing Co.*, 798 S.W.2d 580, 585 (Tex.App.—Houston [1st Dist.] 1990, writ denied); *State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707, 708-09 (1943); *Merchants Fast Motor Lines, Inc. v. Railroad Comm’n of Texas*, 573 S.W.2d 502, 504 (Tex.1978). Amendments are also presumed not to apply retroactively. See *Amplifone Corp. v. Cameron County*, 577 S.W.2d 567, 570 (Tex.Civ.App.—Corpus Christi 1979, no writ). Doubts as to retroactivity are resolved against the retroactive application of a statute. *Ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981); See also: *Lubbock Independent School Dist. v. Bradley*, 579 S.W.2d 78, (Civ.App.—1979, writ ref’d n.r.e.). In enacting the amended section 6.412 the legislature did not provide that it would operate retrospectively. Therefore the amendment must be construed to apply prospectively. See, Op. Tex. Att’y Gen. No. DM-493 (1998)(amendment providing that water district director is ineligible for office if he becomes a candidate for another office, applies only to a director who becomes a candidate after the effective date of the amendment).

Section 6.412(d)(1)(A) provides that a person is ineligible to serve if the person “has served for all or part of three previous terms as a board member or auxiliary board member on the appraisal review board”. To avoid a retroactive application of this provision the code should be construed to apply only to persons who serve all or part of three previous terms after the effective date of the amendment. In other words, a person will be considered ineligible for appointment to the board only if the person has served all or part of three previous terms after June 19, 1999.

Section 6.412(d)(3) provides that a person is ineligible to serve if the person “has ever appeared before the appraisal review board for compensation”. To avoid a retroactive application of this provision the code should be construed to apply only to persons who appear before the board for compensation after the effective date of the amendment.

C. Appearance Before the Board for Compensation

According to the Code Construction Act words and phrases shall be read in context and construed according to the rules of grammar and common usage while

words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Tex. Gov't Code Ann. §311.011. According to Black's Law Dictionary, "appear" means to be properly before a court and "appearance" means a coming into court as a party to a suit, either in person or by attorney, whether as plaintiff or defendant. Generally, the tax code provides for protests and review by the appraisal review board by both the taxing units and taxpayers. Tex. Tax Code Ann. §§41.01 - 41.70. Presumably appearances before the board as used in the amendment refers to appearances by the taxing units and taxpayers and their counsel. Generally, only the parties to the protest and review and their counsel are considered to make "appearances" before the review board. Staff that provide support to the board itself and who are not otherwise interested in the outcome of the board proceeding are not considered to make an "appearance" even though they are present. An attorney who attends the board proceedings in an advisory capacity is therefore not making an "appearance" before the board.

D. Holdover Status


Generally, when a public officer is no longer eligible to serve, that officer continues in office by virtue of article XVI, section 17 of the Texas Constitution, the holdover provision, which provides that "all officers of the State shall continue to perform their offices until their successors shall be duly qualified." There is no question that members of the appraisal review board hold a public office. Op. Tex. Att'y Gen. Letter Opinion No. 97-070 (1997). Accordingly, even if a current member of an appraisal review board was made ineligible to continue to serve the member would have the authority to continue to act as a member until a successor was duly qualified. Op. Tex. Att'y. Gen. No. JM-874 (1988)(acts of commissioner were valid and not subject to collateral attack even though commissioner ineligible when appointed.)

SUMMARY

The amendments to Tax Code §6.412 are to be applied prospectively only. Therefore, any current member of an appraisal review board is not made ineligible by the amendments unless the acts giving rise to the ineligibility arise after the effective date of the amendment, June 19, 1999. An attorney who attends appraisal review board meetings and provides legal advice to the board under contract is not making an appearance before the board and therefore is not made ineligible to serve on the appraisal review board. Any acts performed by a member who is made ineligible by the amendments are nonetheless valid and binding pursuant to the constitutional holdover provisions which authorizes such a member to continue to serve as a member of the board until his or her successor is duly appointed.

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Very truly yours,


for José R. Rodríguez
El Paso County Attorney

JRR/tlg

xc: Cora Viescas, Chief Appraiser - El Paso Central Appraisal District

AN ACT

1-1 relating to eligibility to serve on an appraisal review board.
 1-2

1-3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-4 SECTION 1. Subsection (c), Section 6.41, Tax Code, is
 1-5 amended to read as follows:

1-6 (c) To be eligible to serve on the board, an individual must
 1-7 be a resident of the district and must have resided in the district
 1-8 for at least two years. ~~[A member of the appraisal district board~~
 1-9 ~~of directors or an officer or employee of the comptroller, the~~
 1-10 ~~appraisal office, or a taxing unit is ineligible to serve on the~~
 1-11 ~~board. In an appraisal district established for a county having a~~
 1-12 ~~population of more than 300,000, an individual who has served for~~
 1-13 ~~all or part of three previous terms as a board member or auxiliary~~
 1-14 ~~board member on the appraisal review board, is a former member of~~
 1-15 ~~the governing body or an officer or employee of a taxing unit, or~~
 1-16 ~~is a former director, officer, or employee of the appraisal~~
 1-17 ~~district is ineligible to serve on the appraisal review board. In~~
 1-18 ~~an appraisal district established for any other county, an~~
 1-19 ~~individual who has served for all or part of three consecutive~~
 1-20 ~~terms as a board member or auxiliary board member on the appraisal~~
 1-21 ~~review board is ineligible to serve on the appraisal review board~~
 1-22 ~~during a term that begins on the next January 1 following the third~~
 1-23 ~~of those consecutive terms.]~~

1-24 SECTION 2. Section 6.412, Tax Code, is amended by amending
 2-1 Subsection (c) and adding Subsections (d) and (e) to read as
 2-2 follows:

2-3 (c) A person is ineligible to serve on the appraisal review
 2-4 board if the person is a member of the board of directors, an
 2-5 officer, or employee of the appraisal district, an employee of the
 2-6 comptroller, or a member of the governing body, officer, or
 2-7 employee of a taxing unit.

2-8 (d) A person is ineligible to serve on the appraisal review
 2-9 board of an appraisal district established for a county having a
 2-10 population of more than 100,000:

2-11 (1) if the person [is]:

2-12 (A) has served for all or part of three previous
 2-13 terms as a board member or auxiliary board member on the appraisal
 2-14 review board; or

2-15 (B) is [+1] a former member of the board of
 2-16 directors, officer, or employee of the appraisal district [or a
 2-17 taxing unit for which the appraisal district appraises property];
 2-18 or

2-19 (2) if the person served as [a former member of the
 2-20 board of directors of the appraisal district, or]

2-21 [+3] a [former] member of the governing body or
 2-22 officer of a taxing unit for which the appraisal district appraises
 2-23 property, until the fourth anniversary of the date the person
 2-24 ceased to be a member or officer; or

2-25 (3) if the person has ever appeared before the
 2-26 appraisal review board for compensation.

2-27 (e) In an appraisal district established for a county having
 3-1 a population of 100,000 or less, a person who has served for all or
 3-2 part of three consecutive terms as a board member or auxiliary
 3-3 board member on the appraisal review board is ineligible to serve
 3-4 on the appraisal review board during a term that begins on the next
 3-5 January 1 following the third of those consecutive terms.

3-6 SECTION 3. The importance of this legislation and the
 3-7 crowded condition of the calendars in both houses create an
 3-8 emergency and an imperative public necessity that the
 3-9 constitutional rule requiring bills to be read on three several
 3-10 days in each house be suspended, and this rule is hereby suspended,
 3-11 and that this Act take effect and be in force from and after its

3-12 passage, and it is so enacted.

President of the Senate

Speaker of the House

I certify that H.B. No. 79 was passed by the House on April 23, 1999, by the following vote: Yeas 141, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 79 on May 17, 1999, by the following vote: Yeas 141, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 79 was passed by the Senate, with amendments, on May 13, 1999, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

APPROVED:

Date

Governor