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February 17, 2000

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attn.: Opinions Committee

Re: Request for Opinion

Dear General Cornyn:

On behalf of, and with the approval of, the Texas Agricultural Finance Authority Board of Directors, I hereby request an opinion from your office regarding the issue presented below.

Question

Whether a statute, or more specifically, §58.014(b) of the TEX. AGRIC. CODE ANN., must be applied literally where the resulting application would be illogical or in contrast to what the Legislature apparently intended, and where it appears that the Texas Legislature (Legislature) inadvertently overlooked that subsection in drafting or not amending the statute to make its application more reasonable and/or consistent with common practice.

Background

The Texas Agricultural Finance Authority ("TAFA") is a public authority within the Texas Department of Agriculture ("the Department") established under the TEX. AGRIC. CODE ANN. ("the Code"), Chapter 58, to provide financial assistance to certain agricultural businesses that are, or propose to be engaged in the production, processing, marketing or exporting of Texas agricultural products.

Chapter 58 of the Code is entitled "Agricultural Finance Authority." The Code, §58.012 provides for a nine-member Board of Directors ("Board") for TAFA, and §58.014(b) defines a quorum as a "majority of the voting membership of the board." A majority of a nine-member board would be five members. However, §58.014(b) proceeds to allow the Board to act by adopting resolutions with a vote of only three directors. As a result, it is possible for a resolution to be adopted or enacted and Board action taken by approval of only one-third of the TAFA Board, clearly not a quorum (or majority) of the entire Board.

The original language of §58.014(b) was enacted in 1987. At that time, the Board of Directors was made up of six directors. The number of members on the Board was increased in 1995 to nine. At that time, §58.014 was also amended by the adding of new subsections (c) and (d), both unrelated to the issue at hand; however, subsection (b) was not amended to correspond to the addition of new Board members.

It appears that there was a Legislative oversight in not amending §58.014(b) in 1995, thereby allowing a resolution to continue to be adopted and Board action to be taken by approval of only three directors of a nine-member Board. Even if there are some situations where the vote of three directors would reasonably approve a resolution, such as when only a quorum (five) members are present at a Board meeting and a majority of that quorum should rule, more often than not, more than five members are present and three votes would not be a majority vote, as the Board believes was intended.

Basic Supporting Research

Staff members of the Department's Office of General Counsel have researched this question but have not been able to find any cases dealing with statutory construction in situations where the Legislature has made a possible mistake or oversight. Cases were found that present issues similar but not identical to our fact pattern. They may be divided into two groups: a large number of cases ruled that statutes were not to be followed literally if the resulting application would be absurd, while a smaller number of cases ruled that statutes must be followed literally, since courts were not to assume the role of the Legislature by rewriting or correcting statutes or legislative action.

In addition to case law, the Department's research also found some general statutory provisions relating to code construction, which are at odds with the language of §58.014.

A. Courts in the following cases held that statutes were not to be followed literally if the resulting situation would be absurd.

The case of *Texas Dept. of Public Safety v. Thomas* ruled that courts should not apply a statute literally when the application of the statute's plain meaning would lead to an absurd result that the Legislature could not possibly have intended. Instead, the court ruled, other textual sources may be considered. *Texas Dept. of Public Safety v. Thomas*, 985 S.W.2d 567, 570 (Tex. App.-Waco 1998, no writ). Similarly, *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991), ruled that in situations where a literal application of a statute would lead to absurd consequences, a non-literal application of

that statute would not intrude upon the lawmaking powers of the Legislature, but instead would "demonstrate respect for the Legislature by assuming that it would not act in an absurd way." Finally, the case of *State v. Melton* held that statutes must be construed to give effect to the intent and purpose of the Legislature, but, where a strict adherence to the statute would lead to absurdity or to contradictory provisions, the court would have to ascertain the statute's true meaning. *State v. Melton*, 970 S.W.2d 146, 151 (Tex. App.-Austin 1998, rehearing overruled, and review granted).

Other cases that contain similar reasoning include the following: *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 83 S.W.2d 929 (1935); *Petroleum Casualty Co. v. Williams*, 15 S.W.2d 553 (Tex. Comm'n App. 1929, holding approved); *Stanul v. State*, 870 S.W.2d 329 (Tex. App.-Austin 1994, petition for discretionary review dismissed, rehearing on petition for discretionary review granted, petition for discretionary review refused, rehearing on petition for discretionary review denied); *Klinger v. City of San Angelo*, 902 S.W.2d 669 (Tex. App.-Austin 1995, writ denied); *Texas Department of Public Safety v. Butler*, 960 S.W.2d 375 (Tex.App.-Houston[14th Dist.] 1998, no writ); and *Newsom v. State*, 372 S.W.2d 681 (Tex. Crim. App. 1963).[1]

B. Courts in the following cases ruled that courts may not rewrite or correct statutes or legislative action.

The court in *Skrabanek v. Ritter* ruled "however harsh or however limited in application a statute may appear under specific facts, it cannot be rewritten by the courts. It is the duty of the courts to administer laws as they are found and not to make law. To do otherwise is to assume functions that pertain solely to the Legislature." *Skrabanek v. Ritter*, 412 S.W.2d 337, 342 (Tex. App.-Austin 1967, writ ref'd n.r.e.).

In addition, in *Gilmore v. Waples* the court held: "it is not the function of the judiciary to correct legislative errors, mistakes, or omissions." *Gilmore v. Waples*, 108 Tex. 167, 188 S.W. 1037 (1916). Finally, the case of *Baker v. Marable* echoed the rule of *Gilmore*, also holding that it is not the function of the judiciary to correct legislative errors, mistakes, or omissions. *Baker v. Marable*, 373 S.W.2d 377 (Tex. Civ. App.-Eastland 1963, no writ).

C. Other General Statutory Provisions.

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[1] See also *Klevenhagen v. International Fidelity Ins. Co.*, 861 S.W.2d 13 (Tex. App.-Houston [1st Dist.] 1993, no writ); *Crimmins v. Lowry*, 691 S.W.2d 582 (Tex. App.-Eastland 1984, no writ); *State v. Terrell*, 588 S.W.2d 784 (Tex. 1979); *Miers v. Brouse*, 153 Tex. 511, 271 S.W.2d 419 (1954); *Huntsville Independent School Dist. v. McAdams*, 148 Tex. 120, 221 S.W.2d 546 (1949); *Kilday v. Germany*, 163 S.W.2d 184 (1942); *State v. $50,600.00*, 800 S.W.2d 872 (Tex. App.-San Antonio 1990, writ denied).

The Texas Govt. Code Ann., Chapter 312 also has some provisions relating to what constitutes a quorum and grants of authority to state officers or other persons. Those sections generally define a quorum as a majority of the statutory members, and provide that authority may be executed by a majority. (See TEX. GOVT CODE ANN., §312.004 and §312.015). These sections provide support for the notion that board action is generally not intended to be given to a minority of members of a board.

The department, on behalf of the TAFA Board of Directors, also requests that this opinion request be expedited. The TAFA Board continues to consider and act on financing applications received under its financing programs. The TAFA Board has in the past, and currently, considered a majority vote of those Board members present to be required for approval of an application, and applications are generally approved by unanimous vote or with only one or two members not approving. Although, the Department has found no occasions to date in which an application was approved only on a vote of three members, or in which there were three board members voting against an approved application, the possibility of the situation occurring compels the Board to act to get an expedited clarification from your office.

Kathryn Reed, general counsel for the Department, will serve as the agency contact on this matter. She may be contacted at 512-463-4075, should you have any questions.

Thank you for your assistance in this matter.

Sincerely,

Martin A. Hubert
Deputy Commissioner

cc: Robert Kennedy
Kathryn Reed
Jane Ann Stinnett, Chairman, TAFA Board of Directors