TEXAS HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES

LYLE LARSON, CHAIR

April 7, 2017

FILE # ML-48140-17
I.D. # 48140

RQ-0160-KP

Attorney General Ken Paxton
Post Office Box 12548
Austin, TX 78711-2548

RE: Request for an Opinion

Dear General Paxton:

As Chairman of the House Natural Resources Committee and pursuant to the requirements of Section 402.042(c)(2) of the Texas Government Code, I respectfully request your formal written opinion on the following question raised in the attached letter addressed to me from the law firm Armbrust & Brown, PLLC on behalf of the Wells Branch Municipal Utility District: **Is a municipal utility district operating under Chapters 49 and 54, Water Code, authorized by Texas law to use its surplus funds, which include ad valorem property tax and utility service revenue, to repair or replace cluster-type mailbox facilities that serve the single-family residences in the municipal utility district?**

Please see the attached supporting information, which includes background information as well as documentation of the applicable statutes, case law, and previous Attorney General Opinions. Should you need more information, please do not hesitate to contact Shannon Houston in my office at 512-463-0802 or shannon.houston_hc@house.texas.gov.

Thank you in advance for your timely consideration of this matter and for your service to our state.

Sincerely,

Lyle Larson
Chairman

TEXAS HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES

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Lyle Larson
Chairman

ARMBRUST & BROWN, PLLC

ATTORNEYS AND COUNSELORS

100 CONGRESS AVENUE, SUITE 1300
AUSTIN, TEXAS 78701-2744
512-435-2300

FACSIMILE 512-435-2360

JEFF HOBBS
(512) 435-2371
jhobbs@abaustin.com

April 5, 2017

The Honorable Lyle Larson
Chairman, House Committee on Natural Resources
P.O. Box 2910
Austin, Texas 78768-2910

RE: Request for Attorney General Opinion – Wells Branch Municipal Utility District

Dear Chairman Larson:

This law firm represents Wells Branch Municipal Utility District ("District"), which respectfully seeks an opinion from the Office of the Attorney General of Texas on the following issue:

> Is a municipal utility district operating under Chapters 49 and 54, Water Code, authorized to use its surplus funds, which includes ad valorem property tax and utility service revenue, to repair or replace the cluster-type mailbox facilities that serve the single-family residences in the district?

We have provided background information and analysis below examining the District's specific constitutional and statutory authority, as well as the "public purpose" restriction on public spending in Article III, Section 52(a) of the Texas Constitution.

A. Background.

The District is a municipal utility district located in Travis and Williamson Counties north (but within the extraterritorial jurisdiction) of the City of Austin, generally bounded on the north by Grand Avenue Parkway, on the south by Howard Lane, on the east by Interstate Highway 35, and on the west by MoPac Expressway. Mail to single-family residential addresses within the District is delivered to cluster-type mailbox units that serve numerous addresses – typically the addresses of homes within a block of the cluster mailbox location. It is the District's understanding that these mail receptacles were installed over the last approximately 30 years by developers as the residential areas within the District were built out. Many of the cluster mailbox units also include parcel lockers for the delivery of oversized items. District staff has estimated that there are approximately 172 cluster mailbox unit locations within the District.

Residents of the District have recently reported incidents of vandalism to, and mail and package theft from, the cluster mailbox units within the District and have expressed a desire to replace the existing cluster mailbox units with something more secure. One resident has noted that the cluster mailbox units within the District are not homogenous in appearance and has suggested that they all be replaced with a matching product uniform in color as a way of increasing property values in the District. Because most of the residential subdivisions within the District do not have active homeowners associations that could finance the repair or replacement of cluster mailboxes that serve numerous customers, certain residents have asked whether the District can assume the responsibility to repair and/or replace the cluster mailbox units that serve the single-family residential homes within the District. The purpose of this request is to determine whether the District has the legal authority to do so. Financing for the requested repairs or replacements would come from the District's general surplus funds, which are derived from a combination of ad valorem property tax revenue and utility service revenue.

B. United States Postal Service Regulations.

The United States Postal Service's *Postal Operations Manual* provides that "[p]urchase, installation, and maintenance of mail receptacles are the responsibility of ***the customer***" (emphasis added) but that "[t]he Postal Service may elect, under certain conditions, to purchase, install, and maintain curb-mounted mail receptacles or cluster box units." Postal Operations Manual at Parts 632.11, .12. The District is aware that the Postal Service has recently repaired or replaced the cluster mailbox units in at least one location in the District. Postal Operations Manual Parts 632.11 and .12. The Postal Service has also placed notices on the mailbox units recommending residents to safeguard mail by not leaving it in mailboxes overnight and watching for suspicious activity, and advising that tampering with the mailboxes and theft of mail are a federal crimes.

C. The District's statutory grant of authority.

The District, originally named North Austin Growth Corridor Municipal Utility District No. 1, was created in 1981 pursuant to Article XVI, Section 59 of the Texas Constitution, and Chapter 54 of the Texas Water Code. The District also operates under Chapter 49, Texas Water Code, enacted by the Texas Legislature in 1995, which is applicable to all general and special law districts, except groundwater conservation districts. As such, pursuant to Section 54.201 of the Water Code, the District has "the functions, powers, authority, rights, and duties which will permit accomplishment of the purposes for which it was created." TEX. WATER CODE § 54.201(a). The Texas Constitution establishes those purposes, which are—

> The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State . . . .

TEX. CONST. art. XVI, § 59(a).

Paralleling some of the Constitution's language, the Texas Water Code further provides that municipal utility districts are created for the following purposes:

> (1) the control, storage, preservation, and distribution of the storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;
>
> (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
>
> (3) the reclamation and drainage of its overflowed land and other land needing drainage;
>
> (4) the preservation and development of its forests, water, and hydroelectric power;
>
> (5) the navigation of its inland and coastal water;
>
> (6) the control, abatement, and change of any shortage or harmful excess of water;
>
> (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
>
> (8) the preservation of all natural resources of the state.

TEX. WATER CODE § 54.012.

In furtherance of those purposes, the Water Code also vests municipal utility districts with specific legislative grants of authority. Section 49.211 broadly grants all districts created under the Article XVI, Section 59 of the Texas Constitution the authority "to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend inside and outside its boundaries any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this code or any other law." *Id.* at § 49.211(b).

Section 54.201(b) authorizes municipal utility districts to purchase, construct, repair and maintain facilities that are "incident, helpful, or necessary" to the following:

> (1) supply water for municipal uses, domestic uses, power, and commercial purposes and all other beneficial uses or controls;
>
> (2) collect, transport, process, dispose of, and control all domestic, industrial, or communal wastes whether in fluid, solid, or composite state;
>
> (3) gather, conduct, divert, and control local storm water or other local harmful excesses of water in a district;

(4) irrigate the land in a district;

(5) alter land elevation in a district where it is needed;

(6) navigate coastal and inland waters of the district; and

(7) provide parks and recreational facilities for the inhabitants in the district, subject to the provisions of Chapter 49.

Id. at § 54.201(b).

Additionally, the Water Code grants municipal utility districts specific authorization to use public funds for construction and maintenance of security lighting within public utility easements or rights-of-way or property owned by a district, and for repairs or maintenance of streets within a district if the district was created by general law or special legislative act and has been in existence for at least 10 years. *Id.* at §§ 54.236, .242.

The Water Code further establishes a district's eminent domain authority, which is limited to acquisition of land, easement or other property "necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes . . . ." *Id.* at § 49.222(a).

C. The question of the District's authority to repair or replace mailbox facilities.

1. Statutory authority under the Water Code.

Pursuant to its legislative grant of authority, the District has constructed, owned, operated, and maintained facilities that provide water, wastewater, drainage, and park and recreational services to residents within the District's boundaries. There is no legislative grant of authority in the Water Code or other Texas law that specifically permits a municipal utility district to purchase, construct, repair or replace mailbox facilities that are used for the delivery of mail to private citizens, whether on district property or on private property. The Texas Supreme Court long ago held that the powers of water districts created pursuant to Article XVI, Section 59 of the Texas Constitution "are measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the legislature." *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 285 (Tex. 1940). *See also Bexar Met. Water Supply Dist. v. City of San Antonio*, 228 S.W.3d 887, 890 (Tex. App—Austin 2007, no pet.) (quoting *Mann*). In *Mann*, the Court recognized that even with normal municipalities, "[p]owers which are not expressed and which are merely convenient or useful may not be included and cannot be maintained." *Mann*, 142 S.W.2d at 284. *See also Lower Nueces River Water Supply Dist. v. Cartwright*, 274 S.W.2d 199, 207 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (citing *Mann*) (explaining that water districts "perform limited rather than general functions when compared to the older types of municipal organizations, such as cities.").

There is no clear grant of legislative authority that permits a municipal utility district to construct or maintain mail facilities for the delivery of mail to private residents. Mail facilities

are not specifically enumerated in Chapter 49 of the Water Code among the "recreational facilities" that a general or special district may develop and maintain. TEX. WATER CODE § 49.462(1) (defining "recreational facilities"). And although the Water Code does not define the term "recreational," it does not appear that mail facilities would fall within the definition of "recreation" provided by other legislation. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 75.001(3) (defining "recreation" to include activities such as fishing, swimming, hiking, bicycling, and "any other activity associated with enjoying nature or the outdoors").

However, Texas case law and opinions from the Office of the Attorney General in the area of recreational facilities are instructive, and appear to affirm the strict interpretation of a district's authority within the confines of legislative grant. In *Harris County Water Control & Improvement District No. 110 v. Texas Water Rights Commission*, the Austin Court of Appeals held that a municipal utility district was not authorized to provide a community center, swimming pools, tennis courts and a clubhouse, because they did not further a purpose specifically permitted by the Water Code or Article XVI, Section 59 of the Texas Constitution. 593 S.W.2d 852, 855 (Tex. Civ. App.—Austin 1980, no writ).

In examining the *Harris County Water Control and Improvement District* opinion, the Attorney General's Office recognized that "[i]mplicit in the language of the opinion is a question of the degree of relationship between the recreational facilities and the constitutional purposes of the district." Op. Tex. Att'y Gen. No. MW-313 (1981). The Office opined that a conservation and reclamation district was authorized to construct park facilities on a reservoir, which included parking areas, restrooms, boat ramps, picnic tables, lighting, road, and fencing, explaining—

> The Harris County W.C.I.D. #110 opinion prohibited construction of a complex of recreational buildings and facilities which were unrelated to the constitutional purposes of the district. It is our understanding that the facilities you purpose to build are related to a relatively minor portion of the total reservoir project and serve to promote the full use and enjoyment of the reservoir by the public. We feel that the improvements you propose are ordinary and necessary to the proper control, management, and regulation of the public reservoirs and lakes, and are in furtherance of the constitutional purposes of "the conservation and development of all natural resources of this State, including the control, storing, preservation and distribution of . . . the waters of its rivers and streams, for irrigation, power and all other useful purposes. Tex. Const. art. XVI, § 59(a).

The Attorney General's Office later considered a municipal utility district's proposal to develop and maintain a park that would include playgrounds, volleyball and basketball courts, picnic tables and grills, and a jogging trail, and advised that "a municipal utility district, operating under chapter 54 of the Texas Water Code may not use taxes to purchase real property for the independent purpose of having it used as a public park and developed recreational area . . . ." Op. Tex. Att'y Gen. No. JM-1173 (1990). It reasoned that "the provision of facilities for recreation and pleasure is not among the constitutional purposes for which water districts may levy and expend ad valorem taxes, but that the provision of recreational facilities may be considered a proper secondary activity for a district if furnishing them promotes a constitutional purpose."

Since the *Harris County Water Control and Improvement District* opinion, the Legislature amended the Water Code to specifically provide that a water district is "created for the purpose of financing, developing, and maintaining recreational facilities," independent from its traditional water preservation and reclamation purposes. TEX. WATER CODE § 49.463. However, the amendment does not appear to have modified the standard for examining a district's authority under the Texas Constitution and the Water Code. Based on that standard, as examined by the Attorney General Opinions cited above, the maintenance and repair of mail facilities for a municipal utility district's residents might not be "ordinary and necessary" to its constitutional purposes established by Article XVI, Section 59(a).

2. Other constitutional limitations on District's authority to spend public funds.

Apart from the lack of any express authority in the Water Code to repair or maintain private mail facilities, the Texas Constitution provides further limitations on the District's spending powers. Article III, Section 52(a) of the constitution generally prohibits the use of public funds for private purposes, but a public expenditure that incidentally benefits private persons may comply with this provision if it meets three requirements: (1) its predominant purpose must be to accomplish a public purpose and not to benefit private parties; (2) the governmental entity must retain sufficient control over the transaction to ensure that the public purpose is accomplished and to protect the public's investment in it; and (3) the public must receive a return benefit. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Worker's Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002).

The preliminary question under this test is whether the District's repair of mailbox facilities would predominantly accomplish a public purpose. One individual residing in the District has suggested a public purpose will be served because the maintenance of secure mail facilities will ensure that the District's utility bills are safely delivered to its customers and, as a result, timely paid (although the District is unaware that any vandalism or damage to the mail facilities has resulted in the interference with delivery of any utility bills). While we have not located any Texas cases answering this question, one opinion from the Attorney General's Office suggested that the transmission of mail does not inherently serve a public purpose. Op. Tex. Att'y Gen. No. JM-1091 (1989) (analyzing whether use of university mail system by private organization served a public purpose, and noting, "it is certainly possible that the use of the campus mail by an organization for a particular type of mailing would serve a public purpose, whereas the use of the campus mail by the same organization for another type of mailing would not"). While delivery of the District's water and wastewater bills to its residents might arguably further a public purpose of facilitating the delivery—and, ultimately, payment—of bills for public utility services, those bills, which are mailed once per month, are only one item among a host of other private matters that flow through the mail system on a daily basis. Accordingly, maintenance and repair of the residents' mail facilities might not ***predominantly*** serve a public purpose.

Regarding the separate consideration of sufficient control, the Attorney General's Office has recognized that to retain sufficient control over expenditures for improvements on real property, a municipality must have a sufficient interest in the property for future maintenance and repairs. Op. Tex. Att'y Gen. No. GA-0528 (2007) (holding city must acquire sufficient interest in private property on which it would construct seawall to satisfy Article III, Section 52(a) of the Texas Constitution). In this instance, it is our understanding that most, if not all, of the

residents' mail facilities are not located on any real property that the District owns or to which it has an easement or other legal right of access. And, acquiring such ownership or access right through condemnation might not be considered within the District's eminent domain authority established in Section 49.222(a) of the Water Code. TEX. WATER CODE § 49.222(a) (granting eminent domain power "necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes . . . .").

Sincerely,

ARMBRUST & BROWN, PLLC

/s/ Jeff Hobbs

Jeff Hobbs