

RECEIVED

JUL 25 2017

OPINION COMMITTEE



FILE # ML-48174-17
ID. # 48174

TEXAS HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES

RQ-0171-KP

LYLE LARSON, CHAIR

July 21, 2017

Via electronic mail
opinion.committee@oag.texas.gov

Honorable Attorney General Ken Paxton
Office of the Texas Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 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 powers and authority of the West Travis County Public Utility Agency ("WTCPUA") to impose impervious cover requirements.

Because there are very few functional public utility agencies in the state of Texas, and there is little precedent or case law from which the WTCPUA can base its actions and decisions, guidance is needed with respect to the questions identified herein.

These questions have come to my attention via Travis County Municipal Utility District No. 22 ("MUD 22"), a MUD with jurisdiction in the WTCPUA's Service Area. The answer to the question posed herein will not only affect those who seek water from the WTCPUA, but will answer questions that apply statewide to public utility agencies operating under Texas Local Government Code Chapter 572.

Accordingly, I seek your opinion as to the following question:

- 1) Does the WTCPUA have the authority to impose impervious cover requirements on persons who apply for water service?

Please see the attached supporting information, which includes background information as well as documentation of the applicable statutes, and case law. 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,

A handwritten signature in black ink, appearing to read "Lyle Larson".

Lyle Larson
Chairman

DADE PHELAN, VICE-CHAIR

TRENT ASHBY • DEWAYNE BURNS • JAMES FRANK • KYLE KACAL • TRACY O. KING • EDDIE LUCIO III • PONCHO NEVÁREZ • FOUR PRICE • PAUL WORKMAN

P.O. BOX 2910 • AUSTIN, TEXAS 78768-2910 • (512) 463-0802

DISCUSSION

I. BACKGROUND

By way of background, the WTCPUA provides water and wastewater service to northern Hayes and western Travis counties. The WTCPUA was created under the authority of and is governed by Texas Local Government Code Chapter 572.

Texas Local Government Code Chapter 572 clearly set-forth the powers of a public utility agency as follows:

Sec. 572.058. POWERS.

- (a) A public utility agency may not engage in any utility business other than the collection, transportation, treatment, or disposal of sewage or the conservation, storage, transportation, treatment, or distribution of water for a participating public entity that owns jointly with the agency a facility in this state.
- (b) A public utility agency may:
 - (1) perform any act necessary to the full exercise of the agency's powers;
 - (2) enter into a contract, lease, or agreement with or accept a grant or loan from a:
 - (A) department or agency of the United States;
 - (B) department, agency, or municipality or other political subdivision of this state; or
 - (C) public or private corporation or person;
 - (3) sell, lease, convey, or otherwise dispose of any right, interest, or property the agency considers to be unnecessary for the efficient operation or maintenance of its facilities; and
 - (4) adopt rules to govern the operation of the agency and its employees, facilities, and service.

Texas Loc. Gov't Code § 572.058. With respect to water service, therefore, it may perform any act necessary for the "conservation, storage, transportation, treatment, or distribution of water." *Id.*

The current WTCPUA Water and Sewer Service and Development Policies (June 19, 2014, Amended May 18, 2016) is attached as Exhibit A and is hereafter referred to as the "WTCPUA Policy." For persons or entities without an existing service agreement with the WTCPUA or that are not located within WTCPUA Water certificate of convenience and necessity No. 13207, the WTCPUA considers application for water service at one of two levels of service – "Service Level A" or "Service Level B."¹

¹ See WTCPUA Policy at page 11.

To obtain service under either Service Level A or Service Level B, the WTCPUA requires that the applicant limit the development to 20% “Impervious Cover.”² The impervious cover requirement is not imposed on projects within the jurisdiction of the City of Bee Cave presumably because “[w]ater quality protection measures must be in compliance with Bee Cave water quality requirements.”

In sum, the WTCPUA imposes impervious cover requirements on projects that are not otherwise covered by the City of Bee Cave municipal ordinances governing water quality as a condition to obtaining water service. This is true despite the fact that a project outside the jurisdiction of Bee Cave would, in fact, be subject to compliance with county water quality rules and regulations. The WTCPUA operates in a manner in such a way so as to impose stricter land use and water quality regulations on development projects than would be imposed by the county.

II. IMPERVIOUS COVER REQUIREMENTS

The Supreme Court of Texas addressed the question of the nature of impervious cover requirements in *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999). That case involved the challenge to the City of Austin's Save Our Springs Ordinance, a water pollution control measure enacted in 1992. Among the requirements of the SOS Ordinance were limits to impervious cover on land in the regulated areas. *Id.* at 113. As part of that litigation, the Court had to determine the nature of impervious cover requirements. The Court held that while impervious cover restrictions “clearly ha[ve] effects on land use” they also constitute measures “designed to protect water quality.” *Id.* at 121. Thus, an impervious cover requirement, according to the Supreme Court, regulates both land use and water quality.³

III. WTCPUA’S AUTHORITY IS LIMITED AND DOES NOT INCLUDE THE POWER TO IMPOSE IMPERVIOUS COVER REQUIREMENTS

A. The WTCPUA Does Not Have Any Express Powers to Impose Impervious Cover Requirements

The WTCPUA is a political subdivision of the state and a state agency. Texas Loc. Gov’t Code § 572.052(c). It is well established that Texas agencies derive no express powers from the Texas Constitution.⁴ It is also well settled in Texas that administrative agencies have only such powers as are granted by statute.⁵ Such powers must be specifically granted in clear and express

² WTCPUA Policy at pages 1 (section (A)(4)), 2 (section (A)(6)(a)), 3 (section (A)(7)(a)(i)(A), (B), and (D)), 11 (under either Service Level A or B), 14-15, 17, and 18. In at least one instance, the WTCPUA has required an applicant for water service to execute a contract that contains impervious cover requirements.

³ See also, *Lowe’s Home Ctrs., Inc. v. City of Sunset Valley*, No. 03-04-00411-CV, 2004 Tex. App. LEXIS 11047, at *2 n.2 (Tex. App. – Austin, 2004, no pet.) (noting that impervious cover requirements are designed to protect water quality).

⁴ Ronald L. Beal, Texas Administrative Practice and Procedure § 1.2.3, at 31 (2017).

⁵ *Tex. Coast Utils. Coalition v. R.R. Comm’n of Tex.*, 423 S.W.3d 355 (Tex. 2014); *Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95, 106 (Tex. 2010); *Tex. Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 192–193 (Tex. 2007); *T.N.R.C.C. v. Lakeshore Utility Co., Inc.*, 164 S.W.3d 368, 377 (Tex. 2005); *Tex. Workers’ Comp. Comm’n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 652 (Tex. 2004); *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 441–42, 45 Tex. Sup. Ct. J. 767 (Tex. 2002); *P.U.C. of Texas v. The City Public*

language.⁶ The powers expressly granted to the WTCPUA by statute for water service are for the “conservation, storage, transportation, treatment, or distribution of water.” Texas Loc. Gov’t Code § 572.058(a). Clearly absent from this list is the power to regulate land use or water quality. In other words, none of the clear and express language relating to the powers of the agency found in its enabling legislation allows the WTCPUA to regulate land use or water quality.

B. The WTCPUA Does Not Have Any Implied Powers to Impose Impervious Cover Requirements

Notwithstanding the fact that the WTCPUA does not have an express grant of authority, it might argue that it has an implied power to regulate water quality through impervious cover requirements.

Service Board of San Antonio, 53 S.W.3d 310, 315–316 (Tex. 2001); *State v. Public Util. Comm’n*, 883 S.W.2d 190, 194 (Tex. 1994); *Martinez v. Tex. Employment Com’n*, 570 S.W.2d 28, 31 (Tex. 1978); *State v. Jackson*, 376 S.W.2d 341, 344 (Tex. 1964); *Key Western Life Ins. Co. v. Bd of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 848 (1961); *RR Com’n v. Rowan Oil Co.*, 152 Tex. 439, 259 S.W.2d 173, 176 (1953); *State v. Robison*, 119 Tex. 302, 30 S.W.2d 292, 297 (1930); *Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Assoc.*, 2014 Tex. App. LEXIS 12649 (Tex. App. Austin 2014); *Harlingen Family Dentistry, P.C. v. Tex. HHS Comm’n*, 452 S.W.3d 479 (Tex. App. Austin 2014); *Tex. State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520 (Tex. App. Austin 2014); *Tex. Ass’n of Psychological Assocs. v. Tex. State Bd. of Examiners of Psychologists*, 439 S.W.3d 597 (Tex. App. Austin 2014); *State Agencies & Insts. of Higher Educ. v. R.R. Comm’n of Tex.*, 421 S.W.3d 690 (Tex. App. Austin 2014); *Ellis v. Reliant Energy Retail Servs., L.L.C.*, 418 S.W.3d 235 (Tex. App. Houston [14th Dist.] 2013); *Southwestern Elec. Power Co. v. PUC of Tex.*, 419 S.W.3d 414 (Tex. App. Amarillo 2011); *TXU Generation Co. v. P.U.C. of Tex.*, 165 S.W.3d 821, 829 (Tex. App. Austin 2005); *City of Garland v. P.U.C. of Tex.*, 165 S.W.3d 814, 819 (Tex. App. Austin 2005); *City of Allen v. P.U.C. of Tex.*, 161 S.W.3d 195, 199 (Tex. App. Austin 2005); *SW Bell Tel. Co. v. P.U.C. of Tex.*, 72 S.W.3d 23, 31 (Tex. App. Austin 2001, pet. denied w.o.j.); *McDaniel v. Tex. Natural Res. Conservation Comm’n*, 982 S.W.2d 650, 651–52 (Tex. App. Austin 1998).

⁶ *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. 2013) (per curiam); *Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 95, 106 (Tex. 2010); *Tex. Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 192–193 (Tex. 2007); *Tex. Natural Res. Conservation Comm’n v. Lakeshore Utility Co., Inc.*, 164 S.W.3d 368, 377 (Tex. 2005); *Stauffer v. City of San Antonio*, 162 Tex. 13, 344 S.W.2d 158, 160 (1961); *Commonwealth of Massachusetts v. The United N.S.D. Co.*, 140 Tex. 417, 168 S.W.2d 226, 229 (1942); *Tara Partners, Ltd. v. CenterPoint Energy Res. Corp.*, 371 S.W.3d 441, 444 (Tex. App. Houston [1st Dist.] 2012); *Liberty Mut. Ins. Co. v. Adcock*, 353 S.W.3d 246, 249 (Tex. App. Fort Worth 2011); *Energy Tex., Inc. v. PUC of Tex.*, 2012 Tex. App. LEXIS 6699 (Tex. App. Austin Aug. 8, 2012) (memo op.); *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 925 (Tex. App. Austin 2010); *SWEPILP v. R.R. Comm’n of Tex. & Hidalgo County*, 314 S.W.3d 253, 259 (Tex. App. Austin 2010, pet. filed); *Tex. Comm’n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 674 (Tex. App. Austin 2010); *PUC of Tex. v. City of Harlingen*, 311 S.W.3d 610, 616–17 (Tex. App. Austin 2010); *Lee v. Tex. Workers’ Comp. Comm’n*, 272 S.W.3d 806 (Tex. App. Austin 2008); *AEP Tex. Cent. Co. v. Pub. Util. Comm’n*, 258 S.W.3d 272, 280–281 (Tex. App. Austin 2008); *Sterling Truck Corp. v. Motor Vehicle Bd. of the Tex. DOT*, 255 S.W.3d 368, 374 (Tex. App. Austin 2008); *Tex. Orthopaedic Ass’n v. Tex. State Bd. of Podiatric Med. Examiners*, 254 S.W.3d 714, 719 (Tex. App. Austin 2008); *CenterPoint Energy Houston Electric, LLC v. Gulf Coast Coalition of Cities*, 252 S.W.3d 1, 16 (Tex. App. Austin 2008); *State v. PUC of Tex.*, 246 S.W.3d 324, 333 (Tex. App. Austin 2008); *TXU Generation Co. v. P.U.C. of Tex.*, 165 S.W.3d 821, 829 (Tex. App. Austin 2005); *City of Allen v. P.U.C. of Tex.*, 161 S.W.3d 195, 199 (Tex. App. Austin 2005); *Brazoria County v. Tex. Comm’n on Envtl. Quality*, 128 S.W.3d 728, 734 (Tex. App. Austin 2004); *Schade v. Tex. Workers’ Comp. Comm’n*, 150 S.W.3d 542 (Tex. App. Austin 2004); *G.T.E. Southwest Inc. v. P.U.C.*, 10 S.W.3d 7, 12 (Tex. App. Austin 1999, rehearing granted).

It is true that even though agency power must be expressly granted by the legislature, interpretation of the enabling legislation is permitted to imply certain additional powers necessary to fulfill the obvious intent of the regulatory scheme.⁷ Notwithstanding, there are limits on determining that such implied powers exist.

An agency may not base its authority on necessary implication if the implied power, in reality, amounts to a new and additional power or one that contradicts the statute. An implied power is only permissible when it is first concluded that the legislature obviously intended the agency to have it.⁸ There is no such obvious intent here.⁹ The legislature clearly knows how to grant an agency the power to regulate water quality – and did not do so here. *See* Texas Water Code Chapter 26 (regulating water quality).

Presumably, the WTCPUA may argue that its “conservation” mandate implies the ability to regulate water quality and therefore the ability to impose impervious cover requirements. Such an argument fails, however, when one considers the definition of “conservation.”

Useful in defining the term “conservation” is the statutory canon that all statutes are presumed to be enacted by the legislature with full knowledge of the existing conditions of the law and with reference to it.¹⁰ Section 59, art. 16, of the Texas Constitution directs the Legislature to pass all such laws as may be necessary for the “conservation and development of all of the natural

⁷ *Tex. Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 192–193 (Tex. 2007); *T.N.R.C.C. v. Lakeshore Utility Co., Inc.*, 164 S.W.3d 368, 377–78 (Tex. 2005); *State v. Public Util. Comm’n*, 883 S.W.2d 190, 194 (Tex. 1994); *Texas St. Bd. of Veterinary Medical Examiners v. Jefferson*, 2016 Tex. App. LEXIS 2002 (Tex. App. Austin 2016); *Sebastian Cotton and Grain Ltd. v. Willacy App. Dist.*, 492 S.W.3d 824 (Tex. App. Corpus Christi 2016); *TXU Generation Co. v. P.U.C. of Tex.*, 165 S.W.3d 821, 829 (Tex. App. Austin 2005); *City of Garland v. P.U.C. of Tex.*, 165 S.W.3d 814, 819 (Tex. App. Austin 2005); *Hammack v. PUC*, 131 S.W.3d 713, 723 (Tex. App. Austin 2004, pet. denied); *Texas Advocates Supporting Kids with Disabilities/Tex. Educ. Agency v. Tex. Educ. Agency*, 112 S.W.3d 234, 238–239 (Tex. App. Austin 2003); *P.U.C. of Tex. v. Southwestern Bell Tel. Co.*, 112 S.W.3d 221, 226–227 (Tex. App. Austin 2003); *Tex. Bldg. Owners & Managers Assn. v. P.U.C.*, 110 S.W.3d 524, 531 (Tex. App. Austin 2003, pet. denied); *P.U.C. v. City Pub. Serv. Bd. of San Antonio*, 109 S.W.3d 130, 136 (Tex. App. Austin 2003).

⁸ *Tex. Coast Utils. Coalition v. R.R. Comm’n of Tex.*, 423 S.W.3d 355 (Tex. 2014); *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492 (Tex. 2013); *P.U.C. of Texas v. City Public Service Board of San Antonio*, 53 S.W.3d 310, 315–317 (Tex. 2001); *Sexton*, 720 S.W.2d at 137–138; *see also Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 910 n.30 (Tex. 2009); *Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Assoc.*, 2014 Tex. App. LEXIS 12649 (Tex. App. Austin 2014); *Harlingen Family Dentistry, P.C. v. Tex. HHS Comm’n*, 452 S.W.3d 479 (Tex. App. Austin 2014); *Tex. Ass’n of Psychological Assocs. v. Tex. State Bd. of Examiners of Psychologists*, 439 S.W.3d 597 (Tex. App. Austin 2014); *CenterPoint Energy Entex v. Railroad Comm’n*, 208 S.W.3d 608, 615 (Tex. App. Austin 2006); *Mid-Century Ins. Co. v. Texas Workers’ Comp. Comm’n*, 187 S.W.3d 754, 757 (Tex. App. Austin 2006); *City of Corpus Christi v. PUC*, 188 S.W.3d 681, 689–90 (Tex. App. Austin 2005); *TXU Generation Co. v. P.U.C. of Tex.*, 165 S.W.3d 821, 829 (Tex. App. Austin 2005); *City of Garland v. P.U.C. of Tex.*, 165 S.W.3d 814, 819 (Tex. App. Austin 2005); *Brushy Creek Mun. Utility Dist. v. Texas Water Com’n*, 887 S.W.2d 68, 70–71 (Tex. App. Austin 1994), *overruled on other grounds at* 917 S.W.2d 19 (Tex. 1996); *Kawasaki Motors v. Motor Vehicle Com’n*, 855 S.W.2d 792, 797–98 (Tex. App. Austin 1993); *City of El Paso v. Public Util. Comm’n*, 839 S.W.2d 895, 909–10 (Tex. App. Austin 1992); *P.U.C. of Texas v. G.T.E.-S.W.*, 833 S.W.2d 153, 171–72 (Tex. App. Austin 1992); *Beaver Express Service v. RR Com’n*, 727 S.W.2d 768, 773–74 (Tex. App. Austin 1987, writ denied).

⁹ In other words, power “may not be implied merely upon the belief that the legislature failed to grant a power that would have been expedient in fulfilling the legislative objectives.” Ronald L. Beal, *Texas Administrative Practice and Procedure* § 1.2.3, at 31 (2017).

¹⁰ *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 677 (Tex. 2007); *Am. Transitional Care Ctrs. of Tex. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001); *Phillips v. Beaver*, 995 S.W.2d 655, 658 (Tex. 1999); *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990); *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

resources of this State . . . 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” At least one court has concluded that this means that the word “conservation” is defined as “the . . . distribution of . . . the waters of its rivers . . . for useful purposes,” that courts are “bound by the definition thus given[,] . . . and any further discussion of that term is academic.” *Ball v. Merriman*, 245 S.W. 1012, 1014 (Tex. Civ. App. -- Beaumont 1922) (citations omitted), *reversed on other grounds*, 116 Tex. 527, 296 S.W. 1085 (1927). Defining the term “conservation” as it is used in the Constitution yields the conclusion that if any agency is charged with “conservation” it does not give that agency authority over water quality, but instead over the distribution of available water.

Additional support for this view is found in the definition of the word “conservation” in the Texas Water Code, which is as follows:

- (8) "Conservation" means:
 - (A) the development of water resources; and
 - (B) those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

Texas Water Code § 11.002(8). Subsection (B) of this statutory definition is repeated in the Texas Administrative Code as the definition of “conservation.” 30 TAC § 297.1(13). Finally, the Public Utilities Commission of Texas defined “conservation” as the elimination of wasteful consumption¹¹ Taken together – these constitutional, statutory, and administrative interpretations of the word “conservation” mean the elimination of waste. They do not mean the preservation of water quality.¹²

Any implied power arguably granted to an agency should be narrowly construed when such power would allow governmental interference with established or traditional property rights.¹³ Impervious cover limitations effectively constitute a regulation on the use, bulk, height, number, and size of buildings. Therefore, the WTCPUA’s enabling statute should be read narrowly in its interpretation to determine whether the WTCPUA has the implied authority to impose water quality restrictions.¹⁴

¹¹ Public hearings of the Public Utility Commission of Texas on the Cost of Service ratemaking Standards of § 111 (d)(1) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601, et seq. 7 Texas P.U.C. Bulletin 250, 250, 1981 Tex. PUC LEXIS 186, *33, 44 P.U.R.4th 33 (August 20, 1981) (Docket No. 3437).

¹² It is significant that water quality is regulated by Chapter 26 of the Water Code while the conservation of water is regulated by Chapter 11 of the Water Code. If “conservation” included water quality, the legislature would not have addressed them, in two separate chapters.

¹³ *City Public Service Bd*, 9 S.W.3d at 874; *G.T.E. Southwest Inc.*, 10 S.W.3d 7, 12 (Tex. App. Austin 1999, rehearing granted).

¹⁴ Section 572.011(3) does not provide the WTCPUA authority to regulate water customers, but instead acknowledges the benefits that are derived from the joint ownership of facilities.

Only a power which is reasonable and necessary to accomplish a delegated duty that will be upheld.¹⁵ There is nothing about imposing impervious cover requirements to accomplish the “conservation, storage, transportation, treatment, or distribution of water” – especially when the implied power should be read narrowly because of its interference with traditional property rights.

C. The WTCPUA Does Not Have the Authority to Impose Impervious Cover Restrictions

Because the enabling statute for the WTCPUA does not grant a power to the WTCPUA expressly or by reasonable implication to impose land use or water quality restrictions, the agency simply has no legal authority to impose such a requirement.¹⁶

¹⁵ *Tex. Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 193 (Tex. 2007); *CenterPoint Energy Houston Elec. LLC v. Gulf Coast Coalition of Cities*, 2007 Tex. App. LEXIS 9919 (Austin Dec. 20, 2007), *remanded*, 252 S.W.3d 1, 2008 Tex. App. LEXIS 2819; *Tex. DHS v. Christian Care Centers*, 826 S.W.2d 715, 719–20 (Tex. App. Austin 1992, writ denied).

¹⁶ *Martinez v. Tex. Employment Com'n*, 570 S.W.2d 28, 31 (Tex. 1978); *TXU Generation Co. v. P.U.C. of Tex.*, 165 S.W.3d 821, 829 (Tex. App. Austin 2005).