INTRICACIES OF WATER CODE CHAPTER 36

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Overview

- Governance
- Directors
- Purchasing
- Open Government
- Law Suits
Law Affecting Districts:
- Texas Constitution Article XVI, § 59 Conservation and Reclamation Districts;
- Texas Water Code Chapter 36; and
- Texas Special District Local laws Code/Enabling Legislation District Rules.

§ 36.052 Other Laws Not Applicable:

“Other laws governing the administration or operations of districts created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, shall not apply to any district governed by this Chapter [36]. This Chapter prevails over any other law in conflict or inconsistent with this Chapter [36], except any special law governing a special district shall prevail over this Chapter [36].”

Chapter 49 Water Code not applicable.
Governance

Many other laws applicable:

• Open Meetings and Public Information Acts
• Professional Services Procurement Act
• Conflict of Interest Statutes
• Public Retirement System Laws
• Local Government Records Act
• Purchasing Statutes
• Sick Pool Leave Laws
• Eminent Domain Property Code
• Public Fund Investments Act
• Public Funds Collateral Act
• Election Code
• Tax Code
• Administrative Procedures Act
Board of Directors – Eligibility:

- “A member of a governing body of another political subdivision is ineligible for appointment or election as a director.” Tex. Water Code § 36.051(a).

- “Political Subdivision” means a county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III or Section 5a, Article 16, Texas Constitution, a state agency, or a non-profit water supply corporation created under Chapter 67 [Water Code].
Board of Directors’ – Eligibility continued:

- A director is disqualified and vacates the office of director if the director is appointed or elected as a member of the governing body of another political subdivision.
Board of Directors – Eligibility Exceptions:

- The prohibition does not apply to any district with a population less than 50,000.


- Added in 2003, the “Common Law Doctrine of Incompatibility” does not disqualify:

  1. A member of the governing body or officer of another political subdivision other than a municipality or county from serving as a director, or

  2. A director of the district from serving as a member of the governing body or officer of another political subdivision other than a municipality or county.
Board of Directors – Quorum:

- A majority of the membership of the Board constitutes a quorum for any meeting and *a concurrence of the majority of the entire membership of the board* is sufficient for transacting any business of the district.

- 5 member board, only three in attendance.

*But see* Enabling Legislation –

- A majority vote of a quorum of the board is required for board action.
Board of Directors – Signing Documents:

• The president is the CEO, presides at all meetings, and shall execute all documents on behalf of the District.

• The secretary is responsible for keeping the records and shall attest the president’s signature on all documents.

• The board may appoint an assistant or deputy secretary.

• The board may designate to the GM full authority to manage and operate the affairs of the district.
Purchasing:

- The board shall have the right to purchase all materials, supplies, equipment, vehicles, and machinery needed by the district to perform its purposes 36.057(g).

Professional Service Procurement Act required in selecting:

- Attorneys
- Engineers
- Auditors
- Financial Advisors
- or other professional consultants
Purchasing continued:

Professional Service under PSPA means:

• Accounting
• Architecture
• Landscape architect
• Land surveying
• Medicine
• Optometry
• Professional engineering
• Real estate appraising
• Professional nursing

Chapter 36 expands to include Attorneys, Financial Advisors, and “other Professional Consultants.”
Purchasing continued:

- A district may purchase property from any other governmental entity by negotiated contract without the necessity of securing appraisals or advertising for bids.

  Water Code § 36.067(b)

- A district may use the reverse action procedure for purchasing.

  Water Code § 36.067(c)
Purchasing continued:

- Chapter 271 Local Gov’t Code
- The governing body of a *governmental agency* may execute, perform, and make payments under a contract for the use or the acquisition of any *personal property*.
- *Governmental agency* includes conservation and reclamation districts, which are further defined as a district created under Art. 3, § 52 or Art. 16, § 59.
Purchasing continued:

• Chapter 2269 Gov’t Code

• Applies to “public works” contract by a governmental entity including any special district.

• “Public works contract” means a contract for constructing, altering, or repairing a public building, or public work.
Open Gov’t under Chapter 36:

Open Meetings Notice

• Except for meeting where DFC adopted*, notice of board meetings governed by Open Meetings Act Chapter 551.

• “Neither failure to provide notice of a regular meeting nor an insubstantial defect in notice of any meeting shall affect the validity of any action taken at the meeting.

• Not been tested.

§ 36.063(a).

*DFC adoption meeting has additional notice requirements.
Open Meetings - Conduct

• Meetings shall be conducted in accordance with the Open Meetings Act.

• “A meeting of a committee of the board, or a committee composed of representatives of more than one board, where less than a quorum of any one board is present is not subject to the provisions of the Open Meetings Act. § 36.064.

• AG Opinions: a committee of less than a quorum granted authority to supervise or control public business or public policy is a governmental body subject to the Act.

• Tarrant Regional Water District v. Bennett, 453 S.W.3d 51, 58 (Tex. App. – Fort Worth 2015, pet denied) (upholding similar provision under Ch. 49).
Open Records:

• The records of each district are the property of the district and are subject to the Public Information Act. § 36.065(b).

• The preservation, storage, and destruction or other disposition of the records are subject to the requirements of Local Government Records Act.
Lawsuits

Four different sections govern suits by or against the districts.

General - § 36.066

(a) Board member immune from suit and from liability for official votes and actions.

(b) If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant in the interests of justice and subject to apportionment on issues district prevails on, recovery of attorney’s fees, costs for expert witnesses, and other costs.
Lawsuits – Rule Enforcement – § 36.102

(a) If the district prevails in any suit to enforce its rules, the district may seek and the court shall grant against any person, in the same action, recovery for attorney’s fees, experts, and other costs.

Lawsuits – Rule Enforcement – Waiver of Immunity

(e) In an enforcement action by a district against any person that is a governmental entity for violation of district rules, the limits on the amount of fees (transport and production fees) that a district may impose, constitutes a limit of liability of the governmental entity.
Lawsuits – Appeal of DFC – § 36.10835

• Appeal filed in district court and decided under substantial evidence rule.
Lawsuits – Judicial Review of District Action – § 36.251

(a) A person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order of the district, including a permit appeal, may file suit against the district or its directors.

(b) Only the district, applicant, and party to a contested case may participate in an appeal of an action involving a contested case. An applicant is a necessary party.


Burden of proof is on the petitioner. Appeal is governed by substantial evidence.
Substantial Evidence:

Sec. 2001.174. Review under Substantial Evidence Rule or Undefined Scope of Review. If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

(1) May affirm the agency decision in whole or in part; and
(2) Shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
   (A) In violation of a constitutional or statutory provision;
   (B) In excess of the agency’s statutory authority;
   (C) Made through unlawful procedure;
   (D) Affected by other error of law;
   (E) Not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
   (F) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
Substantial Evidence Rule:

• Court may not substitute its judgment for the judgment of the GCD on the weight of the evidence;

• Evidence may actually “preponderate” against the GCD’s finding if the GCD’s determination was within the “bounds of reasonableness”; and

• More than a mere “scintilla” of evidence.
Validation:

§ 36.124

A governmental act or proceeding of a district is conclusively presumed, as of the date it occurred, valid and to have occurred in accordance with all applicable statutes and rules if:

(a) Third anniversary of the date of the act has expired; and

(b) An invalidation lawsuit not filed.

Does not apply to:

• Void acts
• Misdemeanors or felonies
• Rule preempted by federal law
• Matters litigated when § 36.124 was adopted.
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