

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

December 4, 2020

Edward Vigil, Chair
Soil and Water Conservation Commission
P.O. Box 30005, MSC 3189
Las Cruces, NM 88003
Email: rio@tularosa.net

Re: Opinion Request – Recent Amendments to the Soil and Water Conservation District Act

Dear Mr. Vigil:

The Soil and Water Conservation Commission requested our opinion regarding statutory changes made in 2018 and 2019 to the Soil and Water Conservation District Act, NMSA 1978, Sections 73-20-25 to -48 (1965, as amended through 2019) (hereinafter the “Act”).¹ In particular, we were asked:

1. Do the recent amendments remove the ten-year limit applicable to mill levies that were passed by voters under the prior statutory language?
2. If a soil and water conservation district holds a previously-existing mill levy covered by the ten-year limit, will it continue to keep this prior mill levy if voters reject the passage of a new mill levy?
3. If voters approve an increase of an existing mill levy or the creation of a new levy, would the original mill levy remain subject to the ten-year limitation?
4. Is it the responsibility of county clerks to ensure that candidates for local soil and water conservation district boards satisfy the applicable statutory criteria? And, relatedly, is a county clerk responsible for apprising a would-be candidate for a local soil and water conservation district board of the applicable statutory criteria?

As discussed in detail below, we conclude:

¹ We are also in receipt of a letter from the Valencia Soil and Water Conservation District, which largely posed to us the same questions.

1. The 2018 and 2019 amendments to the Act do not affect the ten-year limit applicable to mill levies approved by soil and water conservation district voters under the prior law.
2. An existing mill levy subject to the ten-year limit will remain in effect if voters reject the adoption of a new mill levy under the recent amendments to the Act.
3. If voters approve an increase in the amount of a mill levy adopted before the recent amendments or approve a new levy under the amended provisions, the earlier mill levy will remain subject to the ten-year limit.
4. A county clerk's authority to ensure that candidates for a soil and water conservation district board are qualified is limited to determining whether they are registered to vote in the appropriate area. County clerks have no legal obligation to inform would-be candidates of the qualifications for holding positions on a soil and water conservation board.

Background

New Mexico's various soil and water conservation districts are intended "to conserve and develop beneficially the soil, water and other natural resources of the state." NMSA 1978, § 73-20-26. Districts are created by landowners within given geographic areas, who may petition the Soil and Water Conservation Commission (the "Commission") for approval. *See generally* § 73-20-33(A) (setting forth the requirements for petitions to the Commission). The creation of such a district is subject to a local referendum of all eligible voters. *See* § 73-20-34 (providing that, "in the event that approval of the proposed district is not carried by a majority of votes cast in a referendum, the commission shall deny the petition and shall enter and record its order").

Individual soil and water conservation districts are authorized by the Act to carry out a variety of functions. This includes conducting research, developing conservation plans, publishing suggested "preventive and control measures relating to resource conservation and development," assisting private landowners or governmental agencies in executing conservation plans, and administering conservation projects initiated by other governmental agencies. Section 73-20-44. In order to fulfill these various functions, soil and water conservation districts are explicitly authorized to "borrow money and otherwise contract indebtedness," which may be secured by, among other things, district revenues, including revenues from mill levies. Section 73-20-45(D); *see also* § 73-20-46 (setting forth requirements for district-wide property assessments).

Mill Levies

In two successive legislative sessions, the legislature made significant changes to the Act as it relates to the ability of soil and water conservation districts to issue mill levies. Until July 1, 2018, the relevant language of the Act read as follows:

In the event a district is unable to meet or bear the expense of the duties imposed upon it by the Soil and Water Conservation District Act, the supervisors may adopt a resolution that, to be effective, shall be approved by referendum in the district and that shall provide for an annual levy for a stated period of up to ten years in a stated amount not exceeding one dollar (\$1.00) on each one thousand dollars (\$1,000) of net taxable value, as that term is defined in the Property Tax Code, of real property within the district, except that real property within incorporated cities and towns in the district may be excluded.

Section 73-20-46(A) (2009). This provision limited annual mill levies to one dollar per each thousand dollars of net taxable value for a period stated in the referendum of up to ten years.

In 2018, House Bill 98 significantly altered this language in the Act. *See* H.B. 98, 53rd Leg., 2nd Sess. (N.M. 2018). As amended, and as it exists today, the relevant portion of this statute states:

In the event a district is unable to meet or bear the expense of the duties imposed upon it by the Soil and Water Conservation District Act, the supervisors may adopt a resolution that, to be effective, shall be approved by referendum in the district and that shall provide for an annual levy in a stated amount not exceeding five dollars (\$5.00) on each one thousand dollars (\$1,000) of net taxable value, as that term is defined in the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978], of real property within the district, except that real property within incorporated cities and towns in the district may be excluded.

Section 73-20-46(A) (2018). The 2018 amendment increased the maximum annual amount of annual mill levies from one dollar to five dollars per each one thousand dollars of net taxable value and removed the language limiting mill levies to a stated period of up to ten years. The latter change means that the law no longer limits the duration of mill levies approved by referendum.² Because many mill levies in existence at the time of the 2018

² Although the 2018 amendment removed the ten-year limit on an approved mill levy, it did not affect the requirement that a soil and water conservation district board, after the initial authorization is approved by referendum, “adopt a resolution each following year authorizing the levy.” Section 73-20-46(A). In addition,

amendment (and now) had been approved with stated limits of up to ten years, the 2018 amendment created some ambiguity as to their legal status.

Possibly to address this ambiguity, the legislature revisited the Act again in 2019 and added a new statutory provision addressing mill levies that were issued prior to the enactment of the 2018 amendment. *See* H.B. 407, 54th Leg., 1st Sess. (N.M. 2019). This new provision reads:

A levy approved by the voters of a district and authorized by the commission pursuant to Section 73-20-46 NMSA 1978 prior to July 1, 2018 shall continue to be assessed pursuant to the laws in effect at the time the levy was initially approved; provided that the aggregate of all levies in a district approved prior to July 1, 2018 that continue in effect and any levies in the same district approved on or after July 1, 2018 shall not exceed the maximum allowable levy in a district pursuant to Subsection A of Section 73-20-46 NMSA 1978.

Section 73-20-46.1 (2019).

The plain language of Section 73-20-46.1 provides that the passage of an entirely new mill levy would not affect the ten-year limit on mill levies approved under the law in effect before July 1, 2018. Hence, mill levies approved and existing prior to July 1, 2018 remain limited to a stated period of up to ten years. In addition, soil and water conservation districts holding a mill levy that existed prior to July 1, 2018 would retain that same mill levy if the district held a subsequent referendum and failed to approve a new mill levy or an increase in its old levy. A district's failure to approve a new or increased mill levy would not have any bearing on the legal status of its previous levy, pursuant to Section 73-20-46 and Section 73-20-46.1.

Similarly, the successful passage of a new or increased mill levy also would not affect the ten-year limit on an existing mill levy. With respect to an increase in the amount of an older mill levy that existed prior to July 1, 2018, these mill levies are, pursuant to Section 73-20-46.1, governed almost entirely by the statute as it read at the time of their initial passage. This means that such an older mill levy would remain subject to the ten-year limit after it was increased and could only be increased up to "one dollar (\$1.00) on each one thousand dollars (\$1,000) of net taxable value." Section 73-20-46 (2009).³

the amendment did not affect Section 73-20-46(G), which provides that, if a district board determines that there will be sufficient funds for the operation of the district in a particular year, the board must adopt a resolution decreasing or deleting the assessment for that year.

³ By this we mean that an older mill levy cannot be increased up to "five dollars (\$5.00) on each one thousand dollars (\$1,000) of net taxable value" as Section 73-20-46 permits today. Because Section 73-20-46.1 provides that mill levies in existence on July 1, 2018 continue to be governed by the statute in place at the time of their passage, this means *both* that they retain their older ten-year duration limits *and* that they cannot

We emphasize that older mill levies are not exempt from the five-dollar allowable levy maximum per district set by Section 73-20-46. *See* § 73-20-46.1 (providing that “the aggregate of all levies in a district approved prior to July 1, 2018 that continue in effect and any levies in the same district approved on or after July 1, 2018 shall not exceed the maximum allowable levy in a district pursuant to Subsection A of Section 73-20-46 NMSA 1978”). Soil and water conservation districts cannot, pursuant to the Act, pass new mill levies or increase the amount of already-existing mill levies without complying with this statutory mandate.

Duties of County Clerks

Pursuant to the Act, soil and water conservation district boards are comprised of five elected supervisors who must reside in the district. *See* § 73-20-37(A). Four of these elected supervisors must be “landowners within the defined geographical area of their district.” *Id.* The Act specifies that the final elected supervisor, designated as the supervisor-at large, “may serve the district without landowner qualification.” *Id.* Elections for soil and water conservation district supervisor positions are held in accordance with the Local Election Act, NMSA 1978, Sections 1-22-1 to -19 (2018, as amended through 2019).

Based on the relevant provisions in both the Act and the Local Election Act, county clerks have only limited authority to determine whether a candidate for a soil and water conservation district board has satisfied the qualifications for office. In particular, while county clerks are responsible for determining “whether a candidate filing a declaration of candidacy is registered to vote within the area to be elected to represent,” they do not have the authority under the Local Election Act to determine whether the candidate either resided in the district or owned land within the geographical boundaries of the district. Section 1-22-10(A).⁴ Instead, any registered voter may file a legal challenge to the qualifications of candidates in the appropriate district court. *See* § 1-22-10(B) (providing that, “Any voter may challenge the candidacy of any person seeking election at the regular local election for the reason that the person does not meet the requirements for the office sought by filing a petition in the district court within seven days after the day for filing a declaration of candidacy.”).

Finally, as to whether county clerks are obligated to inform prospective candidates for soil and water conservation district boards of the qualifications for office and supply those

be increased beyond “one dollar (\$1.00) on each one thousand dollars (\$1,000) of net taxable value.” Section 73-20-46 (1965, amended 2009).

⁴ Section 1-22-10 provides that county clerks, as filing officers, “shall determine whether a candidate filing a declaration of candidacy is registered to vote within the area to be elected to represent.” *See also* § 1-1-5.9 (defining the term “proper filing officer” as “for the purposes of filing: ... declarations of candidacy and candidate qualification documents by all other candidates, the county clerk of the county in which the candidate resides”).

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qualifications to prospective candidates, we note that no such law exists. After diligent search, we can find no provision of law obligating a county clerk to shoulder the general burden of informing all prospective candidates for public office, including those for soil and water conservation district boards, of the qualifications of the particular office the candidate might seek.

Please note that we are providing this opinion and legal advice in the form of a letter that is a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Kreienkamp", is written over a light blue rectangular background.

John Kreienkamp
Assistant Attorney General

Enclosure

cc: Valencia Soil and Water Conservation District Board of Supervisors