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March 30, 1977

Honorable Tom Craddick
Chairman, Natural Resources
Committee
Texas House of Representatives
Austin, Texas 78767

Letter Advisory No. 130

Re: Constitutionality of HB 390 which would exempt wells used for agricultural purposes from the permit fees charged by the Harris-Galveston Coastal Subsidence District.

Dear Chairman Craddick:

You have requested our opinion regarding the constitutionality of House Bill 390, presently pending in the 65th Legislature.

House Bill 390 proposes to amend a portion of the statute creating the Harris-Galveston Coastal Subsidence District, Acts 1975, 64th Leg., ch. 284 at 672. The latter act provides for the "regulation of the withdrawal of groundwater . . . for the purpose of ending subsidence" within the District, defined to include Harris and Galveston Counties. Sections 1(a), 4. Section 19(a) requires that a permit be obtained from the District's Board of Directors

> [b]efore a well . . . which is used . . . for the purpose of withdrawing groundwater may be operated or drilled for that purpose . . . .

Section 37 provides that fees for permits shall be established by the Board. Section 43 exempts from the application of the act certain types of wells. House Bill 390, about which you inquire, would add an exemption for "wells used for agricultural purposes." You ask whether such an exemption contravenes the Equal Protection Clause of the United States and Texas Constitutions.

The permit required by the 1975 law and the fees imposed thereunder are in the nature of a license. The Supreme Court has declared the standard to be applied in determining whether the classification scheme imposed by a licensing act comports with equal protection:

> Where a state may validly require a license, it may make such classifications, subclassifications or exemptions as deemed necessary, so long as such classifications are not unreasonable and arbitrary . . . . "A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act." . . . The mere fact that discrimination is made does not necessarily vitiate the classification, and unless there is no substantial basis for the discrimination, there is no warrant for judicial interference . . . . All that is required is that the enactment shall be applicable to all persons alike under the same circumstances.

Dogden v. Depuglio, 209 S.W.2d 588, 594 (Tex. 1948).

In applying this standard, Texas courts have upheld statutes and ordinances which have classified persons for licensing purposes according to the character of the business in which they were engaged. Town of Ascarate v. Villalobos, 223 S.W.2d 945, 950 (Tex. 1949); Pierce v. City of Stephenville, 206 S.W.2d 848, 851 (Tex. Civ. App. -- Eastland 1947, no writ); Mims v. City of Fort Worth, 61 S.W.2d 539, 542-43 (Tex. Civ. App. -- Fort Worth 1933, no writ); contra, Lossing v. Hughes, 244 S.W. 556 (Tex. Civ. App. -- Dallas 1922, no writ). Since 1904, the United States Supreme Court has recognized the validity of statutory distinctions based upon the character of the goods or products dealt in or sold. Hammond Packing Co. v. Montana, 233 U.S. 311, 333-34 (1914); McCray v. United States, 195 U.S. 27, 62-64 (1904).

In our opinion, the exemption of "wells used for agricultural purposes" from the licensing requirements of the 1975 act would not necessarily establish an arbitrary or unreasonable classification. The exemption is applicable to all persons under the same circumstances, and we are unable to conclude that the Legislature could find no substantial basis for treating agricultural wells in a manner different from the treatment accorded various other kinds of wells. It is therefore our opinion that House Bill 390, in exempting "wells used for agricultural purposes" from the permit requirements of the 1975 act creating the Harris-Galveston Coastal Subsidence District does not contravene the Equal Protection Clause of the United States and Texas Constitutions.

You also ask whether the Legislature may establish a "graduated scale for fees, permitting certain well owners (such as agricultural producers) to pay a permit fee lower than charged to other well owners." We believe that any challenge to a graduated fee scale would be judged in accordance with the standards discussed above, but we cannot determine the validity of any other graduated fee plan without being apprised of the particular classifications proposed.

Very truly yours,

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APPROVED:

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C. ROBERT HEATH, Chairman
Opinion Committee

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