

**LEGAL ISSUES IN THE OPERATION AND MANAGEMENT
OF WATER DISTRICTS AND WATER ASSOCIATIONS**

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*The opinions expressed in this outline are solely the author's and do not necessarily reflect those of the Public Service Commission or any other person employed by the Public Service Commission.

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I. REFERENCES

- A. KRS 58.010 -.190 (Revenue Bonds)
- B. KRS 61.101-.103 (Whistleblower Act)
- C. KRS 65.200-.2006 (Claims Against Local Government Act)
- D. KRS 65.805-.830 (Special Districts)
- E. KRS 65.940-.956 (Governmental Leasing Act)
- F. KRS Chapter 74 (Water Districts)
- G. KRS 96.930- 943 (Collection of Municipal Sewage Bills)
- H. KRS Chapter 106 (Acquisition of Waterworks by Cities and Water Districts)
- I. KRS 107.700-770 (Kentucky Privatization Act)
- J. KRS Chapter 273 (Religious, Charitable and Educational Societies – Nonstock, Nonprofit Corporations)
- K. KRS 337.505-.550 (Prevailing Wage Rate)
- K. KRS Chapter 416 (Eminent Domain)
- L. KRS 424.260 (Bidding Requirements)
- M. House Bill 83 (2008 General Session)
- N. House Bill 201 (2010 General Session)
- O. Governor’s Office for Local Development, Special District’s Manual (April 2008)
- O. Opinions of Attorney General
 - 1. KRS 15.020: The Attorney General is “the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state

officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties . . .”

2. See York v. Commonwealth, 815 S.W.2d 415, 417 (Ky.App. 1991) (“An attorney general’s opinion is highly persuasive, but not binding on the recipient.”).

II. ORGANIZATION: LEGAL NATURE OF A WATER DISTRICT

A. A water district is “a political subdivision.” Louisville Extension Water District v. Diehl Pumping & Supply Co., 246 S.W.2d 586 (Ky.1952). Water “districts are political subdivisions of county government.” Public Service Com’n of Kentucky v. Dewitt Water Dist., 720 S.W.2d 725, 731 (Ky. 1986). “[A] water district is a type of special district which constitutes a political subdivision of the commonwealth.” Davis v. Powell’s Valley Water Dist., 920 S.W.2d 75, 78 (Ky.App.1995).

B. **“Special district** means any agency, authority, or political subdivision of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries. It includes all political subdivisions of the state except a city, a county, or a school district.” KRS 65.005.

C. Significance

1. Open Records Act/Open Meetings Act – Applies to all public agencies. Special districts are included within the definition of public agency. KRS 61.870(1); KRS 61.805(1).

2. Claims Against Local Government Act applicable to water districts. Special districts are included within the definition of “local government.” KRS 65.200.

3. Whistleblower Act applicable to water districts. KRS 61.101(2) (“**Employer** means the Commonwealth of Kentucky or any of its political subdivisions.”).

4. Bidding Requirements. KRS 424.260 requires “districts” to make newspaper advertisement of bids for services and materials exceeding \$20,000.

5. Sovereign Immunity Implications.

6. Exemption from some taxes (e.g., motor vehicle usage tax). See, e.g., OAG 71-376.

7. Other water utilities (investor-owned utilities, water associations) are not subject to these requirements.

III. CREATION OF A WATER DISTRICT

A. Petition to PSC (KRS 74.012)

1. Not less than 5 resident freeholders of the geographical area sought to be served must make formal application to the PSC for authority to petition the county judge/executive for establishment of a water district. See Letcher County Water and Sewer District, Case No. 96-515 (Ky.PSC Nov. 26, 1996) (Application of County Judge/Executive for creation of water district does not accord with KRS 74.012 and must be rejected).

2. PSC must set matter for hearing and notify all other water suppliers (private or public; jurisdictional or non-jurisdictional), planning and zoning or other regulatory agencies or agencies with the authority in general area. But see Application of Jonathan Creek Water Association, Case No. 91-144 (Ky.PSC Jun. 19, 1991) (application for creation of water district to replace an existing water association does not require that a hearing).

3. To approve the application, the PSC must find that “that the geographical area sought to be served by such proposed water district or water association cannot be feasibly served by any existing water supplier, whether publicly or privately owned, and whether or not subject to the regulatory jurisdiction of the commission.” KRS 74.012(3).

4. Purpose of PSC Review: Discourage the proliferation of unneeded water districts. KRS 74.012 enacted during the same session of the General Assembly as KRS 74.361 (Water District Merger Statute) wherein General Assembly found “the reduction of the number of operating water districts in the Commonwealth will be in the public interest.”

5. PSC has liberally interpreted “cannot be feasibly served”.

- a. Rockcastle County Water Association, Case No. 90-159 (Ky.PSC May 14, 1991). Despite finding that an existing water association could feasibly serve the proposed area, PSC found the water association was unwilling to serve and therefore statutory prerequisites met. (“Feasible” is defined in Webster’s New World Dictionary as ‘capable of being done or carried out; practicable; . . . probable.’ When the circumstances are viewed as a whole, it is clear that the formation of the proposed association represents the only means by which the residents proposed to be served by the new association will be able to obtain water service.”)

- b. Case No. 96-515, Letcher County Water and Sewer District (Ky.PSC May 19, 1997). While recognizing that nearby cities could

serve the unincorporated areas of Letcher County, Kentucky, the PSC found that no cities had expressed an interest in serving these customers and that it could not force municipalities to extend service. It therefore found that area could not be feasibly served by any existing water supplier.

c. Case No. 98-502, Breathitt County Water District (Ky.PSC Dec. 2, 1999) (finding that no existing water supplier could feasibly serve the proposed water district's area even though a municipal utility served the general vicinity and had agreed to be the wholesale water supplier to the proposed water district).

6. PSC approval is also required for creation of a water association. Incorporators must first obtain PSC approval prior to filing incorporation documents with Secretary of State. See, e.g., Case No. 90-159, Rockcastle County Water Association (Ky.PSC May 14, 1991).

B. Fiscal Court Action (KRS 65.805 -.830)

1. KRS 74.010: "Subject to the provisions of KRS 74.012, a fiscal court may create a water district in accordance with the procedures of KRS 65.810."

2. Petition to Fiscal Court

a. Must be signed by a number of registered voters at least equal to 20 percent of an average of the voters living in the proposed service area and voting in the last 4 general elections.

b. Must state the statutory authority under which the district is created.

c. Must state demographic characteristics of the area.

d. Must contain description of the area, including population of service area; metes and bounds description; anticipated date of beginning of service; projected effect of providing service; and projected growth of service demand.

3. Notice given to all planning commissions, cities, and area development districts within proposed area.

4. Public Hearing held. Testimony of interested persons taken and recommendations of any planning commissions, cities, and area development districts solicited.

5. Fiscal Court sets forth its written findings of fact and shall approve or disapprove the formation of the district to provide service as described in the plan of service.

6. If Fiscal Court approves, it must also adopt an ordinance creating the water district.

7. ***Practice Pointer:*** Water district should maintain copies of all fiscal court ordinances and county judge/executive addressing the creation and subsequent changes to the water district. Do not rely upon the County Clerk.

IV. MANAGEMENT – WHO ARE THE PLAYERS?

A. Board of Commissioners: “A water district shall be administered by a board of commissioners which shall control and manage the affairs of the district.” KRS 74.020(1).

1. Number

a. Single County Districts – 3 or 5 (Solely within the County Judge/Executive’s discretion).

b. Single County (Merged) Districts – Prior to July 15, 2008, County Judge/Executive possesses authority to appoint 2 additional commissioners when 2 or more water districts within a single county merged. **HB 83 eliminates this authority to expand board membership for merged single county districts.**

c. Single County District extends service into other counties pursuant to KRS 74.115:

(1) Into One County: County Judge/Executive of adjoining county appoints 2 additional members to serve on board of commissioners (to represent the new portion of district).

(2) Into Two or More Counties: Respective County Judge/Executives appoint two additional members from the original area and two members from the extended area.

(3) Exception: No new members need to be added where district acquires an existing water or gas system beyond its boundaries or extends its system into one or more counties beyond its existing boundaries if the new area to be served is deemed to be a “minor portion” of the total area served and respective fiscal court agrees to acquisition or expansion. If less than 25 percent of the total assets of

the distribution system are located within any particular county, there is a conclusive presumption that, with respect to that county, that only a minor portion of the water district's total area is served and the addition of new members to the board of commissioners to represent that county is not required.

-- Example: Daniel Boone Water District is located completely within Mingo County. It expands its distribution facilities to serve portions of McCain and Obama Counties. The fiscal courts of both counties consent to the extension. Upon completion of extension, approximately 10 percent of Daniel Boone's total distribution facilities will be located in McCain County and 20 percent will be located in Obama County. The extension will not require an increase in the number of Daniel Boone Water District commissioners.

d. ***Practice Pointer:*** Before making an extension into another county, board should consider the effect that the expansion will have on its composition.

2. Qualifications:

a. Residence Requirements:

(1) "Members of the board shall be residents of the district, or of any incorporated or unincorporated area served by the district." KRS 74.020(1). Residence means "actual residence at a place, coupled with the intent to remain at such place." OAG 85-41.

(2) Member does not need to be a customer of water district. OAG 84-228 (Water District by-laws may not require commissioners to be customers.).

(3) HB 4 (2009 Special Session): Permits a non-resident who is a customer of the water district to serve as a member. (Act expires June 30, 2010.)

b. Compatibility of Office – May a person be a water district commissioner and hold another public office?

(1) Incompatibility of office exists when "two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest. . . . The question is whether one office is subordinated to the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public

interest.” See LaGrange City Council v. Halls Bros. Of Oldham County, Inc., 3 S.W.2d 765, 769-770 (Ky.App. 1999).

(2) The offices of water district commissioner and mayor of a city located within the water district’s boundaries are not incompatible. OAG 84-279.

(3) A person may serve on a water district’s board of commissioners and also serve as a member of a city council. OAG 82-635.

(4) A county judge/executive cannot legally serve at the same time as a water district commissioner. OAG 78-651; OAG 67-68.

(5) No member of fiscal court (magistrates or commissioners) can legally serve at the same time as a water district commissioner. OAG 78-651.

(6) Person who holds office of trust with Federal Government cannot serve as a water district commissioner. Ky. Const. §237; OAG 80-234 (opining that a postmaster may not serve as water district commissioner while holding position of postmaster).

(7) Water district commissioner cannot hold the position of superintendent or manager of the water district. See Letter from Thomas M. Dorman, Executive Director, Public Service Commission, to Barbara May, Chairman, Marion County Water District (Dec. 10, 2002); OAG 65-754; OAG 64-914.

(8) Water district commissioner cannot hold the position of an employee of the water district. OAG 65-754.

(9) Spouse or relative of a water district commissioner may serve as superintendent of water district. OAG 66-70.

(10) Member of General Assembly may not serve as a water district commissioner. OAG 65-199.

(11) State offices are not incompatible per se. KRS 61.080(1) prohibits a person from holding a state office and a county office at the same time. Water district commissioner is not considered a county or state office. (“Being a political division of the state, the members of the commission would not be considered either state, county or city officers within the meaning of Section 165 of the Constitution and KRS 61.080.”) OAG 82-635.

(12) Effect of accepting incompatible office. See KRS 61.090 (“The acceptance by one (1) in office of another office or employment incompatible with the one (1) he holds shall operate to vacate the first.”)

c. Training. Within 12 months of initial appointment, Water District Commissioner must complete 12 hours of new commissioner training that Public Service Commission provides or accredits. Failure to complete training within the required time will result in automatic forfeiture of office. KRS 74.020(8)(b).

d. Felony Conviction - Ky. Constitution §150 – Any person convicted of a felony is disqualified from holding public office.

e. Subsequent Disqualification - If disqualifying event occurs (e.g., moving residence outside district), can person continue to hold office?

(1) A member moving outside of district’s territory does not automatically vacate his office but makes member subject to removal. He would continue to serve as de facto officer until he resigns or removed. OAG 76-381. See also Com. Ex Rel. Breckinridge v. Winstead, 430 S.W.2d 647 (Ky. 1968).

(2) Actions of disqualified member are still valid as to third parties. (E.g., a contract that water district award based upon the vote of a disqualified member is not invalid.) OAG 85-41.

3. Term of Office

a. 4 years in length

b. Initial Appointment of Commissioners – Terms are staggered to ensure continuity of operations and institutional experience.

c. Unexpired terms. Appointee serves only to completion of unexpired term, then must be reappointed. KRS 74.020(4).

d. No limitation on the number of terms that a commissioner may serve. Fiscal Court has no authority to limit the number of terms to which a person may be appointed. OAG 85-116.

e. Completion of term. Commissioners continue to serve until their successors are appointed and qualified. KRS 65.008. See also OAG 82-176 (“[A] member of the Water District Board can hold over after the expiration of his term only where there is no regularly elected and qualified successor. Where such officers hold over,

their official acts are valid until their successors are appointed and qualified.”

4. Appointments – Who appoints the Commissioners?

a. County Judge/Executive appoints. Approval of the Fiscal Court of the appointment must be obtained. “[T]he fiscal cannot disapprove of such appointment on whimsical, unreasonable, or arbitrary grounds.” OAG 82-176.

b. Public Service Commission.

(1) A vacancy resulting from the expiration of a term shall be filled by the PSC if within 90 days of the expiration of the term the vacancy has not been filled by the appropriate county judge. KRS 74.020(4).

(2) **HB 201 Revisions:** PSC is now authorized to fill any vacancy resulting from expiration of term, death, resignation or removal if the vacancy has not been filled within 90 days.

(3) If 90-day period has run and the PSC has not acted, County Judge/Executive may still make appointment to fill vacancy. The PSC may adopt or affirm the County Judge/Executive’s action. See Letter from David Edward Spenard, Asst. Attorney General, to Alisa B. Gatten, Office Manager, Nebo Water District (Nov. 18, 1998). But see Gallatin County Water District, Case No. 2003-00085 (Ky.PSC May 9, 2003) (dismissing application for appointment as moot upon appointment and approval by county fiscal court); Hendron Water District, Case No. 99-394 (Ky.PSC Mar. 28, 2000).

(4) Mountain Water District, Case No. 2001-00379 (Ky.PSC Dec. 7, 2001). When 90 days elapsed after the terms of two water district commissioners, the commissioners and the water district applied to PSC for the reappointment of these commissioners. County Judge/Executive requested that no action be taken pending completion of legal action by Judge/Executive against members of Fiscal Court. Held: If no appointments and approvals are made within 90 days, PSC must act. “[T]he General Assembly intended to cut short any period of uncertainty regarding water commissioner appointments.” Given the construction program that water district has undertaken, uncertainty over membership of board of commissioners would be counterproductive. Finding no

allegation that the persons whose terms have expired are not competent to serve, they should be reappointed.

(5) Mountain Water District, Case No. 2001-00379 (Ky.PSC Jan. 29, 2002) (on rehearing). County Judge/Executive argues that her nominees should have preference in any PSC appointment. Held: Appointment of incumbents is a more reasonable course of action. PSC notes in response to assertions that preference to elected officials desires should be given preference over those of an unelected Board of Commissioners that "[I]t is perhaps for that reason that the General Assembly gave this Commission the duty to appoint commissioners when the initial appointment process, which is conducted by elected officials, results in deadlock."

(6) Western Fleming Water District, Case No. 2005-00462 (Ky.PSC Feb. 1, 2006). County Judge/Executive requested PSC appointment of his nominee when Fiscal Court refused to approve. The incumbent commissioner requested reappointment. Although noting that it was not required to defer to the preferences of the county judge/executive, members of fiscal court or commissioners of the water district, the PSC refused to reappoint because the member had "lost the confidence a majority of the members of . . . [the board of commissioner and county/judge executive] and that his reappointment may have a divisive effect on the water district's management."

(7) Ledbetter Water District, Case No. 2005-00384 (Ky.PSC Mar. 30, 2006). County Judge/Executive requested PSC appointment of his nominee when Fiscal Court refused to approve. The current office holder requested reappointment. Despite finding no statutory preference for an incumbent commissioner, PSC noted that there was no allegation that incumbent was less than competent to fulfill his role as commissioner and that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse."

(8) Breathitt County Water District, Case No. 2007-00493 (Ky.PSC Mar. 20, 2008). Members of Fiscal Court requested the PSC appointment of their nominees after Fiscal Court rejected County Judge/Executive's nominees. County Judge/Executive subsequently applied for appointment of his nominees. While application was pending before PSC, County Judge/Executive and Fiscal

Court reached agreement upon appointment and submitted agreement to PSC for action. Appointing the nominees upon whom the County Judge/Executive and Fiscal Court had agreed, PSC noted that while a county judge/executive and a county fiscal court may reach agreement on the vacant position, they lack authority to fill the vacancy once it has remained unfilled for more than 90 days. Any action on their part to appoint and approve a candidate at that time has limited legal effect and constitutes only a recommendation to the PSC.

While noting that it has exclusive authority to fill vacancies that exist for 90 days or more, PSC stated that it will defer to the local elected officials in those instances where the local appointing and approval authorities have reached agreement on a candidate. Absent unusual circumstances that raise clear concerns about an agreed candidate's qualifications, such deference is appropriate because local officials generally have a better understanding of the candidates' qualifications and of the water district's needs and because these officials are directly accountable to the water district's customers through the ballot box. See also Letcher County Water District, Case No. 2008-00395 (Ky.PSC. Jan. 28, 2009).

c. Fiscal Court cannot appoint water district commissioners.

(1) "There is no statutory authority for such an appointment to be made by a magistrate, acting unilaterally, or by the superintendent of the water district. The county judge/executive will have to keep recommending and nominating persons for the position until a name is submitted which meets the approval of the fiscal court. The appointment procedure is a joint process involving the county judge/executive and the fiscal court and the statute contemplates an appointment acceptable to both." OAG 78-341.

(2) "Fiscal Court has no authority to nominate or initially appoint . . . [water district] commissioners. They can either approve or disapprove of . . . specific appointments of such commissioners." OAG 84-206.

d. PSC Procedures Used to Fill Vacancy

(1) Once it learns of the vacancy, PSC initiates proceeding and notifies county judge/executive, fiscal court and water district.

(2) Any party is permitted to nominate a candidate for vacancy or offer himself as a candidate.

(3) PSC screens nominees through discovery process. Proponents are required to furnish information regarding:

(a) Education

(b) Business Background

(c) Utility Experience

(d) Government/Management Experience

(e) Criminal Convictions

(f) Business Dealings/Other associations with water district.

(4) PSC Staff conducts Internet search of nominees. Criminal background checks are possible.

e. Water District's Obligation to Notify Authorities of Vacancy or Pending Vacancy

(1) At least sixty (60) days before the expiration of the term of office of an appointed member of a district's governing body, the district shall notify the appointing authority of the forthcoming expiration of the term of the appointed member of the district's governing body. KRS 65.008.

(2) Within thirty (30) days of the occurrence of a vacancy on its board of commissioners resulting from the expiration of a term or the death, resignation, or removal of the incumbent, a water district shall notify in writing the Public Service Commission of the existence of the vacancy. The notice shall include the name of the commissioner who last held the position and the date on which the unexpired term will end. KRS 74.020(9)(a).

(3) Within thirty (30) days of the appointment of a commissioner and the appropriate fiscal court's approval of that appointment, a water district shall notify the Public Service Commission of the appointment. The notice shall include the appointed person's name and the date of the expiration of his or her term. KRS 74.020(9)(b)

f. **Practice Pointer:** The Water District should maintain a record of all appointment orders.

g. **Practice Pointer:** Water District should encourage the appointing County Judge Executive and the approving County Fiscal Court to state in the appointment and the resolution of approval of appointment the ending date of the term and the reason for appointment (e.g., “to fill the uncompleted term of Commissioner X who died in office”). See Letcher County Water and Sewer District, Case No. 2008-00395 ((Ky.PSC. Jan. 28, 2009).

5. Removal of Commissioners

a. County Judge/Executive. (KRS 65.007)

(1) Grounds

(a) Inefficiency

(b) Neglect of duty

(c) Malfeasance

(d) Conflict of interest

(e) A commissioner who participates in any official action by the water district board of commissioners that results in a direct financial benefit to him may be removed. KRS 74.020(3).

(2) Procedure

(a) Written notice of charges and removal proceedings presented by County Judge/Executive.

(b) Public Hearing chaired by County Judge/Executive.

(c) Right to employ counsel

(d) Record of hearing required

(e) Decision to remove subject to Fiscal Court approval.

(f) Right to appeal to circuit court.

b. Public Service Commission (KRS 74.455). See also OAG 78-215 (holding that PSC may remove any water district commissioner for good cause.)

(1) Grounds – “Good Cause Standard”

(a) Incompetence

(b) Neglect of duty

(c) Gross immorality

(d) Nonfeasance (nonperformance of duty)

(e) Misfeasance (improper doing of an act that a person can lawfully do)

(f) Malfeasance (the commission of an act which is positively unlawful)

(g) Failure to comply with the rules, regulations, and orders issued by the Public Service Commission.

(2) Procedure

(a) Follow the Commission’s rules of procedure

(b) Public hearing on the merits

(c) Opportunity to appear – with or without legal counsel.

(d) Right to file briefs, memoranda and motions

(e) Right to cross-examine witnesses and examine exhibits

(f) Right to present evidence

(3) **No right to appeal. PSC’s decision is final.**

(4) PSC’s right of removal also extends to directors and trustees of water associations.

(5) PSC Proceedings. Horn v. Estill County Water District No. 1, Case No. 91-032 (Ky.PSC May 11, 1992) (customers’ complaint seeking removal of water district commissioners for alleged misconduct); Southern Madison Water District, Case No. 2006-00465 (Ky.PSC Feb. 15,

2008) (investigation into potentially improper transactions between a water district and commissioner); Conley v. Magoffin County Water District, Case No. 2007-00373 (Ky.PSC Mar. 24, 2008) (customer complaint alleging water district commissioner no longer resided in water district's territory); Investigation into Qualifications of Toni Akers and Michael Litafik, Case No. 2009-00209 (Ky.PSC Aug. 20, 2009) (investigation of allegations that water district commissioners no longer met residence requirements).

6. Resignations.

a. Must be made in writing. KRS 63.010.

b. Must be tendered to the court "required to fill the vacancy." KRS 63.010. For water district commissioners, the resignation must be tendered to County Fiscal Court (As County Judge Executive appoints and Fiscal Court must approve the appointment, Fiscal Court fills the vacancy.)

c. Resignation is not effective until it is accepted by the appointing authority and is recorded in its minutes. See OAG 78-161; OAG 61-742. It may be withdrawn at any time prior to acceptance.

7. Positions.

a. **Prior to the enactment of HB 83:**

(1) KRS 74.020(5) identified only 3 positions: Chairman, Treasurer, and Secretary. Members of the board of commissioners elected these officials. Few duties specifically assigned to the actual position.

(a) Chairman: Signs warrants (KRS 74.050).

(b) Secretary: Countersigns warrants (KRS 74.050).

(c) Treasurer:

(i) Pays properly signed warrants. KRS 74.050.

(ii) If proper safeguards are in place, Treasurer is not required to sign checks issued by the water district. See Letter from Jason C. Mosley, Assistant Attorney General, to Charles Pangburn, Counsel for Northern Kentucky Water District (Nov. 17, 2000); but see Horn v.

Estill County Water District No. 1, Case No. 91-032 (Ky.PSC May 11, 1992) (finding that treasurer's signature required to disburse funds by check).

(2). May one commissioner hold more than one position on the board of commissioners? KRS 74.020(5) suggests that a different person must hold each position. See Letter from William H. Bowker, Deputy Executive Director, Public Service Commission, to Barbara May, Chairman, Marion County Water District (Dec. 16, 2002).

b. **With enactment of HB 83:**

(1) KRS 74.020(5) identifies the following positions: Chairman, Vice-Chairman, Secretary, and Treasurer. It further provides that other officers and assistant officers as Board of Commissioners deem necessary, may be created. **The officers/assistant officers must be members of board of commissioners.**

(2) With the exception of chairman, commissioners are authorized to hold more than one office on board of commissioners. Chairman may hold only that office.

(3) Role of treasurer has been clarified. Treasurer is deemed the "lawful custodian" of water district funds and is responsible for disbursing them in accordance with procedures that the water district must adopt. Treasurer must maintain a proper record of the receipts and disbursements in accordance with the Uniform System of Accounts for utilities.

(4) Board of commissioners is expressly authorized to adopt by-laws to govern the operation of the water district. These by-laws may not be inconsistent with provisions of KRS Chapter 74.

8. Bonds. Each commissioner is required to execute a bond for the faithful performance of his duties. KRS 74.020(5). See also KRS 65.067(1) (requires all officers who hand public funds in the execution of their duties to give a good and sufficient bond to the local governing body for the faithful performance of their duties and for all money coming into that person's hands or under that person's control.)

a. County Judge/Executive approves the bond. KRS 74.020(5). **[HB 83 eliminates designation of County Judge/Executive as approval authority.]**

b. Bond must be given within 30 days of appointment. KRS 62.050(3).

c. Amount.

(1) As approving officer, County Judge/Executive must determine the appropriate amount of the bond. KRS 62.060(1). **[HB 83 eliminates designation of County Judge/Executive as approval authority but does not designate a new approval authority.]**

(2) See KRS 65.067(1) (for bonds for persons handling public funds) (“The bond amount shall be based upon the maximum amount of public funds the officer, official, or employee handles at any given time during a fiscal cycle.”)

d. Failure to have performance bond.

(1) Penalty of not less than \$500 and not more than \$1,000. KRS 62.990.

(2) Creates a vacancy in the office. See, e.g., Reynolds v. Floyd County Fiscal Court, 90 S.W.2d 694 (Ky.App. 1935).

e. Storage. Attorney General advises that such bonds should be filed with County Clerk, County Judge/Executive, and with water district. Letter from David Spenard, Assistant Attorney General, to James Owen, General Manager, Christian County Water District (Nov. 14, 2005).

9. Oaths.

a. Each commissioner must take the oath of office within 30 days of notice of appointment. KRS 62.010(3). If commissioner violates KRS 62.010(3) before January 1, 2010, his office is considered vacant. If violation occurs on or after January 1, 2010, the commissioner’s office is considered vacant and he is ineligible for the same office for two years. KRS 62.990(2).

b. Oath may be administered by state or federal judge, member of General Assembly, or any county judge/executive, notary public, clerk of a court, or a justice of the peace, within his district or county. KRS 62.020(1).

c. Persons administering the oath shall certify in writing that the oath of office was administered and the date of its administration. The person administering the oath shall file a written certification in

the office of the county clerk of the county in which the water district is located. KRS 62.020(3).

10. Salaries

a. Established by County Judge/Executive with the approval of fiscal court. **Board of Commissioners does not set its own salary. It may make recommendations to County Judge and Fiscal Court.**

b. Maximum limits

(1) \$3,600 annual salary. KRS 74.020(6).

(2) \$6,000 annual salary if 6 hours of PSC-certified water district management training completed. KRS 74.020(6).

(3) Treasurer may receive an additional \$200 annually for his services

c. **Practice Pointer:** Have a copy of the Fiscal Court ordinance approving current salary levels. Maintain proof of water district management training.

d. **Practical Consideration:** Failure to obtain approvals will subject water district to disallowance on salary issue; potential ratepayer suits.

e. Retroactive approval of salaries permitted. Fiscal Court may enter an order ratifying the past salary levels. OAG 77-425.

f. Water District Commissioner Training Expenses. Regardless of whether higher compensation is provided for attending training, the water district must cover cost of training. KRS 74.020(7)(a).

g. Salary limits do not include fringe benefits. See Caldwell County Fiscal Court v. Paris, 945 S.W.2d 952, 954 (Ky.App. 1997) (“‘compensation’ and ‘salary’ . . . mean the actual salary or fees paid to an officer”). See also, Hardin County Water District No. 1, Case No. 2001-00211 (Ky.PSC Mar. 1, 2002) (salary limits do not prevent water district from furnishing health insurance coverage to commissioners). Payment of fringe benefit may be included in salary if part of scheme “to raise the salary of a particular official through the subterfuge of paying certain benefits for him not uniformly available to similarly situated officials. Caldwell County Fiscal Court at 955.

11. Liability Insurance

a. A water district may purchase liability insurance out of its own funds for its commissioners or other employees.

b. KRS 65.150(1): "A county or city or urban-county government and any board, commission, agency or authority of a county, city or urban-county government may expend funds necessary to insure any of its employees, officials and property against any liability or property damage arising out of an act or omission committed in the scope and course of performing legal duties."

12. Free Water Service

a. KRS 278.170(2):

Any utility may grant free or reduced rate service to its officers, agents, or employees, and may exchange free or reduced rate service with other utilities for the benefit of the officers, agents, and employees of both utilities. Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity. The terms "officers" and "employees," as used in this subsection, include furloughed, pensioned, and superannuated officers and employees, and persons who have become disabled or infirm in the service of the utility. **Notice must be given to the commission and its agreement obtained** for such reduced rate service except in case of an emergency, in which case the commission shall be notified at least five (5) days after the service is rendered.

b. General Rule: Utilities may provide free service to their employees and officers. Prior Commission approval of such service must be obtained.

c. Exception for Water Districts and Water Associations. The Commission has historically refused to permit water districts to provide free service to their employees or customers.

(1) Cumberland Falls Highway Water District, Case No. 94-054 (April 7, 1994) at 2. PSC rejected a request to

approve free service to water district commissioners who were not paid any salary. Held: “Employee concession service should not be allowed for public corporations such as water districts and water associations. Such publicly owned utilities have no shareholders to whom the foregone revenues can be charged, which can only occur with investor-owned utilities.”

(2) East Logan Water District, Case No. 92-094 (March 16, 1992) at 1. See also West Shelby Water District, Case No. 2007-00211 (Ky.PSC Aug. 29, 2007).

(3) The PSC, however, has allowed some water districts to provide free water service to their commissioners. See, e.g., Muhlenberg County Water District Tariff Sheet 1 (issued May 13, 1985) (cancelled May 21, 2008).

(4) Previous Rationale for PSC prohibition:

(a) Appearance of impropriety. Free water to water district officials creates the impression that private persons are benefiting from their position and are being treated more favorably than others.

(b) Use of free service or reduced rates to circumvent the compensation limits set forth in KRS 74.020. But see Caldwell County Fiscal Court v. Paris, 945 S.W.2d 952, 954 (Ky.App. 1997).

(5) **Old Rationale Rejected; New Rationale for Denial Established.** Case No. 2008-00220, Cannonsburg Water District (Ky.PSC Mar. 10, 2009).

(a) Earlier decisions that held that free or reduced rate service was inappropriate because water district was non-profit entity and possessed no shareholders rejected. The Commission found no difference between authorized fringe benefits, such as health insurance, and free water. Ratepayers bore the cost of both types of benefits.

(b) The following policy arguments for denial announced:

i. It circumvented that statutory controls over water district commissioner compensation that are placed in county judge/executives and fiscal courts.

ii. It has limited value as a recruiting or retention tool.

iii. It reduces the transparency of a water district's payments to its commissioners.

iv. It separates water district commissioners from other ratepayers and may undermine public confidence in the water district's governance.

(c) The Commission noted that free service may be appropriate in special circumstances. A water district that applies for such service should provide with its application evidence regarding the level of official compensation, including: fringe benefits; the officials' workload; the size and scope of the water district's operations; the water district's past history of attracting qualified persons to serve in positions of responsibility; the cost of such service; and the effect of the provision of such service.

d. Possible Consequences of Failure to Comply. See, e.g., Case No. 95-107, North Marshall County Water District (Ky.PSC Oct. 13, 1995).

(1) Penalties assessed against water district and commissioners.

(2) Required collection/billing of undercharges.

(3) Removal of water district commissioners.

13. Travel and Other Expenses

a. KRS Chapter 74 is generally silent on reimbursement of water district commissioners' expenses. Exception: cost of water district management training. KRS 74.020(7)(a); KRS 74.020(8)(b).

b. KRS 64.710 prohibits the payment of any lump sum expense allowance or contingent fund for personal or official expenses.

c. Allowable expenses are those "that are reasonable in amount, beneficial to the public, and not predominantly personal to the officer in the sense that by common understanding and practice they are considered to be personal expenses." Funk v. Milliken, 317 S.W.2d 499, 506 (Ky. 1959) (addressing expenses for county fee officers). Decisions will be "will be governed by the

__ at 507.

d. Officer is “required to submit a detailed account of the expenses, with adequate supporting data, in order to obtain credit.” Funk v. Milliken at 507.

e. Travel expenses from home to office are not recoverable. “[I]n common understanding, both in the field of government and in private business, the expense of travel from home to office or place of employment is considered to be a personal expense.” Funk v. Milliken at 511.

f. Automobile expenses. “[A] claim for automobile expenses should not be allowed without a showing of the purpose and official necessity of each trip, and the distance traveled on each trip. Funk v. Milliken at 507. See also McWhorter v. City of Richmond, 514 S.W.2d 678, 679 (Ky. 1974); OAG 95-1.

14. Training [**HB 201 Revision**].

a. Water district commissioners first appointed after July 14, 2010 must attend a program of instruction conducted by PSC within 12 months of appointment to remain in office. Failure to attend the instruction will result in forfeiture of office.

b. At least only annually PSC must provide or cause to be conducted a program of instruction, consisting of at least 12 hours of instruction, that is intended to train newly appointed commissioners in the laws governing the management and operation of water districts and other subjects that the PSC deems appropriate.

c. Water district is required to reimburse commissioner for the cost of the instruction.

B. Superintendent/General Manager (KRS 74.040)

1. **Before HB 83:**

a. Commission may appoint a **competent** person as superintendent of water districts.

b. Superintendent shall be subject to the orders of the commission.

- c. May, with ***the approval and consent*** of the commission, employ all necessary labor and assistance in the performance of his duties.
- d. Superintendent ***shall report all*** expenses incurred.
- e. Commission fixes superintendent's salary (no limitation).
- f. Spouse or relative of a water district commissioner may serve as superintendent of water district. OAG 66-70.

2. **With HB 83:**

- a. Commission may appoint a person to serve as chief executive officer. May be designated as "general manager, superintendent, or chief executive officer of the district or any other similar title."
- b. Chief Executive Officer shall perform such other duties of board of commissioners may require of him or her.
- c. Chief Executive Officer shall employ all necessary labor and assistance in the performance of his duties. HB 83 eliminates the requirement for board of commissioners approval to employ persons or retain professional services. CEO may act without express approval in most cases. But see KRS 74.030 ("The commission may employ legal counsel whose compensation shall be paid from water district funds.")
- d. Chief Executive Officer ***shall report all*** expenses incurred.
- e. Commission fixes chief executive officer's salary (no limitation).
- f. Spouse or relative of a water district commissioner may serve as superintendent of water district. OAG 66-70.

C. Water District Counsel

1. **Before HB 83:**

- a. General: County Attorney shall act as counsel for the water district. KRS 74.030.
- b. Practical Realities: County Attorney seldom will represent water districts.

- (1) Limited experience in regulatory and financing areas

(2) Limited resources that must be used for other priorities

(3) County attorney not entitled to extra compensation from water district for his services, but must perform services as part of the duties of his office.

(a) “KRS 74.030 requires the County Attorney to act as counsel to the water commission without extra compensation.” OAG 78-13.

(b) Since KRS 74.030 “specifically designates that the county attorney shall represent water districts in his official capacity, it is the conclusion of this office that he is not entitled to extra compensation from the funds of a water district but must perform the duties as part of his office.” 1958 OAG 42,590.

(c) “[W]e do not believe that the commission can employ the county attorney as private counsel and pay him accordingly and at the same time receive his services free as part of his duties as county attorney” OAG 66-315.

c. Retention of Private Counsel.

(1) KRS 74.030: “Commission may, subject to approval of the county judge/executive employ counsel whose compensation shall be paid from water district funds.”

(2) ***Practice Pointers:***

(a) Document that County Attorney is unable or unwilling to provide legal services; or that water district believes that specialized legal expertise is required. Examples: Letter to County Attorney; Memorandum for Record; Letter to County Judge/Executive setting forth the need for private legal counsel; Fiscal Court Ordinance.

(b) Document County Judge/Executive’s approval (e.g., Letter from County Judge Executive, Fiscal Court Ordinance).

(c) Periodically update both.

(d) Attorney Selection

(a) Bidding for services is not required, but is recommended.

(b) If non-competitive process is used, prepare a memorandum for record explaining the reasons for selection.

(e) Water District should have a retainer agreement with its private counsel that sets forth the duties and responsibilities, billing practices, hourly fees, and any other arrangements.

(3) Role of County Attorney Once Private Attorney Hired. “[T]he county attorney must at least continue to advise the commission on all legal matters, but may be assisted by special counsel employed by the commission, in the performance of duties that possibly consume a considerable amount of time, such as the financing of the district and the institution of condemnation suits.” OAG 66-315.

(4) ***Practical Considerations:***

(i) Civil suits against commissioners for unauthorized or unapproved expenditures. Personal liability.

(ii) Removal for cause.

(iii) Rate case problems. If payments were not lawful, the PSC could disallow the expense. Water district could fail to obtain recovery of expense through its rates.

2. **HB 83:**

a. Authorizes employment of legal counsel to be paid from water district funds. Authorization from county judge executive no longer required. Board of Commissioners must authorize.

b. Removes requirement that county attorney must provide legal services.

c. Raises questions whether a county attorney may represent a water district. General duties of county attorney do not include representation of special districts. See KRS 69.210. Generally, statutes related to special districts expressly provide or require

county attorney to represent. See, e.g., KRS 75.250 (concerning fire districts)

D. Chain of Command

1. **To whom are Commissioners responsible?** Outside of the removal authorities, they are responsible to no official. Must exercise their independent judgment. They are not required to follow the dictates of any elected official in the operation of water district except as required by law.

2. Commissioners cannot delegate responsibility for water district's operations to General Manager. Responsibility for District's operations ultimately rests with Commissioners. KRS 74.070: "All corporate powers of the water district shall be exercised by, or under the authority of, its commission. The business and affairs of the water district shall be managed under the direction and oversight of its commission."

3. **Role of the Chairman: First Among Equals?**

4. **Practice Pointer:** Commissioners should have evidence demonstrating approval of all employees, should be requiring monthly reports of all expenses from Superintendent, and should be retaining evidence that expenses have been reviewed. They should also document the basis for their decisions.

V. GENERAL POWERS AND RESPONSIBILITIES

A. General Powers

1. Acquire/install pipe and water laterals (KRS 74.070).

2. Operate a water system (KRS 74.070).

3. Make contracts (KRS 74.070).

4. Hire Chief Executive Officer (KRS 74.070).

5. Prosecute and defend suits (KRS 74.070).

6. Contract with any city, water district or sewer construction district for operation of a water system or sanitary sewer system or both (KRS 74.414).

7. Condemn needed property that cannot be acquired through purchase (KRS 74.090).

8. Perform all acts necessary (KRS 74.070).

9. Establish water rates and make reasonable regulations for the disposition and consumption of water (KRS 74.080).

10. Sell excess property so long as sale is consistent with the terms of its revenue bond ordinances. See OAG 67-544.

B. Funding

1. Taxing Powers

a. Water districts have no taxing powers except to make assessments against benefited properties. See OAG 77-334 (“[T]he General Assembly has not yet delegated the tax levying authority in the strict constitutional sense, to water districts.”).

b. Water districts are excluded the definition of “taxing district” and are not expressly authorized to levy ad valorem taxes. KRS 65.180.

2. Assessments

a. To construct facilities, water districts may issue assessments to the owners of property benefiting from the proposed facilities. Assessments are “local burdens laid on property made for a public purpose, but fixed in amount once and for all time with reference to the special benefit which such property derives from the cost of the project.” Krumpelman v. Louisville & Jefferson County Metropolitan Sewer Dist., Ky., 314 S.W.2d 557, 561 (1958). They are “an enforced contribution on the property owner for the public benefit.”

b. Procedure:

(1) The water district examines the real estate that may be affected by the proposed facilities and places each piece of real estate into one of five classes based upon the benefit received from the construction and operation of the proposed facilities. The real estate that receives the greatest benefit is placed in Class A. The real estate that receives the least benefit is placed in Class E. All real estate that actually receives water service as a result of the facilities will be placed into Class A. KRS 74.130(1). Assessments shall be based upon the following ratios:

- Class A – 5
- Class B – 4
- Class C – 3
- Class D – 2
- Class E – 1

(2) The water district prepares a written report containing a statement of the estimated cost of facilities, a description of real estate in the affected area, the amount of real estate in each class, the names of the owners, and a statement of the estimated benefits that will accrue to each class as a result of the construction. KRS 74.130(2).

(3) The water district submits the report to county judge/executive. County judge/executive reviews report for sufficiency. If report is sufficient, he accepts and holds a final hearing on the report. Public notice of hearing must be given. Pending hearing, the report is made available for public inspection in the office of the county clerk. Any land owner subject to assessment may file exceptions to the report. If county judge/executive deems the report be to insufficient, he returns to the water district with instructions to gather more information.

(4) Following public hearing, county judge/executive confirms or rejects the report.

(5) If report confirmed, the water district prepares an assessment roll. The assessment roll contains a description of all the land, the name of the owner, and the amount of the assessment against each tract. Assessment roll is filed with the county clerk.

(6) County judge/executive conducts a public hearing on the proposed assessments. Notice of public hearing is required. At hearing county judge/executive hears all objections to the cost of the improvement and to the assessments on real estate. County judge/executive may direct changes. Final assessment roll is filed with the county clerk and county treasurer. KRS 74.150. Assessment serves as a lien upon the landowner's property. KRS 74.220.

(7) Notice of assessments made upon landowners. If payment not made in 30 days, the landowner is deemed to have consented to the issuance of bonds or taking of loan to be paid out of assessment revenues. KRS 74.170.

c. Assessments create a lien upon real estate and may be enforced by filing of an action in circuit court. KRS 74.220.

d. Assessments are not subject to PSC jurisdiction. See Daut v. Boone County Water District, Case No. 97-056 (Oct. 9, 1997)

“As an assessment is neither a rate nor a practice or act related to utility service, and as no provision of KRS Chapter 278 expressly authorizes our review of a water district’s use of assessments to finance system improvements, the Commission finds that the complaint [about use of assessments] involves a matter outside the Commission’s jurisdiction and should be dismissed . . .”).

e. Assessment process is seldom used. Most water districts have found it to be cumbersome and ineffective. It, however, may be effective in areas where development is expected and water district wishes to place the cost of facilities onto new development. Since the improvements will enhance the value of real estate and make it more attractive to development, placing the cost of improvements on those who will directly benefit may be more equitable than current system for financing improvements.

3. Issuance of Revenue Bonds (KRS 74.280 – 74.340)

a. Water District is expressly authorized to issue negotiable bonds to construct additions, extensions, and all necessary appurtenances to the water system. KRS 74.290(1).

b. Bonds may not be issued for a period to exceed 50 years. KRS 74.290(2).

c. Bonds not subject to taxation. KRS 74.290(3).

d. Rates must be sufficient to provide for payment of principal and interest and for the operation and maintenance of facilities and **an adequate depreciation account**. KRS 74.300.

e. KRS Chapter 58 permits a water district to issue revenue bonds and also governs the issuance of revenue bonds and bond anticipation notes.

f. KRS 65.117. Water District must notify the state local debt officer in writing before issuing any note, bonds, lease or long-term debt obligation that exceeds \$200,000. Notification must include “the relevant financial terms of the obligation, including the interest rates or method of determining rates, the date of issue, the maturity dates, term of obligation, renewal periods, and the trustee or paying agent.”

4. Temporary Surcharge (KRS 74.395)

a. Water District may assess a temporary surcharge over a 5-year period to finance an extension project.

b. Procedure

(1) Water District develops expansion project plan. Plan must include:

(a) The design and estimated cost of each element of expansion

(b) A time schedule for each step in the project

(c) The proposed financing

(d) The amount of surcharge to water district rates needed to collect amount to finance project

(2) Board of Commissioners formally approves.

(3) Review by Public Service Commission

(a) Public hearing required.

(b) PSC may modify plan.

(c) PSC establishes a surcharge to accomplish plan. Surcharge may not exceed 5 years.

(d) PSC must require the water district to maintain records that will permit refunds of surcharge if necessary.

c. Handling of Surcharge Collections

(1) All funds must be placed in a separate reserve account and may be invested only in securities issued or guaranteed by the United States Government. Interest on these securities is part of this reserve account.

(2) Funds in the separate reserve account may be used solely for the expansions in the approved plan.

(3) If construction has not begun within 5 years after implementation of the surcharge, all monies (including interest and earnings) must be refunded.

(4) Amendments may be made to original plan, but "may not violate the intent of the initial plan and must be approved by PSC.

d. These surcharges should not be confused with those assessed through the general rate adjustment process.

5. Assistance from County Governments

a. KRS 74.350 authorizes counties, by resolution of fiscal court, to pay “any part of the costs of establishing or purchasing a water line or water system.” See also OAG 68-266 (holding that KRS 74.350 is broad enough to provide for county contributions to a water district calculated to assist in stabilizing and making secure such system.”

b. KRS 67.083 authorizes county fiscal courts to appropriate funds to cooperate with other governmental units for the provision of utility service.

c. A county may transfer ownership of a water line to a water district without compensation. OAG 86-30.

d. A county may furnish county funds to a water district for the construction of a water main which will be owned and operated by the water district. OAG 76-240.

6. Donations to Non-Water Related Activities

a. Limitation upon use of water district funds. See 1956 OAG 36,219 (“The water services rendered to each citizen constitutes a public function, and the amount of the fee charged to each citizen is in the nature of a tax necessary to pay the expense of the governmental function of serving water to such citizen. To expend any part of the funds arising from fees for water services for any purpose other than those for which the district was created is to contravene the provisions contained in sections 171 and 180, State Constitution, and to do so, is illegal. The officer making such illegal expenditure subjects himself to the obligation upon the demand of any citizen who pays fees for water services to either recover from the person to whom the illegal sum was donated or to reimburse the district for the amount of the illegal donation.”).

b. OAG 92-43: “[A] water district created pursuant to KRS Chapter 74 may expend funds only in keeping with its statutory purpose, or express statutory authorization.”

c. Donations to civic organizations are not consistent with water district purpose. See OAG 92-43 (“a donation of water district funds, by a water district created pursuant to KRS Chapter 74, ‘to civic organizations such as the chamber of commerce or an independent non-profit organization formed for the purpose of

attracting business and industry to the county in which the water district operates,' would involve an expenditure inconsistent with the statutory purpose of a water district, and thus cannot be lawfully made.”). See also Letter from David E. Spenard, Assistant Attorney General, to Frank Hampton Moore, Jr., counsel for Warren County Water District (Jan. 2, 2007).

C. Acquisition and operation of sewage disposal systems

1. KRS 74.407 provides:

Water districts are hereby authorized to acquire, develop, maintain and operate sewage disposal systems within the confines of their respective districts except that such sewer systems shall not include territory within the boundaries of existing municipal corporations having the authority to provide such sewer services without the consent of such municipal corporations. . . . The water district commissioners shall have all of the powers and authority, as regards sewer systems that are conferred upon them for the purpose of furnishing a water supply under KRS 74.010 to 74.390.

2. The power to acquire a sewage disposal system is broad enough to include the construction of sewage treatment facilities. OAG 62-1051.

3. Water District may act **without additional approval from county judge/executive or fiscal court.**

4. Sewage system may only operate within the water district's boundaries.

5. A water district does not have the authority to regulate private or independent sewer systems within its territory.

a. Boone County Water and Sewer District developed a master plan for providing sewer services in Boone County, Kentucky. Plan would have permitted the water district to control the development of sanitary sewer systems within Boone County. Contending that KRS 74.407 authorized the development of a sewage disposal system and that control of private sewage disposal systems was incidental to this power, the water district promulgated regulations concerning sewage disposal which the PSC rejected.

b. OAG 69-562: AG found the PSC acted properly. “[I]t is our view that the Water Commission has no authority to regulate or control private or independent sewage systems in the District area. The Water Commission has authority to control only its own sewage system. Even

after a water district sewage system is installed, the Water Commission can then only regulate its own system, but not private or independent systems in the District area.”

D. Acquisition and Development of a Gas System

1. KRS 74.400(1) provides:

Any county judge/executive, except in counties containing a city of the first class, upon petition of seventy-five (75) resident freeholders of a water district organized under the provisions of KRS 74.010, may authorize said water district to acquire, develop, maintain, and operate a system for the distribution of gas to the citizens of the county.

2. Restriction: Source of gas must be within the water district's territory. The existence of natural gas transmission mains within area is not sufficient to meet this requirement.

E. Power to Compel Connection to Water System

1. No statutory provision that permits a water district to compel a person to connect to the water district's water system.

2. OAG 84-148: A water district is created for the purpose of preserving and promoting the public health, convenience, and welfare and to provide fire protection. It, through its board of commissioners, may do all acts necessary to carry on its authorized work. Under the police power of a water district, property owners could be compelled to connect to and use the system where the public health and welfare is involved.

F. Fire Protection

1. Water District has the authority to create fire protection district (KRS 74.075).

2. Installation and Removal of Fire Hydrants

a. KRS 74.415

(1) The commissioners of a water district, or the governing body of a water association referred to in KRS 74.012(1), in order to provide adequate means of fire protection, may consider the installation of fire hydrants on new or extended water lines within their area. They may investigate the availability of supplementary funding to pay the incremental costs of

line sizing and hydrant installation. The commissioners or governing body shall not eliminate fire hydrants from new or extended water lines unless they determine that hydrants are not feasible. Their analysis shall include consideration of the incremental costs of adequately sized pipe and associated pumps and towers, and the benefits of real estate development, water sales, the availability of fire protection insurance, and the reduced fire insurance premiums which may result from the installation of hydrants at specified intervals.

(2) If a private real estate subdivision developer has not included adequately sized pipe and fire hydrants in his development plan, the commissioners of a water district or the governing body of a water association which has the capacity to supply adequate water for fire hydrants shall require, at the time the developer applies for permission to hook into the district's water lines, an analysis by the developer of the incremental cost of hydrants and piping adequately sized for hydrants, the effect of hydrants on the cost and availability of fire protection insurance, and conclusions as to why the installation of hydrants is not feasible.

b. Removal of fire hydrants from proposed extensions.

(1) A water district cannot remove fire hydrants from new or extended water mains unless it determines that hydrants are not feasible.

(2) Analysis must consider:

(a) Incremental costs of adequately sized pipe and associated pumps and towers

(b) Benefits of real estate development

(c) Water sales

(d) Availability of fire protection insurance

(e) Reduced fire insurance premiums that may result from the installation of hydrants at specified intervals.

c. Private developments that fail to provide for hydrants where water district can provide fire protection service.

a. Water district must require the developer to provide an analysis why the installation of fire hydrants is not feasible before permitting the developer to hook into the water district's lines.

b. Analysis must include:

(1) The incremental cost of hydrants and piping adequately sized for hydrants

(2) The effect of hydrants on the cost and availability of fire protection insurance

(3) Conclusions as to why the installation of hydrants is not feasible

4. Planning Commission's Authority to Compel Water District to Install Fire Hydrants

a. KRS 100.324 exempts public utilities from any requirement for the approval of a local planning and zoning commission for the location or relocation of any service facility.

b. Utilities are not exempted from **any other planning and zoning commission requirement**. "[T]he size of the pipe and dimension of water mains [within a subdivision] would remain within the jurisdiction of the planning commission pursuant to its subdivision regulations and the commission could therefore compel the water district by mandamus, if necessary, to comply with its regulations." OAG 78-253.

c. Planning and zoning commission may require a water district to attach fire hydrants to existing water lines or future water lines. "Fire hydrants are nothing more than discharge pipes attached to the water main and would be . . . a part of the equipment, design and specification of the water system subject to the subdivision regulation and control of the planning commission." OAG 78-790.

d. Where quality of service is affected or directly conflict with PSC regulations, PSC jurisdiction may supersede planning and zoning commission's authority. See Benzinger v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 38 (1943).

5. Free Service to Fire Departments

a. OAG 84-147. “[A]t the present time there is no authority for requiring the water district to furnish water free of charge to a fire protection district.”

b. In 1996 General Assembly enacts HB 349 to amend to KRS 278.170 to permit provision of free water service to fire departments.

Upon obtaining commission approval of a tariff setting forth terms and conditions of service the commission deems necessary, a utility as defined in KRS 278.010(3)(d) may grant free or reduced rate service for the purpose of fighting fires or training firefighters to any city, county, urban-county, charter county, fire protection district, or volunteer fire protection district. Any tariff under this section shall require the water user to maintain estimates of the amount of water used for fire protection and training, and to report this water usage to the utility on a regular basis.

KRS 278.170(3).

c. Filed tariffs of water utilities that provide free water service for fire protection services must require the submission of quarterly water usage reports from fire departments and state a penalty to be assessed for failure to submit these reports.

VI. WATER DISTRICT OPERATIONS: SERVICE TERRITORY

A. General Considerations

1. Water District has defined territory limits. It may provide water service only within those limits. Olson v. Preston Street Water Dist. No. 1, 291 Ky. 155, 163 S.W.2d 307 (1942).

2. Implied Obligation: Water District has the duty to serve all within territory if service can be reasonably extended. KRS 278.280. See also OAG 75-719 (a “water district is under an obligation to serve all inhabitants, including the subject applicant, within its geographical area of service as fixed under KRS 74.010 and as defined by the certificate of convenience and necessity”).

B. Defining Territory Limits

1. Fiscal Court ordinance/resolution creating Water District establishes the boundaries of the water district.

2. Extensions/Changes in Limits

a. General Procedure – KRS 74.110

(1) Water District petitions county judge executive for annexation or deletion of territory. Petition states the reasons for the change. Notice must be given to the residents of the affected area. KRS Chapter 424 provides the form of notice.

(2) Residents of the affected area may file objections on the proposed action.

(3) County Judge/Executive holds hearing on the petition.

(4) If County Judge/Executive finds the proposed action is reasonably necessary, he enters order annexing or striking the territory. If he finds that it is unnecessary, he dismisses petition.

(5) Water district and residents have right to appeal to circuit court.

b. Extension Into An Adjoining County – KRS 74.115.

(1) Water District is authorized to petition the county judge/executive of an adjoining county to extend its territory into the adjoining county.

(2) Procedures are the same as in KRS 74.110 but one additional requirement imposed. Water district must receive a written request from 2 or more freeholders in the adjoining county.

c. County Judge/Executive, not fiscal court, is the principal decision maker. Statutes provide no role for fiscal court.

d. Water District may not acquire the territory of another water district. OAG 63-666. See also OAG 76-285 (suggesting that a water district may not annex the territory of another water district.) But see Carroll County Water District No. 1 v. Gallatin County Water District, No. 2008-CI-00194 (Gallatin Cir. Ct. Apr. 13, 2009) *affirmed* Carroll County Water District v. Gallatin County Water District, No. 2009-CA-000864 (Ky Ct. App. Apr. 23, 2010). Two water districts may, however, simultaneously follow the procedures in KRS 74.110 for one district to de-annex the territory in question and the other district to annex that territory.

3. No requirement for continuous service territory. KRS 74.115(2) (“Water districts may be established and extended regardless of whether the entire territory is continuous, provided that such territory lies in a county or counties in which the district has been authorized to serve.”).

4. Territory cannot include a city unless the city consents to its inclusion. KRS 74.120(1). Governing body of city must provide its consent by resolution or ordinance. Consent may be limited to a term of years. (Similar to a franchise agreement.).

5. City’s Annexation of Water District’s Territory. If water district facilities are in place, then water district may continue to serve even if city refuses to consent. KRS 96.538 provides:

Any utility providing water, sewer or gas service in any area annexed, subsequent to July 15, 1980, by any municipality shall have the dominant right to continue to provide water, sewer or gas service in said area to consumers then being served and to new consumers located nearer to its facilities than to the facilities of any other utility as all those facilities were located immediately prior to annexation.

C. PSC’s Role in Annexation/De-annexation/Boundary Changes

1. Generally no role for the Public Service Commission in the process. See City of Shepherdsville, Ky. v. Kentucky Turnpike Water District, Case No. 8244 (Sept. 28, 1981) (“KRS 74.110 provides that the county judge/executive is vested with the authority to change water district boundaries and the procedure set forth in that statute does not provide for any participation therein by this Commission.”).

2. PSC, however, may direct water district to seek an expansion of existing boundaries to make reasonable extensions of service. See, e.g., Christian County Water District, Case No. 90-220 (Ky.PSC Feb. 20, 1991); Campbell County Kentucky Water District, Case No. 8505 (Ky.PSC Aug. 4, 1982).

3. Where the water district’s proposed changes will affect existing customers, KRS 278.260 provides PSC with the authority to review the process. See, e.g., Oldham County Water District, Case No. 2005-00016 (Ky.PSC Feb. 6, 2006); Kenton County Water District No. 1, Case No. 90-093 (Ky.PSC Dec. 3, 1990) (approving the transfer of customers between two water districts). But see Christian County Water District v. Hopkinsville Water and Sewer Comm’n, No. 2009-CA-001543 (Ky. Ct. App. Aug. 13, 2010) (stating in dicta that PSC has no role in agreement between city and water district for city to acquire territory that water district currently serves).

C. Contracting to Provide Service in Another Water District's Territory

1. OAG 63-666: A water district may not annex the territory of another water district. Effectively holds that two districts may not possess the same territory. But see Carroll County Water District No. 1 v. Gallatin County Water District, No. 2008-CI-00194 (Gallatin Cir. Ct. Apr. 13, 2009).

2. KRS 74.414 permits a water district to contract with another to provide water service to its territory.

a. Water District may contract with a water district, city, or sewer construction district to operate a water system or sanitary sewer system regardless of whether the water district will have any ownership rights in the operated system.

b. No compensation for operating the system is required so long as there is a general benefit which accrues to the water district from having more water or sewer customers and consequent increased use of water or sewer services.

D. Territory Disputes

1. Grant of territory is not a grant of an exclusive right to serve. City of Cold Springs v. Campbell County Water District, Ky. 334 S.W.2d 269 (1958).

2. The Public Service Commission has recognized that no exclusive right to serve exists for water utilities. Auxier Water Company v. City of Prestonsburg, Case No. 96-362 (April 2, 1997). See also Kentucky Utilities Co. v. Pub. Serv. Com'n, Ky. 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not "have any right to be free of competition").

3. Limited restrictions upon encroachments of water district's territory

a. Encroachments by municipal utilities

(1) If water district is serving the area, a city is restricted from extending service into the water district's territory unless the water district consents. KRS 96.150(1).

Any city that owns or operates a water supply or sanitary sewer system may extend the system into, and furnish and sell water and provide sanitary sewers to any person within, any territory contiguous to the city, and may install within that territory necessary apparatus; provided, **however, that the extension of a**

water supply or sanitary sewer system shall not enter into any territory served by an existing water supply or sanitary sewer district unless such district requests the extension of water or sewer services from a city. For these purposes the city or sanitation authority established by an inter-local agreement may condemn or otherwise acquire franchises, rights, and rights-of-way, as private corporations may do.

(2) If the water district facilities are not in place and serving the area, then municipal utility may have a claim to serve the disputed area. Note that KRS 96.150 is not applicable since it applies only to extra-territorial actions by municipal utility and not to provision of service within the municipality's boundaries.

(3) Forum to enforce right is circuit court.

b. Title 7, Section 1926(b) of the U.S. Code

(1) "The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event."

(2) Coverage: Water districts (or water associations) that receive funding from the U.S. Department of Agriculture are protected from encroachments upon their service territory by municipalities or other water districts or associations or public utilities.

(a) Municipal utilities may not annex areas that are within an RD debtor's territory.

(b) Prohibits municipal condemnation a debtor's facilities that are used to provide water service. City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057 (5th Cir. 1987).

(c) Prohibits municipal utility from selling water at wholesale to a wholesale customer of water association or district. Jennings Water, Inc. v. City of North Vernon, 682 F.Supp 421 (S.D. In. 1988). Effectively prohibits private users from leaving federally indebted water supplier.

(d) Prohibits municipal or private utility from serving as a supplemental supplier of water to wholesale customer served by federally indebted water supplier even where the water district is unable to supply the water to the wholesale customer. Adams County Reg'l Water District v. Village of Manchester, 226 F.3d 513 (6th Cir. 2000).

(e) Where the water association lacks a defined service territory, it is sufficient that it has made service available to an area. Actual facilities do not have to be located in the disputed area. North Shelby Water Co. v. Shelbyville Municipal Water Commission, 803 F.Supp. 15 (E.D. Ky 1992).

(f) Adequacy of the available water service is not relevant to the water district or water association's right to serve. North Shelby Water Co. v. Shelbyville Municipal Water Commission, 803 F.Supp. 15 (E.D. Ky 1992). See also Ketterer v. City of Leitchfield, No. 4:00CV-3M (W.D. Ky. May 24, 2000).

(g) It is not enough that the area in dispute is within the water district's territory. The water district must have made service available to the area in question. See Lexington-South Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230 (6th Cir. 1996) (emphasis added) ("[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.")

(3) Purposes behind statute

(a) Encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost.

(b) Safeguard the viability and financial security of such associations (and RD's loans) by protecting them from the expansion of nearby cities and towns. of the statute is to protect U.S. Government's interest as water district's creditor. Ensure that the water district will have an adequate customer base to pay off debt.

(4) Venue for enforcement is U.S. District Court.

(5) Reference: <http://www.ruralwater.org/sec1926b/>

(6) Limits City's ability to impose franchise fee on water district's revenues within the city's boundaries. See City of Radcliff v. Hardin County Water District No. 2, No. 1998-CA-002225-MR (Ky. Ct. App. Jul. 16, 1999) (holding that as a result of 7 USC §1926 "a city may not require a franchise of a water district serving a newly annexed territory unless and until any federal financing of the district has been satisfied or otherwise removed").

4. PSC has no jurisdiction over municipal utility-water district service area disputes. City of Lawrenceburg, Ky. v. South Anderson Water District, Case No. 96-256 (June 11, 1998). City of Hawesville v. East Daviess County Water Association, Case No. 2004-00027 (Ky.PSC. Mar. 25, 2004).

5. Territory Intrusion and Requirement for a Certificate.

a. Certificate of public convenience and necessity is required to construct facilities other than those in the ordinary course of business. KRS 278.020(1).

b. Ordinary Extension Defined. 807 KAR 5:001, Section 9(3), provides: "No certificate of public convenience and necessity will be required for extensions that **do not** create wasteful duplication of plant, equipment, property or facilities, or **conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto**, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers."

c. A water district's construction of facilities in the territory of another public utility is not an extension in the ordinary course and requires a certificate of public convenience and necessity. See Carroll County Water District No. 1 v. Gallatin County Water District, Case No. 2007-00202 (Ky.PSC Sept. 15, 2008). But see Gallatin

County Water District v. Public Service Commission, Case No. 2008-CI-001669 (Franklin Cir. Ct. Feb. 18, 2009 (“PSC may not create a water district boundary where the courts have determined there is no boundary”).

- d. d. Certificate proceedings are the appropriate process for PSC to determine the jurisdictional utility to serve a disputed area where dispute is between a water district and another jurisdictional utility.

Controversies between persons or corporate bodies engaged in a public utility enterprise concerning the right to construct new facilities to serve a particular customer or class of customers (other than ordinary extensions of existing systems in the usual course of business) are within the jurisdiction of the Public Service Commission upon application made under KRS 278.020 for a certificate of public convenience and necessity.

City of Cold Springs v. Campbell County Water District, Ky. 334 S.W.2d 269, 274 (1960). See Re Russell Cave Water District, 63 PUR3d 78 (Ky.PSC 1966) (denying a certificate of public convenience and necessity to a water district because an investor owned utility was better able to provide service to a disputed area).

D. ***Practice Pointers:***

1. ***Know your service territory. Maintain current service territory map. Update with any change in territory boundaries.***
2. ***If another water district is providing water service in your territory, either amend your territory to reflect actual practice, enter into contractual agreements with the other water district for the provision of service to those portions of your territory, or take legal action to expel the other water district.***
3. ***Retain a copy of all fiscal court ordinances and county judge/executive orders addressing service territory. If you don't currently have them, assemble them.***

VII. WATER DISTRICT OPERATIONS: BIDDING

- A. Construction Work (KRS 74.260) - **(Repealed by 2006 General Assembly)**

B. Construction/Goods and Services.

1. Water district may not make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of **more than twenty thousand dollars (\$20,000)** without first making newspaper advertisement for bids. (KRS 424.260).

2. What are professional services?

a. General Definition:

(1) “[A] profession includes any occupation or vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art founded on it. The word implies attainments in professional knowledge, as distinguished from mere skill, and the application of such knowledge to uses for others as a vocation.” City of New Rochelle v. Friedman, 190 Misc. 654, 78 N.Y.S.2d 681 (1947).

(2) KRS 274.005:

"Professional service" means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which, prior to the passage of this chapter and by reason of law or a professional code of ethics, could not be performed by a corporation. The personal services which come within the provisions of this chapter are the personal services rendered by, but not limited to, certified public accountants, public accountants, chiropractors, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, veterinarians, optometrists and attorneys-at-law.

b. Types of services held **not** to be professional services.

(1) Computer billing services (OAG 78-725).

(2) Construction inspector (OAG 92-114).

- c. Types of services held as professional services.
 - (1) Construction manager services (OAG 79-501).
 - (2) Public accountant or certified public accountant (OAG 80-624).
 - (3) Insurance services contracts (OAG 81-117; OAG 82-337). See also McCloud v. City of Cadiz, 548 S.W.2d. 158 (Ky.App. 1977).
 - (4) Legal Services (OAG 78-725).
 - (5) Engineering Services (OAG 78-725).
 - (6) Architect (OAG 78-725).

3. Dividing/Severing Purchases or Services

a. Issue: May a water district evade the requirements of KRS 424.260 for a single project or purchase by severing portions of the project and treating those purchases as individual transactions?

b. Where a public entity is prohibited from letting contracts of more than a specified sum using competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding. Bd. of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194 (1962). See also OAG 84-274.

4. Effect of Failure to Comply

a. Contracts are rendered voidable. Costs of bringing proceeding to void contract or to enjoin agency from entering contract, including attorney fees, may be assessed to unsuccessful party. KRS 424.380.

b. Criminal Penalty of not less than \$50 and not more than \$500 for each official who violates the statute. KRS 424.990.

c. Civil forfeiture of not less than \$50 and not more than \$500 from each official. Recovery is made in civil suit and may be brought by any citizen. Party bringing suit may also recover reasonable attorney fees.

5. Purchases from Federal Government are exempted from bidding requirements. KRS 66.470.

C. Sale/Disposal of Surplus Property

1. Local Model Procurement Code - KRS 45A.425

a. Permits the sale or disposal of any personal property which is not needed or has become unsuitable for public use, or which would be suitable, consistent with the public interest, for some other use.

b. Agency must make a written determination as to the need or suitability of the personal property. Determination must fully describe the property, its intended use at the time of acquisition, the reasons why it is in the public interest to dispose of the property, and the method of disposal

c. Surplus property can be transferred to another government agency with or without compensation. Otherwise, it must be sold at public auction or by sealed bids.

2. Local Model Procurement Code will apply only if the water district has adopted its provisions.

3. If Local Model Procurement Code has not been adopted, no statutory requirement for bidding.

a. KRS 424.260 applies – but has no provisions regarding the sale of surplus property.

b. OAG 77-399: Water District is not required to conduct bidding when selling surplus land. KRS 424.260 is not applicable to the sale of surplus property. Water District “should not sell it at a price less than the appraised value, after appraisal by a competent appraiser or by competent appraisers. Further, before the sale, it must appear to the commission that the tract is no longer necessary to the functions of the water district.”

c. Common law principle: Property should be appraised by two competent appraisers and should not be sold at less than appraised value. See OAG 82-8 (“prudence and sound management would dictate that such excess county property, if it is properly found to be excess, be disposed of at no less than the appraised value.”)

VIII. WATER DISTRICT OPERATIONS: PREVAILING WAGE LAWS

A. General Rule: No **public authority** may advertise for bids or enter into a contract for **construction** of **public works** unless the bids or contract requires that all laborers, workmen, and mechanics performing work under the contract are paid the prevailing rate of wages. KRS 337.510.

B. Coverage

1. Public authority

a. Statutory Definition: “[A]ny officer, board or commission of this state, or any public subdivision or department thereof in the state, or any institution supported in whole or in part by public funds, including publicly owned or controlled corporations, authorized by law to enter into any contract for the construction of public works and any nonprofit corporation funded to act as an agency and instrumentality of the government agency in connection with the construction of public works . . .” KRS 337.010(3)(d).

b. Water districts are public authorities and subject to Prevailing Wage Act. See OAG 65-312.

2. Public works: “[A]ll buildings, roads, streets, alleys, **sewers, ditches, sewage disposal plants, waterworks**, and all other structures or work, including ‘adult correctional facilities’, as defined in KRS 197.500, constructed under contract with any public authority.” KRS 337.010(3)(e).

3. Construction.

a. Statutory Definition: “[C]onstruction, reconstruction, improvement, enlargement, alteration or repair of any public works project by contract **fairly estimated to cost more than two hundred fifty thousand dollars (\$250,000).**” KRS 337.010(3)(a).

b. Act applies only if the cost of project exceeds \$250,000.

c. A public authority may not divide the project into smaller projects to avoid compliance with the Act. KRS 337.010(3)(a).

4. Where public authority uses its own employees, the Prevailing Wage Act is not applicable. See OAG 79-427 (“the fiscal court may use county government employees to construct the county building without advertising for bids for such labor and without the application of the prevailing wage law.”).

5. Where the federal government or an agency of the federal government requires a predetermined prevailing wage rate to a project otherwise subject to Prevailing Wage Act, then water district should follow the wage rate for each classification that is the higher. KRS 337.010(4).

6. Prevailing wage rates apply to contractor and **all subcontractors**.

C. Determination of Prevailing Wage Rate

D. Water District's Duties Under Act

1. Before advertising for bids or entering contract on project covered by Act, water district must notify the Department of Workplace Standards (Labor Cabinet) **in writing** of the project and obtain the prevailing wage rate in the locality for each classification of laborers, workmen, and mechanics for each class of work called for in the project. KRS 337.510(1).

2. The water district must attach the schedule of the prevailing rate of wages to and make it part of the specifications for work and of every contract for the construction. KRS 337.510(1).

3. The water district must cause to be inserted in the proposal and contract a "stipulation to the effect that not less than the prevailing hourly rate of wages . . . shall be paid to all laborers, workmen, and mechanics performing work under the contract." KRS 337.510(2).

4. If contracts are not awarded within 90 days of the offering for bids, the water district must ascertain the prevailing wage rates at the time of awarding the contract and make those a part of the contract. KRS 337.520(4).

5. The water district must require in all contractor bonds that the contractor include such provisions as will guarantee the faithful performance of the hourly wage clause. KRS 337.510(2).

6. The water district shall take notice of all complaints of violation of the prevailing wage rates, and when making payments to the contractor, withhold and retain all sums and amounts due and owing as a result of any violation. KRS 337.510(2).

E. Water District Commissioner's Duty Under Act. He shall not **vote for the award** of any contract for the construction of public works or **vote for the disbursement of any funds** on account of the construction of public works unless the water district has first ascertained the prevailing wage rates and made those rates part of the proposal specifications and contract. KRS 337.512(2).

F. Failure to Comply

1. Penalties – KRS 337.990(13).

a. Penalty of not less than \$100 nor more than \$1,000 for each offense.

b. Each day of violation constitutes a separate offense.

c. Any public authority, public official or member of a public authority who **willfully** fails to comply or to require compliance with Prevailing Wage Act is subject to penalty.

2. Civil Liability - If public authority, public official or member of a public authority **willfully** or **negligently** fails to comply with law, and failure results in damages, injury or loss to any person, public authority, public official or member of a public authority may be held liable for the loss.

IX. WATER DISTRICT OPERATIONS: MISCELLANEOUS REQUIREMENTS

A. Reporting Requirements

1. Expiration of Terms of Water District Commissioners: At least sixty (60) days before the expiration of the term of office of an appointed member of a district's governing body, the district shall notify the appointing authority of the forthcoming expiration of the term of the appointed member of the district's governing body. KRS 65.008.

2. Notice of Changes in Membership of Board of Commissioners.

a. Water District must report to the Public Service Commission the existence of vacancy within 30 days of the occurrence of vacancy. Notice to Public Service Commission must include the name of the commissioner who last held the position and the date on which the unexpired term will end. KRS 74.020(9). **[HB 201 Revision]**

b. Water District must report to the Public Service Commission the appointment of a water district commissioner within 30 days of the appointment. Notice to Public Service Commission must include the name of the appointee who last held the position and the date on which his term will end. KRS 74.020(9). **[HB 201 Revision]**.

3. Notice to County Clerk. KRS 65.070(1)(a). Water District must file within 30 days of the close of each fiscal year with the county clerk of each

county with territory in the district a certification showing that any of the following information has changed since the last filing –

- a. Name of district
- b. A map or general description of service area
- c. Statutory authority under which it was created
- d. The names, addresses and the date of expiration of the terms of office of the water district's board of commissioners.

4. Notice to Fiscal Court. KRS 65.070(1)(b). Water district must submit with 30 days of the close of each fiscal year to the fiscal court of each county with territory in the district a copy of the water district's summary financial statement.

5. Public Notice. KRS 65.070(1)(c). Water district must publish within 30 days of the close of each fiscal year in a newspaper of general circulation the names and addresses of its commissioners and either a summary financial statement, which includes the location of supporting documents, or the location of district financial records which may be examined by the public.

B. Budgets – KRS 65.065(1)

1. Water district must prepare a budget annually and submit to fiscal court of the county in which it is located. (For multi-county districts, the budget must be filed with the fiscal court of each county.)

2. Budget will not become effective until filed with fiscal court.

3. **No moneys may be expended from any funds or any sources except in accordance with a filed budget.** If budget is not filed before start of fiscal year, the water district must cease spending its funds.

4. If water district fails to file within 30 days of the start of **the water district's fiscal year**, then fiscal court is required to notify county attorney who must notify the water district and take action to prevent the water district from expending any funds until water district's compliance.

C. Financial Statements/Audits

1. Water districts with annual income or expenses exceeding \$750,000 are required to employ an independent certified public accountant or contract with the Auditor of Public Accounts to perform an annual audit of the funds in its budget. KRS 65.065(3).

2. Audits must conform to generally-accepted governmental auditing standards. At a minimum, these standards must be consistent with the requirements of the Comptroller General of the United States and the Auditor of Public Accounts. KRS 65.065(4).

3. Water districts with annual income and expenses less than \$750,000 must submit annually to the county judge/executive and to the state local finance officer a copy of their annual report to the Public Service Commission in lieu of having an audit conducted annually. These districts must provide for the performance of an audit every four years. KRS 65.065(2) and (5).

D. Governmental Leasing Act (KRS 65.940-.956)

1. Before entering a lease agreement in which the lease price exceeds \$100,000, special district must notify the State Local Debt Officer. KRS 65.944(1)(a). "Lease Price" is "the total of amounts designated as payments of principal under a lease." KRS 65.940(8). The notification to the State Local Debt Officer must the terms of the lease, including the lease price, number of optional renewal periods, interest rate, date of issue, purpose, any trustee or paying agent, if any, and any other information the state local debt officer may require. KRS 65.944(1)(a).

2. Lease for real property cannot exceed 40 years. KRS 65.946.

3. State Local Debt Officer is Commissioner, Governor's Office for Local Development. KRS 66.011(24).

E. Miscellaneous Operating Requirements.

1. Water District must maintain an account of the time spent by all employees and each item of expense incurred in connection with the water district. KRS 74.240(1).

2. Must prepare and make to available water district customers an annual statement of receipts and disbursements and any floating or bonded indebtedness. The report must show the cost of water, material, labor, other salaries, and any other expense incidental to operation and maintenance. KRS 74.240(2).

3. Must at the expiration of each fiscal year prepare an itemized, sworn statement of the funds collected, received, held, or disbursed during that fiscal year. The statement must show the total amount of funds collected and received during the fiscal year from each individual source; and the total amount of funds disbursed during the fiscal year to each individual payee. The list shall include only aggregate amounts to vendors exceeding one thousand dollars (\$1,000). KRS 424.220.

3. Must make **all** water district books **open for inspection** during normal business hours. KRS 74.240(3). **This requirement is in addition to an Open Record Act requirement.**

X. WATER DISTRICT OPERATIONS: CLAIMS AGAINST LOCAL GOVERNMENT ACT

- A. Generally: As political subdivisions of the state, water districts have sovereign immunity. They cannot be sued for damages except where the state has expressly authorized suit.

1. Kentucky Constitution § 231: “The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.”

2. While the General Assembly has created the Board of Claims and enacted a limited waiver of liability with regard to state agencies and commissions, it did not include political subdivisions of the state. In the absence of language including political subdivisions, these political subdivisions are not subject to suit.

3. It is unclear whether water district’s immunity still exists. Kentucky Supreme Court no longer permits the application of sovereign immunity where the entity is a municipal corporation.

Municipal corporations are local entities created by the act of the General Assembly and not agencies performing the services of central state government. As such they do not qualify for sovereign immunity. The term ‘municipal corporation is not limited to a city, and it is not only a city that ‘is no longer immune from suit for tort liability’ [A] **‘municipal corporation’ means nothing more than a local government entity created by the state to carry out ‘designated’ functions** The line between what is a state agency and what is a municipal corporation is not divided by whether the entity created by state statute is or is not a city, but whether, when viewed as a whole, **the entity is carrying out a function integral to state government**

Kentucky Center for the Arts v. Bern, 801 S.W.2d 327, 331-332 (Ky. 1990) (emphasis added). Under this definition, water districts would likely be considered municipal corporations. See also Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, 805 S.W.2d 133 (Ky. 1991).

B. Claims Against Local Government Act (KRS 65.200-.2006)

1. Definition of “Local Government” includes water district.

a. “‘Local government’ means any city incorporated under the law of this Commonwealth, the offices and agencies thereof, any county government or fiscal court, **any special district** or special taxing district created or controlled by a local government.” KRS 65.200.

b. See also Sliding Sales Inc. v. Warren Co. Water District, 984 S.W.2d 490, 493 (Ky.App. 1998) (held that a water district is a local government under Act).

2. Limitations on Liability. KRS 65.2002. Local Governments shall not be liable for injuries or losses resulting from any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

a. The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule

b. The failure to enforce any law

c. The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization

d. The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources

e. Failure to make an inspection.

3. Local governments are not exempted from liability any action in tort for:

a. Any defect or hazardous condition in public lands, buildings or other public property including personalty.

b. Negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

c. Any act or omission of a person other than an employee for which the local government is or may be liable.

4. Aside from these areas, the existing state of common law immunity continues to apply. Nothing in the Claims Against Local Government Act “shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988, nor eliminate or abrogate the defense of governmental immunity for county governments.” KRS 65.2001(2).

5. What is a ministerial act?

a. Design and building of a storm system is a ministerial action for which a local government may be subject to action. See City of Frankfort v. Bryns, 817 S.W.2d 462 (Ky.App. 1991).

b. Denial of sewer hookups is a discretionary act for which a local government may not be subject to action. See Greenway Enterprises Inc. v. City of Frankfort, 148 S.W.3d 298 (Ky.App. 2004).

c. Decision on expansion or enlargement of water mains is a discretionary act and is immune. See also Sliding Sales Inc. v. Warren Co. Water District, 984 S.W.2d 490, 493-494 (Ky.App. 1998).

6. Who is an Employee? KRS 65.200(3)

a. Any elected or appointed officer of a local government

b. Any paid or unpaid employee or agent of a local government

c. **Does not include** any independent contractor nor employee nor agent of an independent contractor

7. Defense of Employees

a. Local Government is obligated to provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which proper notice has been given.

b. Proper Notice: Within 10 days of receipt of service of a summons and complaint of an action in tort, employee must give written notice of such action in tort to the executive authority of the local government. KRS 65.2005(2).

c. The local government shall pay any judgment based thereon or any compromise or settlement of the action.

d. Exceptions

(1) Does not cover any express limitations on local government's liability set forth in KRS 65.2002.

(2) Local government may refuse to pay judgment or settlement, or recover the payment of judgment or claim and costs from an employee if:

(a) The employee acted or failed to act because of fraud, malice, or corruption;

(b) The action was outside the actual or apparent scope of his employment;

(c) The employee willfully failed or refused to assist the defense of the cause of action, including the failure to give notice to the executive authority of the local government;

(d) The employee compromised or settled the claim without the approval of the governing body of the local government; or,

(e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

e. Local government is not obligated to defend a suit brought against a former government employee when action is brought after the employee has left employment or been terminated. Louisville/Jefferson County Metro Government v. Richardson, No. 2004-CA-002440-MR (Ky. Ct. App. Mar. 3, 2006).

8. Periodic Payments – KRS 65.2004

a. Local government may request that judgment be paid over a period of time not to exceed 10 years. Such judgment shall bear interest from the final date of order.

b. Eligibility for Periodic Payments. Court must find

(1) Payment of the judgment is not totally covered by insurance; and

(2) Funds for the current budget year and other funds of the local government which lawfully may be utilized to pay

judgments are insufficient to finance both the adopted budget of expenditures for the year and the payment of that portion of the judgment not covered by insurance.

XI. WATER DISTRICT OPERATIONS: WHISTLEBLOWER STATUTE (KRS 61.101-.103)

A. Employer may not engage in reprisal actions against employee who makes good faith disclosure to appropriate authorities regarding improper activities.

1. Who is Employee? “[A] person in the service of the Commonwealth of Kentucky, or any of its political subdivisions, who is under contract of hire, express or implied, oral or written, where the Commonwealth, or any of its political subdivisions, has the power or right to control and direct the material details of work performance. KRS 61.101(1). Includes employees of water district. “[A] water district is a type of special district which constitutes a political subdivision of the commonwealth.” Davis v. Powell's Valley Water Dist., 920 S.W.2d 75, 78 (Ky.App.1995).

2. Who is an Employer

B. Employer’s Activities prohibited. May not “subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate” against any employee.

C. Employee Disclosures Protected

1. To whom: Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority

2. Subject of Disclosure - any facts or information relative to

a. An actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions

b. Actual or suspected mismanagement, waste, fraud, abuse of authority

- c. Substantial and specific danger to public health or safety.
 - 3. Disclosures must be in good faith
- D. No employer may require any employee to give notice prior to making a report, disclosure or divulgence.
- E. No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing listed in the Act.
- F. Enforcement
 - 1. Criminal Sanctions: Any person who willfully violates Whistleblower Act is guilty of a Class A misdemeanor.
 - 2. Civil Sanctions
 - a. Reinstatement of the employee
 - b. Payment of back wages
 - c. Full reinstatement of fringe benefits and seniority rights
 - d. Exemplary or punitive damages
 - e. Costs of litigation, including reasonable attorney fees and witness fees.
- G. See generally, Stephen A. Simon, Blowing the Whistle in the Commonwealth, Ky. Bench & Bar, July 2010.

XII. COLLECTION OF MUNICIPAL UTILITY SEWAGE BILLS (KRS 96.930- 938)

A. Legislative Declaration (KRS 96.930)

The General Assembly hereby recognizes and declares that the use of water in any manner tending to contaminate it, raises a correlative public duty to provide for the proper disposition thereof according to the highest public health standards, and that such public duty includes full responsibility for paying the cost of such disposition.

B. Cities may enforce collection of lawful rates and charges for the use of municipal sewer facilities by requiring that water service, whether provided publicly or privately, be discontinued until payment is made or some satisfactory arrangement is reached.

C. Procedure:

1. City must notify the water supplier in writing directing the discontinuance of water service to the designated customer's premises until notified otherwise. Notice must be sufficient to designate the customer. Upon receipt of such notice, the water supplier shall discontinue water service to the premises until notified otherwise by the sewer body.
2. Water supplier may require an authorized agent of the city be present when water service is terminated. It may also require the payment of reasonable fees for discontinuing service. Requirements must be in writing.
3. If written requirement for presence of an authorized agent, water supplier does not need to discontinue service until that agent is present.
4. Water supplier is also entitled to fee for discontinuance if its employee prepares to terminate and the billing dispute is resolved.

D. Water Supplier's Liability

1. **To Customer** for termination of service. No liability except for its own negligence or other improper conduct. KRS 96.942.
2. **To Sewer Body:** "Any water supplier which wrongfully fails or refuses to discontinue water service pursuant to an order properly made to it by a sewer body and continues such failure or refusal for a period of thirty (30) days after receipt of the notice, shall be liable to the sewer body for any amount due from the sewer user involved." KRS 96.943.

E. City and Water suppliers may enter into contract providing for such services.

1. Kentucky-American Water Co., Case No. 95-238 (Ky.PSC June 30, 1995). Held: KRS 96.930-.941 controls where there is a conflict with PSC regulations. Agreements between cities and jurisdictional suppliers must be given full effect. No deviation from PSC regulations is required. See also South Shore Water Works, Case No. 95-045 (Ky.PSC July 14, 1995).
2. Similar provisions exist for sewer construction districts (KRS 76.368), metropolitan sewer districts (KRS 76.090; KRS 76.640), and sanitation districts (KRS 220.510). See also Hendron Water District, Case No. 2004-00376 (Ky.PSC Dec. 17, 2004) (holding that joint sewer agencies have power to compel discontinuance).

3. **Emerging Issue:** Must the water supplier discontinue water service for unpaid charges related to stormwater drainage that are assessed by a municipal sewer utility or a sanitation district?

a. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Water utility had agreement with city to bill for sewer, storm water management, and garbage fees. Customer payment would be allocated in following order of priority: water, storm management, garbage and sewer. Given this priority, water utility had agreed to terminate water service for storm water management and garbage fees. Held: No statutory basis for discontinuing water service for failure to pay storm water management or garbage fees presently exists. 807 KAR 5:006, Section 14, prohibits a water utility from discontinuing water service for non-payment of any debts but those owed for water service received at the current place of delivery. While a water utility may request a deviation from 807 KAR 5:006, the water utility had not sought or been granted a deviation. In the absence of such deviation, water utility should discontinue its current practice and credit any payments towards sewer, storm water management, and garbage fees first to sewer payments.

b. Staff Opinion 2009-006 – Boone County Water District (Jul. 14, 2009). Commission Staff opined that a water district is not required to discontinue water service to a customer who fails to pay an assessment to a sanitation district for an extension of a sanitary works. It opined that KRS 220.510(1) did not require the discontinuance of water service.

c. Staff Opinion 2011-005 – Boone County Water District and Northern Kentucky Water District (Mar. 21, 2011). Commission Staff opined that KRS 220.510(1) requires a water district to discontinue water service to a customer when sanitation district requests discontinuance due to customer's failure to pay a storm water management fee owed to sanitation district.

4. Administrative Case No. 347, *An Investigation into the Collection and Billing Practices of Privately-Owned Sewer Utilities* (Ky.PSC January 9, 1995) at 8 (“those sewer and water utilities which agree to the discontinuance of water service for delinquent sewer service bills may petition the Commission for a deviation from Commission Regulation 807 KAR 5:006, Section 14. Absent unusual circumstances, the Commission will favorably consider such petitions.”) See also Peaks Mills Water District, Case No. 2009-00002, (Ky.PSC April 2, 2009) (authorizing a water district to discontinue service for a customer's failure to pay bills for sewer service owed to a privately owned utility). But see OAG 63-914 (holding that a water district has no authority to collect sewer charges for a privately owned and operated sewer system nor can it enforce the

collection of such charges by shutting off the water supply of its mwater consumers for non-payment of sewer charges assessed by the private system.)

F. ***Practice Pointers:***

1. ***Water District counsel should examine each written request for discontinuance to ensure compliance with contract or statutes.***
2. ***Ensure that information is correct.***
3. ***Demand the presence of authorized agent and establish a schedule of required fees for this service.***
4. ***Timely comply with requests.***
5. ***Any contracts with privately owned sewer utilities should be filed with the PSC and an application for deviation should be requested. Indemnification provisions and enhanced supervision are essential for these types of agreements.***

XIII. DISSOLUTION OF A WATER DISTRICT

A. Procedure for dissolving water district. (KRS 74.367).

1. Petition of 5 freeholders to PSC for dissolution
2. PSC holds proceeding similar to KRS 74.012. Must determine whether another water supplier rendering services in the general area could feasibly serve the water district's residents.
3. If PSC finds that another water supplier could feasibly serve the area, **more than 50 percent** of freeholders within the district may file petition with county judge/executive requesting discontinuance of water district.
4. County judge/executive must hold public hearings.
5. If county judge/executive determines that discontinuance is in the best interest of the district, he may order dissolution of the water district.

B. Special District Dissolution (KRS 65.166) – Alternative Dissolution Procedure.

C. Distinguish from Merger or Transfer of Assets to another entity

XIV. MERGER OF WATER DISTRICTS

A. KRS 74.361(1) - Legislative Finding of the 1972 General Assembly:

[R]eduction of the number of operating water districts in the Commonwealth will be in the public interest, in that mergers of such districts will tend to eliminate wasteful duplication of costs and efforts, result in a sounder and more businesslike degree of management, and ultimately result in greater economies, less cost, and a higher degree of service to the general public; and that the public policy favors the merger of water districts wherever feasible.

B. Involuntary Mergers: PSC may order water districts/water associations to merge. KRS 74.361.

1. Procedure

a. Feasibility Study.

(1) “[T]he Public Service Commission shall cause to be prepared in writing a feasibility report and study regarding the proposed merger, containing such studies, investigations, facts, historical data, and projections as in the circumstances may be required in order to enable the commission to formulate a proper decision regarding such merger.

(2) Who pays for study? Not subjects of the study. See Pub. Serv. Comm’n v. Attorney General, Ky. App., 860 S.W.2d 296 (1993) (“Commission was not authorized to charge water districts for cost of management and operations audit conducted as part of merger feasibility study.”)

(3) If a management audit is performed before any merger proceeding is conducted, then the costs of that audit can be assessed to water district and the results of audit may be included in a feasibility study. Pub. Serv. Comm’n v. Attorney General, Ky. App., 860 S.W.2d at 298 (“an audit properly conducted by the PSC under its regulatory function and authorized by KRS 278.255 could subsequently be used if merger was considered.”)

(4) Historically Commission Staff has prepared the feasibility study.

b. Based upon written report and study, PSC proposes the merger by order. Affected water districts, the commissioners of each district, and the county judge/executive of each county where water districts located are served a copy of the order.

c. Public hearing - Water Districts have the following rights:

(1) Make appearance

(2) Present evidence

(3) Examine all exhibits and testimony

(4) Cross-examine all witnesses

(5) Submit such memoranda, written evidence, and briefs as may be desired.

d. At conclusion, PSC shall enter its order, either merging the water districts which are the subject of the merger proceedings into a single water district, or abandoning the merger proposal.

e. PSC may also make Orders related to rates, rentals and charges for services rendered to be levied by the water district which remains in existence following such merger.

f. PSC's Orders subject to judicial review

2. Results of merger proceeding

a. Merger occurs

b. Water Districts' outstanding financial obligations remain separate. Outstanding debt secured by assessments, bond instruments, pledge of income shall continue to be retired from such moneys and funds as shall be collected from the users of facilities operated by such merged water districts in the original water district area in accordance with the terms and provisions of the enabling laws and the authorizing resolutions or indentures under which the outstanding obligations were issued, until all such obligations have been retired. **Practical Consideration:** Three sets of Books, two sets of rates.

c. Water District Commissioners:

(1) All commissioners continue to serve out their remaining term. **[HB 83: Regardless of the stated expiration of their terms, water district commissioners**

will serve for one year from the date of the Commission Order directing the merger. Provisions of KRS 74.363 will apply for number of commissioners and the length of their terms following the expiration of existing commissioners' terms.]

(2) Upon expiration of terms, special rules for the appointment of commissioners apply. KRS 74.020(1).

C. Voluntary Mergers – KRS 74.363

1. Boards of Commissioners may agree to voluntary merger.
2. Required approvals
 - a. Approval of a majority of the membership of the board of each district. KRS 74.363(2).
 - b. PSC Approval. KRS 278.020(5). But see Formation of Graves County Water District, Case No. 2007-00496 (Ky. PSC May 21, 2008) (holding that KRS 278.020(6) and KRS 278.300 are not applicable to water district mergers since the acquirer does not yet exist).
 - c. **Approval of county judge/executives or voters is not required.** However, approval of county judge/executives is necessary to amend boundaries/service territories of the merged district.
3. Composition of Board of Commissioners after Merger
 - a. All current members serve 1 year after the approval of merger by PSC regardless of their normal term expiration.
 - b. Within 1 county: 3 – 7 members to be appointed by county judge/executive with staggered terms. One-third of members appointed initially for 2 years. One-third of members appointed initially for 3 years. One-third of members appointed initially for 4 years. **[HB 83: The merging water districts, not the county judge executive, will determine the number of commissioners on the merged water district board of commissioners. The number of commissioners should be set forth in the merger documents.]**
 - c. Multi-county Districts: 6 or more members. County judge/executive of the county in which the greatest portion of the district's population resides selects 4 members. County judge/executive of the county in which the next greatest portion of

the district's population resides selects 2 members. County judge/executives from the remaining counties will select one each. Member must be a resident of the water district and the county from which he or she is selected. Same staggering of terms. **[HB 83: Eliminates statutory allocation of commissioner positions. Merging water district shall agree upon the allocation and state in the merger documents.]**

4. Assets and Liabilities. Title to all property vests in the new district. Existing debt and other obligations will continue to be funded from the same area or assessment plan until the old obligations extinguished. ***Practical Consideration:*** Three sets of books, two sets of rates. Need to refinance debt and totally merge finances.

XIV. SUMMARY

HOUSE BILL 83

AN ACT relating to water districts.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 65.060 is amended to read as follows:

As used in KRS 65.008, 65.009, 65.065 and 65.070, the term "district" shall mean and the provisions of KRS 65.008, 65.009, 65.065 and 65.070 shall apply to any board, commission, or special district created pursuant to the following statutes: KRS 39F.020, 39F.160; KRS 65.160, 65.162, 65.210 to 65.300, 65.510 to 65.650; KRS 74.010 to ~~74.415~~[74.416]; KRS 75.010 to 75.260; KRS 76.005 to 76.210, 76.241 to 76.273, 76.274 to 76.279, 76.295 to 76.420, 76.600 to 76.640; KRS 77.005 to 77.305; KRS 80.262 to 80.610; KRS 91A.350 to 91A.390; KRS 96A.010 to 96A.230; KRS 104.450 to 104.680; KRS 107.310 to 107.500; KRS 108.010 to 108.070, 108.080 to 108.180; KRS 109.056, 109.059, 109.115 to 109.190; KRS 147.610 to 147.705; KRS 147A.050 to 147A.120; KRS 154.50-301 to 154.50-346; KRS 164.605 to 164.675; KRS 173.450 to 173.650, 173.710 to 173.800; KRS 179.700 to 179.735; KRS 183.132 to 183.160; KRS 184.010 to 184.300; KRS 210.460 to 210.480; KRS 212.720 to 212.760; KRS 216.310 to 216.360; KRS 220.010 to 220.613; KRS 262.100 to 262.660, 262.700 to 262.990; KRS 266.010 to 266.990; KRS 267.010 to 267.990; KRS 268.010 to 268.990; or KRS 273.405 to 273.453.

➔Section 2. KRS 65.805 is amended to read as follows:

As used in KRS 65.810 to 65.830, unless the context otherwise requires, the word "district" shall mean, and the provisions of KRS 65.810 to 65.830 shall apply to, any special district governed by the following statutes: KRS 66.610 to 66.650, 74.010 to ~~74.415~~[74.416], 108.010 to 108.070, 184.010 to 184.300, and 267.010 to 267.990.

➔Section 3. KRS 74.020 is amended to read as follows:

- (1) A water district shall be administered by a board of commissioners which shall control and manage the affairs of the district. The term of each commissioner is four (4) years, except as provided in this section:

- (a) If a district lies wholly within a single county, or operates as a single-county district, as provided in paragraph (c) of this subsection, the board of commissioners shall be composed of either three (3) or five (5) members as the county judge/executive shall determine. Members of the board shall be residents of the district, or of any incorporated or unincorporated area served by the district in the county in which the district was originally established, who shall be appointed by the county judge/executive with the approval of the fiscal court. ~~If two (2) or more water districts within a single county merge as described in KRS 74.361, the county judge/executive may appoint up to two (2) additional commissioners with the approval of the fiscal court.~~ Initial appointments shall be for terms of two (2), three (3), and four (4) years, as designated by the court.
- (b) Except as provided in paragraph (c) of this subsection, if a district formed in a single county extends its area to include territory in one (1) or more~~an~~ adjacent counties~~county~~, as provided by KRS 74.115, the board of commissioners shall be appointed by the appropriate county judges/executive, with the approval of the respective fiscal courts of the concerned counties as follows: in two (2) county districts, three (3) members from the original district and two (2) members from the extended portion of the district; for extensions into three (3) or more counties, the respective county judges/executive, with the approval of the respective fiscal courts, shall appoint, in addition to the existing membership of the commission, two (2) members from the original one-county district and two (2) members from the newly extended portion of the district. Orders establishing the extension shall provide for the staggering of initial terms in an equitable manner.
- (c) If a ~~single-county~~ district acquires~~administered as provided in paragraph (a) of this subsection shall acquire~~ an existing water or gas distribution system serving an area which extends beyond the boundaries of the district

into one (1) or more additional counties~~[another county]~~, or if a district ~~[formed in a single county]~~ extends its area to include territory in one (1) or more~~[an]~~ adjacent counties~~[county]~~ as provided by KRS 74.115, it may operate the distribution system so acquired, or extended, without adding additional board members, if the new area to be served ~~[outside the county]~~ shall be deemed to be a minor portion of the total area served by the district, and if the fiscal court of the county containing the minor portion of the total area shall have agreed to the acquisition or to the extension of the distribution system. If less than twenty-five percent (25%) of the total assets of the distribution system are located within any particular~~[the]~~ county included in the territorial~~[outside of the]~~ boundaries of the district, it shall be conclusively presumed, with respect to that particular county, that the district comes within the terms of this subsection.

- (2) A commissioner may be removed from office as provided by KRS 65.007.
- (3) A commissioner who participates in any official action by the water district board of commissioners which results in a direct financial benefit to him may be removed from office as provided by KRS 65.007.
- (4) Vacancies shall be filled by the same appointing authority which is empowered to make the original appointment. Vacancies resulting from cause other than expiration of the term shall be filled for the unexpired term only. Notwithstanding the provisions of KRS 67.710, a vacancy resulting from the expiration of a term shall be filled by the Public Service Commission if, within ninety (90) days following the expiration of the term, the vacancy has not been filled by the appropriate county judge/executive with approval of the fiscal court.
- (5) The commission shall elect a chairman, vice-chairman, secretary, ~~[and]~~ treasurer, and any other officers and assistant officers as the commission may deem necessary, each of whom shall be members of the commission. Any two (2) or

more offices may be held by the same person, except that the chairman may not hold any other office. Each commissioner shall execute a bond ~~for~~, approved by ~~the county judge/executive, conditioned on~~ the faithful performance of the duties of his position.

- (6) Each commissioner shall receive an annual salary of not more than thirty-six hundred dollars (\$3,600), which shall be paid out of the water district fund, except that beginning January 1, 1999, each commissioner who completes during an educational year a minimum of six (6) instructional hours of water district management training approved by the Public Service Commission may receive an annual salary of not more than six thousand dollars (\$6,000) to be paid out of the water district fund. An educational year shall begin on January 1 and end on the following December 31. In the case of single-county districts, which shall be deemed to include districts described in paragraph (c) of subsection (1) of this section, the salary shall be fixed by the county judges/executive with the approval of the fiscal court; in multicounty districts, it shall be fixed by the agreement between the county judges/executive with the approval of their fiscal courts. In fixing and approving the salary of the commissioners, the county judge/executive and the fiscal court shall take into consideration the financial condition of the district and its ability to meet its obligations as they mature.
- (7) (a) In order to receive an increase in salary as specified in subsection (6) of this section, commissioners shall successfully complete six (6) instructional hours of water district management training annually. The training shall be approved and paid for by the water district of the county the commissioner represents. Those commissioners not required to complete the six (6) instructional hours shall be reimbursed for the cost of instruction if they choose to complete the water district training.
- (b) The Public Service Commission shall be responsible for the regulation of all

water district management training programs for commissioners of water districts, combined water, gas, or sewer districts, or water commissions.

- (c) The Public Service Commission shall encourage and promote the offering of high quality water district management training programs that enhance a water district commissioner's understanding of his or her responsibilities and duties. The commission shall, no later than January 1, 1999, establish standards and procedures to evaluate, accredit, and approve water district management training programs.
- (d) The Public Service Commission may promulgate administrative regulations in accordance with the provisions of KRS Chapter 13A to implement this section.

➔Section 4. KRS 74.030 is amended to read as follows:

The ~~{county attorney shall act as counsel to the water commission, except that the }commission may~~, ~~{subject to approval of the county judge/executive,}~~ employ ***legal*** counsel whose compensation shall be paid from water district funds.

➔Section 5. KRS 74.040 is amended to read as follows:

The commission may ***employ a person to serve as the chief executive officer***~~{appoint a competent person as superintendent}~~ of ***the*** water ***district***~~{districts}~~. ***This person shall not be one of the water district's commissioners. The person may be designated the general manager, superintendent, or chief executive officer of the district or by any other similar title.*** The ***chief executive officer***~~{superintendent}~~ shall ***perform such additional duties as the commission may require of him or her and shall*** be subject to the orders of the commission~~{ and shall look after the improvements established under this chapter}~~. The ***chief executive officer shall***~~{superintendent, with the approval and consent of the commission, may}~~ employ all necessary labor and assistance in the performance of his ***or her*** duties, and he ***or she*** shall report to the commission all expenses incurred. The salary of the ***chief executive officer***~~{superintendent}~~ shall be fixed by the commission~~{ and paid~~

as other salaries provided for in this chapter are paid].

→ Section 6. KRS 74.050 is amended to read as follows:

The treasurer of the commission shall **be the lawful custodian of** ~~pay out~~ the funds of the **water district and shall cause the funds to be disbursed according to procedures adopted by the** commission ~~only upon presentation of warrants signed by the chairman and countersigned by the secretary of the commission~~. **The procedures shall include a requirement for approval of disbursements by a commissioner in addition to the treasurer. The treasurer shall cause to be maintained a proper record of the receipts and disbursements of the water district in accordance with the Uniform System of Accounts for utilities. In addition to the compensation for commissioners as set out in Section 3 of this Act,** as compensation for his **or her** services the treasurer shall receive an amount fixed by the commission, not to exceed two hundred dollars (\$200) per year. **The treasurer** ~~He~~ shall execute bond to the commission in an amount **and with such surety as determined** ~~fixed~~ by the commission.

→ Section 7. KRS 74.070 is amended to read as follows:

~~[The commission may acquire and install pipe and water laterals, and operate a water system for any district.]~~ The commission shall be a body corporate for all purposes, and may make contracts for the water district with municipalities and **other** persons ~~for a water supply~~. **All corporate powers of the water district shall be exercised by, or under the authority of, its commission. The business and affairs of the water district shall be managed under the direction and oversight of its commission. The commission** ~~It~~ may prosecute and defend suits, hire **the chief executive officer** ~~necessary employees~~ and do all acts necessary to carry on the work **of the water district. The commission may adopt bylaws not inconsistent with the provisions of this chapter.**

→ Section 8. KRS 74.110 is amended to read as follows:

The territorial limits of an established water district may be enlarged or diminished in the following way:

- (1) The commission shall file a petition with the county judge/executive, describing the territory to be annexed or stricken off, and setting out the reasons therefor.
- (2) Notice of the petition shall be given *in the manner provided by KRS Chapter 424.* Within thirty (30) days after the notice, any resident of the water district or the territory proposed to be annexed may file objections and exceptions.
- (3) The county judge/executive shall set the matter for hearing, and if the county judge/executive finds that it is reasonably necessary, he shall enter an order annexing or striking off the proposed territory. If the county judge/executive finds that the proposed change is unnecessary, he shall dismiss the petition. Either party may appeal the order to the Circuit Court.
- (4) If any of the territory stricken off has been assessed to pay the costs of any improvements, the commission shall strike the assessments from the assessment roll and refund to the respective owners any assessments collected on the land which have been stricken off.
- (5) If a deficit is incurred by striking off part of a water district, or by striking assessments from the assessment roll, so that the assessment roll is insufficient to pay the bonded indebtedness of the district, the deficit shall be paid out of the general fund of the district, realized from all other resources in the district.

➔Section 9. KRS 74.330 is amended to read as follows:

Refunding bonds shall be issued under the signature of the chairman of the commission, the countersignature of the treasurer of the commission, and the seal of the district. The bonds shall be serially numbered. The commission shall prescribe the form and denominations of the bonds, and the time, not exceeding *forty (40)*~~*thirty (30)*~~ years, at which they will mature and be redeemable. The bonds shall bear interest at a rate or rates or method of determining rates as the commission directs, be payable at least annually, and shall have interest coupons attached. The proceeds of the bonds shall be used exclusively for the refunding of bonded debts. In case any officer whose signature or

countersignature appears on the bonds or coupons ceases to be an officer before delivery of the bonds, his signature or countersignature shall nevertheless be valid the same as if he had been in office until delivery.

➔Section 10. KRS 74.361 is amended to read as follows:

- (1) The General Assembly of the Commonwealth of Kentucky determines as a legislative finding of fact that reduction of the number of operating water districts in the Commonwealth will be in the public interest, in that mergers of such districts will tend to eliminate wasteful duplication of costs and efforts, result in a sounder and more businesslike degree of management, and ultimately result in greater economies, less cost, and a higher degree of service to the general public; and that the public policy favors the merger of water districts wherever feasible.
- (2) The Public Service Commission of Kentucky is authorized and empowered to initiate, carry out, and complete such investigations, inquiries, and studies as may be reasonably necessary to determine the advisability as to the merger of water districts. Prior to ordering a hearing with reference to the merger of any water district into one (1) or more additional water districts, the Public Service Commission shall cause to be prepared in writing a feasibility report and study regarding the proposed merger, containing such studies, investigations, facts, historical data, and projections as in the circumstances may be required in order to enable the commission to formulate a proper decision regarding such merger.
- (3) Based upon the written report and study required to be made incident to any water district merger, the Public Service Commission may propose by order that a merger of water districts be accomplished, and, upon the issuance of such order, shall give actual notice to all water districts proposed to be merged. Said order shall provide for a formal public hearing to be held before the Public Service Commission on the subject of such proposed merger. Actual notice of such merger hearing shall also be furnished to the county judges/executive of each county containing a water district

proposed to be merged, and each water commissioner of a water district proposed to be merged, and notice of such public hearing shall be afforded to the public served by the respective water districts sought to be merged, by newspaper notice in accordance with the provisions of KRS Chapter 424.

- (4) A formal hearing before the Public Service Commission shall be held with reference to such merger proposal, and, upon such occasion, all water districts which are sought to be merged into a single entity shall be afforded the right to appear, to present evidence, to examine all exhibits and testimony, to cross-examine all witnesses, and to submit such memoranda, written evidence, and briefs as may be desired. Such public hearing may be adjourned from time to time by the Public Service Commission, and notice of such adjournments may, but need not, be afforded as with reference to the initial public hearing. At the conclusion of such proceedings, the Public Service Commission shall enter its order, either merging the water districts which are the subject of the merger proceedings into a single water district, or abandoning the merger proposal.
- (5) Outstanding obligations of any water district merged in accordance with the provisions of this section which are secured by the right to levy an assessment as provided by KRS 74.130 to 74.230, inclusive, or secured by a pledge of the income and revenues of the systems operated by any such merged water district, shall continue to be retired from such moneys and funds as shall be collected from the users of facilities operated by such merged water districts in the original water district area in accordance with the terms and provisions of the enabling laws and the authorizing resolutions or indentures under which the outstanding obligations were issued, until all such obligations have been retired.
- (6) In any order ordering the merger of water districts, the Public Service Commission shall make such additional orders as may be required in connection with the schedule of rates, rentals and charges for services rendered to be levied by the water

district which remains in existence following such merger, having due regard to contractual commitments made and entered into by the constituent merged water districts in connection with the issuance of obligations by such districts.

- (7) Upon the effective date of any merger of water districts, the water commissioners of the merged water districts shall continue to serve as water commissioners **of the resulting district, regardless of their normal term expiration, until one (1) year after approval of the merger by the Public Service Commission. Thereafter, the board shall be composed as set forth in Section 11 of this Act.**~~[for the remainder of the terms for which they were appointed, and, following the expiration of the terms of such water commissioners,]~~ The appropriate county judge/executive or county judges/executive shall appoint and reappoint water commissioners to manage the business and affairs of the resultant water district, in the manner provided by **Section 11 of this Act**~~[KRS 74.020].~~
- (8) Any order of merger entered by the Public Service Commission in accordance with this section shall be subject to all of the provisions of KRS Chapter 278, with reference to petitions for rehearing, and appeal.
- (9) Using the authority of this section the Public Service Commission can also cause mergers of water associations into water associations or mergers of water associations into water districts.
- (10) Nothing contained herein shall be construed to prohibit or limit in any respect the acquisition by water utilities subject to the jurisdiction of the commission or by municipally owned water utilities of the assets of water districts or water associations or the merger of water districts or water associations and water utilities subject to the jurisdiction of the commission or municipally owned water utilities.
- ➔Section 11. KRS 74.363 is amended to read as follows:
- (1) Boards of commissioners of any two (2) or more water districts may by concurrent action and by approval of a majority of the membership of the board of each merge

their districts into one (1).

- (2) ~~[Notwithstanding any provisions to the contrary in KRS 74.361(7), in case of a merger under this section,]~~The members of the boards of commissioners of the merged water districts shall serve as members of the board of commissioners of the resulting district, regardless of their normal term expiration, until one (1) year after approval of the merger by the Public Service Commission. Thereafter, the board shall be composed as follows:
- (a) If the boundaries of the resulting district lie wholly within a single county, the board of commissioners shall be composed of between three (3) and seven (7) members as *agreed upon by the merged water districts in their merger documents*~~[the county judge/executive shall determine].~~
- (b) If the boundaries of the resulting district lie within two (2) or more counties, the board of commissioners shall be composed of six (6) or more members as *agreed upon by the merged water districts in their merger documents*~~[follows: four (4) members shall be appointed by the county judge/executive of the county in which the greatest portion of the population of the district resides; two (2) members shall be appointed by the county judge/executive of the county in which the next greatest portion of the population of the district resides; and one (1) member shall be appointed by the county judge/executive of each remaining county in which a portion of the population of the district resides].~~
- (3) Each appointment to the board of commissioners of the resulting district shall be made by the appropriate county judge/executive with the approval of the fiscal court. Each member of the board shall be a resident of the county from which he or she is appointed. The initial terms of the board of commissioners after the merger shall be as follows: approximately one-third (1/3) of the commissioners shall be appointed for a term of two (2) years; approximately one-third (1/3) of the

commissioners shall be appointed for a term of three (3) years; and the remaining commissioners shall be appointed for a term of four (4) years. Thereafter, all commissioners shall be appointed for a term of four (4) years. The provisions of KRS 74.020(2) to (7) shall apply to all commissioners and vacancies on the board of commissioners.

- (4) The resulting district shall have all the assets and legal liabilities of the water districts joining in the merger. The separate existences of the water districts joining in the merger, except the resulting district, shall cease, and the title to all real estate and other property owned by the water districts joining in the merger shall be vested in the resulting district without reversion or impairment. Bonded obligations of any district secured by the right to levy an assessment as provided by KRS 74.130 through 74.230 or secured by the revenue of the systems operated by the district shall continue to be retired or a sinking fund for such purpose created from the tax assessments or revenue from the system operated by the district from funds collected over the same area by the new board of commissioners in accordance with the laws under which the bonds were issued until all bonded obligations of the old district have been retired.

➔Section 12. KRS 74.370 is amended to read as follows:

- (1) Any water district, created in the manner provided in KRS 74.010 to 74.070, both inclusive, may if the commissioners of such water district deem it feasible, build, or acquire or enlarge a water system without resort to, or in combination with, the right to levy assessments for the cost of such water system, as is provided in KRS 74.130 to ~~74.240~~~~[74.250]~~, both inclusive, and may obtain the funds with which to build, acquire or enlarge such system by the issuance of revenue bonds, payable solely from the revenue to be derived from the operation of such system, or payable partially from revenues and partially from assessments.
- (2) In the event the commissioners shall decide to finance the cost of such construction,

acquisition or enlargement by the issuance of revenue bonds, secured solely by the revenue of the system or partially by the revenue of the system and partially by assessments, the commission shall note such decision by appropriate resolution, and shall thereafter proceed under the provisions of KRS 96.350 to 96.510, both inclusive, and the water district and the commission shall have the same powers and duties as a city of the second to sixth class inclusive under the provisions of KRS 96.350 to 96.510, both inclusive. However, the water district and the commission shall not be limited solely to the revenue of the system in securing revenue bonds so issued.

→Section 13. KRS 74.407 is amended to read as follows:

In addition to the other authority which water districts presently have under this chapter, water districts are hereby authorized to acquire, develop, maintain and operate sewage disposal systems within the confines of their respective districts except that such sewer systems shall not include territory within the boundaries of existing municipal corporations having the authority to provide such sewer services without the consent of such municipal corporations. In the event of annexation of territory within a water district by another municipal corporation authorized to provide sewer systems and services, the water district may continue to provide and charge for sewer services within such newly annexed areas until such annexing municipal corporation makes adequate payment, by negotiation or condemnation, for such sewage disposal facilities owned and operated by the water district. The water district commissioners shall have all of the powers and authority, as regards sewer systems that are conferred upon them for the purpose of furnishing a water supply under KRS 74.010 to ~~74.390~~ 74.415.

→Section 14. KRS 76.005 is amended to read as follows:

As used in KRS 76.010 to 76.295 unless the context otherwise requires:

- (1) "District" means a metropolitan sewer district authorized by KRS 76.010 to 76.210.
- (2) "Board" means the board described in KRS 76.030.

- (3) "District area," "within the district," "corporate limits of the district" and similar terms mean that area of a county containing a city of the first class which area was on April 1, 1964, either inside the city of the first class or served by sanitary or combined sanitary and storm water sewers which were under the immediate control and custody of the district, that area of such a county which is added to the district pursuant to KRS 76.170, and that area of such a county which may be annexed to the city of the first class except that no construction subdistrict shall be construed to be within the district area.
- (4) "Construction subdistrict bonds and obligations" and like phrases mean any obligation whatsoever that has been incurred by the district because of some function or activity of a construction subdistrict. Such debts are not obligations of the district, and such debts may be paid only from moneys received by the district on account of the construction subdistrict, or from the funds, if any, in the construction subdistrict reserve fund.
- (5) "Construction subdistrict facilities" are all sewerage facilities within a construction subdistrict, and all sewerage facilities in a county containing a district outside the district area which
- (a) are not a part of a sewer construction district organized pursuant to KRS 76.300 to 76.420 or a sanitation district organized pursuant to KRS 220.010 to 220.540 or a sewer system of a municipal corporation or a sewer system of a water district organized pursuant to KRS 74.010 to ~~74.415~~~~[74.416]~~;
 - (b) join together two (2) or more construction subdistricts or lead from a construction subdistrict to the district area or lead from a construction subdistrict to a disposal plant or a treatment plant outside the construction subdistrict and outside the district area.
- (6) "District facilities" are all facilities of the district within the district area.
- ➔Section 15. KRS 76.242 is amended to read as follows:

The construction subdistrict shall not include the whole or any part of any incorporated city of the first, second, third or fourth class, or any sanitation district or sewer construction district, or that part of a water district in which the water district has exercised its power to establish sanitary sewerage facilities pursuant to KRS 74.407 to ~~74.415~~~~[74.416]~~, except with the consent of the legislative or managing board of such city or district. With such consent, the property owners of such city or district will be considered as freeholders of the construction subdistrict.

→Section 16. KRS 220.010 is amended to read as follows:

As used in KRS 220.010 to 220.540, unless the context otherwise requires:

- (1) "Sanitary works," "improvements," "sanitary system" or "sanitary sewers," means any works constructed by a sanitation district in accordance with the purposes of KRS 220.010 to 220.540, as set forth in KRS 220.030.
- (2) "Person" means any person, firm, copartnership, association or corporation other than a public corporation.
- (3) "Public corporation" means any county, city, school district, water district or drainage district, and any other governmental agency or political subdivision clothed with the power of levying general or special taxes or issuing bonds payable from special funds.
- (4) "Land" or "property" means real property.
- (5) "Board of directors," "directors" or "board" means the governing body of a sanitation district.
- (6) "Sanitation commissioner" or "commissioner" means the commissioner of sanitation districts, as provided for in KRS 220.020.
- (7) "District" means a sanitation district authorized by KRS 220.010 to 220.540.
- (8) "District area," "within the district," "corporate limits of the district" and similar terms mean that area established to be within the district in accordance with KRS 220.020 to 220.540. No construction subdistrict shall be construed to be within the

district area.

- (9) "Construction subdistrict bonds and obligations" and like phrases mean any obligation whatsoever that has been incurred by the district because of some function or activity of a construction subdistrict. Such debts are not obligations of the district, and such debts may be paid only from moneys received by the district on account of the construction subdistrict, or from the funds, if any, in the construction subdistrict, or from the funds, if any, in the construction subdistrict reserve fund.
- (10) "Construction subdistrict facilities" are all sewage facilities within a construction subdistrict, and all sewage facilities outside the district area which join together two (2) or more construction subdistricts or lead from a construction subdistrict to the district area or lead from a construction subdistrict to a disposal plant or a treatment plant outside the construction subdistrict and outside the district area, and which are not a part of a sewer system of a municipal corporation or a sewer system of a water district organized pursuant to KRS 74.010 to ~~74.415~~[74.416].
- (11) "District facilities" are all facilities of the district as provided for in KRS 220.020 to 220.540.

➔Section 17. KRS 220.554 is amended to read as follows:

The construction subdistrict shall not include the whole or any part of any incorporated city, sanitation district, sewer construction district, or that part of a water district in which the water district has exercised its power to establish sanitary sewage facilities pursuant to KRS 74.407 to ~~74.415~~[74.416] except with the consent of the legislative or managing board of such city or district. With such consent, the property owners of such city or district will be considered as freeholders of the construction subdistrict.

➔Section 18. The following KRS sections are repealed:

74.250 Fees -- Costs.

74.416 Approval of sanitary sewer system project in Jefferson County.