



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

June 9, 1953

Hon. J. R. Alamia
Criminal District Attorney
Hidalgo County
Edinburg, Texas

Letter Opinion No. MS-60

Re: Several questions relating to elections under Art. 803, V.C.S., et seq., relating to drainage and flood control.

Dear Mr. Alamia:

By order of April 28, 1953, the Commissioners' Court of Hidalgo County determined that "it is necessary that right-of-way be acquired for the purpose of extending the existing Rio Grande River Flood Control System and a site be purchased for the proposed Anzalduas Diversion Dam in connection with the improvement of rivers, creeks and streams in Hidalgo County to prevent overflows and provide necessary drainage." By said order, an election was ordered to be held on May 23, 1953, to determine whether or not bonds in the amount of \$250,000.00 would be issued "for the purpose of purchasing or otherwise acquiring right-of-way for the extension of the present Rio Grande River Floodway Control System and the site for the proposed Anzalduas Diversion Dam."

The election was held on May 23, 1953; however, the proposition failed to carry by the required two-thirds vote.

On June 2, 1953, a petition bearing the signatures of 450 resident property taxpaying voters of the county, praying for an election upon the same proposition, was presented to the Commissioners' Court. In connection with these facts as stated above, in your letter of June 4, 1953, you request the opinion of this office on the following questions:

1. If the petition is proper and meets the requirements of Article 804, is it the mandatory duty of the Commissioners' Court to order the election, or is the same a discretionary duty?

2. Is it the mandatory duty of the Commissioners' Court to appropriate the money with which to finance the election, or is such duty discretionary in view of the fact that one election has failed to carry?

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3. Would the transfer by the Commissioners' Court to the United States Government of the title in fee of the land to be acquired with the bond proceeds, together with complete control and management thereof, violate Article 820?

It is our opinion that the answer to your first question is that upon the presentation of a petition meeting in all respects the requirements of Article 804, it becomes the mandatory duty of the Commissioners' Court to order an election.

In Opinion No. O-3688 (1941) this office had for consideration whether a school district bond election could be held within a year after a previous election had failed to carry. Article 2785 governing tax elections and bond elections in school districts provided, in part: "If said maintenance tax proposition is defeated at an election held for such purpose, no other election shall be held therefor within one year from the date of said election." In Opinion No. O-3688 it was pointed out that the restriction applied to tax elections, not to bond elections, and the opinion held "that in our opinion a bond election may be called and held at any time irrespective of the success or failure of an election previously held, whether within a year or more than a year from the date of the proposed new bond election."

Article 804 contains no provision restricting the number of elections, but, conversely, provides, in part:

"Upon the petition of fifty or more resident property taxpaying voters of a county for an election upon the question of issuing bonds under the provisions of Section 52, Article 3, or Section 59 of Article 16 of the State Constitution, the commissioners' court shall at a regular or special session thereof, order an election to determine whether or not the bonds of such county shall be issued in an amount not to exceed one fourth of the assessed valuation of the real property of such county . . ." (Emphasis added)

It will be noted that the statute contains no limitations as to the number of elections that may be held, nor any provision that would prohibit the ordering of an election after a previous election had failed. Moreover, there is no restriction on the presentation of a petition. In Article 4478, relating to elections for the establishment of county hospitals and the issuance of bonds therefor, it is provided that: "At intervals of not less than twelve months, ten per cent of the

qualified property taxpaying voters may petition such court to provide for the establishing or enlarging of a county hospital, in which event said court within the time designated in such petition shall submit to such voters at a special or regular election the proposition of issuing bonds . . ." No such provision appears in Article 804.

In view of the absence of restrictions in Article 804 and in view of the fact that said statute clearly provides for the calling of an election upon the presentation of a proper petition, it follows that Opinion No. 0-3688 is applicable, and that another election may be ordered.

Of course, the Commissioners' Court has the duty of determining whether the petition meets the requirements of law, and this involves the exercise of discretion. West End Rural High School Dist. of Austin County v. Columbus Consol. Independent School Dist. of Colorado County, 148 Tex. 153, 221 S.W.2d 777 (1949); Scarborough v. Eubank, 93 Tex. 106, 53 S.W. 573 (1899). However, if the petition meets the requirements of law and the Commissioners' Court so finds, then the ordering of the election is ministerial, and the Court can be compelled to order it.

In the well-known case of Sanson v. Mercer, 68 Tex. 488, 5 S.W. 62 (1887), the Court had for consideration a statute providing that, upon presentation of a petition by 50 qualified voters of territory within the limits of a city, the mayor shall order an election to determine whether such territory shall be allowed to withdraw from the municipality. The Court held that if there were controversy as to the facts covered by the petition, the function of the mayor was discretionary in making the determination of such facts. However, the Court further held that if there were no controversy and the petition met the requirements of law --

" . . . In such a case the discretion of the mayor ceases; the act to be done is purely ministerial; his duty becomes absolute, and he can be compelled to perform it." (5 S.W. at page 64)

In Corpus Juris Secundum (Vol. 29, Elections, Sec. 70, pp. 93 and 94), the following appears:

"Upon the presentation of a proper petition, where the statute makes that a condition precedent . . . the authorities appointed to call an election on particular measures or propositions have no discretion to refuse to call it."

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Article 2806 provides that upon the presentation of petitions of twenty or a majority of the legally qualified voters of each of several contiguous school districts praying for the consolidation of such districts, "the County Judge shall issue an order for an election to be held on the same day in each such district." In the case of Rhea Common School Dist. No. 3. v. Bovina Independent School Dist., 214 S.W.2d 660, 661 (Tex.Civ.App. 1948, error dismissed), the Court held the following concerning Article 2806:

" . . . Thus, it may be seen that the county judge by the terms of the statute is given an expressed, independent duty to perform--first, he must judicially determine whether the petitions are sufficient to call the elections and, second, if he finds the petitions sufficient, he must order the elections and post the notices . . ."

And in the case of Garrett v. Unity Common School Dist., 211 S.W.2d 338 (Tex.Civ.App. 1948, writ refused n.r.e.), the Court held the following concerning Article 2806:

" . . . Upon the presentation of the petition for an election by appellees, it was the ministerial duty of the County Judge to order the election . . ."

See also Boventon v. Brown, 164 S.W. 893 (Tex.Civ.App. 1914, writ refused).

In view of the authorities cited and discussed above, you are advised that, if the Commissioners' Court finds that a petition presented to it under the provisions of Article 804 meets the requirements of such statute, it is the mandatory duty of said Court to order an election as prayed for.

In your second question you ask whether the Commissioners' Court must appropriate the money to finance the election. Article 7.12 of Vernon's Texas Election Code provides as follows:

"All expenses incurred in furnishing the supplies, ballots, and booths in any general or special election shall be paid for by the county, except costs in municipal and school elections. All accounts for supplies furnished and services rendered shall first be approved by the Commissioners Court before they are paid by the county."

In view of Article 7.12 and the opinions of this office shown as annotations under this article by Vernon, you are advised

that the Commissioners' Court must pay for all proper expenses incurred in holding the election.

You state that the Commissioners' Court intends to transfer to the United States Government title in fee to the land to be acquired with the bond proceeds, together with complete control and management thereof. You wish to know whether this would violate the terms of Article 820. Article 820 provides as follows:

"The commissioners court shall have and exercise the control and management of the affairs and operation of the irrigation system of such county to the same extent and in the same manner provided in Chapter 2 of the Title 'Water,' as conferred upon the directors of Water Improvement Districts, and said court shall exercise all of the powers relative to the control, management, affairs and operation of such county irrigation system as such directors have under the provisions of said chapter, and all the provisions of said chapter relative to the control, management, affairs and operation of Water Improvement Districts shall apply to the control, management, affairs and operation of such county irrigation system."

Thus, it is clear that the Commissioners' Court has the same powers as the board of directors of water improvement districts under Chapter 2, Title 128 (Water). Article 7657, which is a part of Chapter 2, provides as follows:

"Any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into thereunder."

Under Article 820, the Commissioners' Court is granted the authority to convey property to the United States under the terms and conditions of Article 7657. Your third question, therefore, is answered that the transfer by the Commissioners' Court to the United States Government would not violate Article 820 if such transfer is lawfully accomplished under the terms and conditions of Article 7657.

We call your attention to one point. You state that the petition was presented to the Commissioners' Court on June 2, 1953. Thus, the petition was presented prior to the effective

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date of House Bill 920 which was signed by the Governor June 8, 1953, and became effective that date. As you know, House Bill 920 repealed Article 822. As this statute was not repealed on June 2, 1953, it is our opinion that the petition should be withdrawn, and that a petition should be presented to the Commissioners' Court after the effective date of said House Bill 920.

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By
George W. Sparks
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GWS-s:wb

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