



TOM RAMSAY
TEXAS HOUSE OF REPRESENTATIVES

February 21, 2001

The Honorable John Cornyn
Attorney General of Texas
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Austin, Texas 78701-2548

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OPINION COMMITTEE

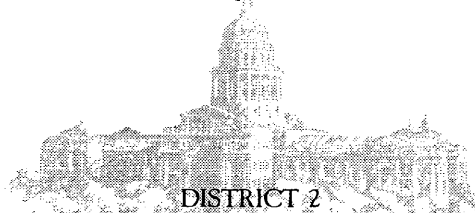
RQ-0359-JC
FILE # ML-41906-01
I.D. # 41906

Re: Request for Attorney General Opinion

Dear General Cornyn:

As the Chairman of the House Committee on County Affairs, I request your opinion on the certain matters pertaining to the creation of a Fresh Water Supply District in Kaufman County. Based upon the facts presented to me, it appears that the public has an interest in the resolution of the following issues.

- (1) Whether a petition to create a fresh water supply district pursuant to Chapter 53 of the Texas Water Code is sufficient if it is not signed by "50 or a majority of the electors of the proposed district who own land in the proposed district."
- (2) Whether a commissioners court has authority to approve a petition more than 30 days after the petition was presented.
- (3) Whether the Temporary Supervisors of a proposed district, who were appointed by the commissioners court at the time the petition to create the district was approved, have authority to schedule and administer the election to approve creation of district.
- (4) Whether the actions taken by the Temporary Supervisors of the Kaufman County Fresh Water Supply District No. 1 on January 8, 2001, including scheduling the election to approve the creation of the district and providing notice of the election to the public, complied with the Open Meetings Act.
- (5) If the actions taken on January 8th failed to comply with the Open Meetings Act, whether the Temporary Supervisors had authority to ratify these actions at a properly posted meeting held on January 12, 2000.
- (6) Whether, in light of the answers to Questions 1-5, a Fresh Water Supply District was created?



BACKGROUND

It has been represented to me that the following facts are uncontested. On November 22, 2000¹, a petition was submitted to the Kaufman County Commissioners Court, asking that it call an election for the organization of a fresh water supply district (Exhibit A). Petitioners indicated the proposed District, Kaufman County Fresh Water Supply District No. 1, would be organized to "conserve, transport, and distribute fresh water" and to "purchase, construct, acquire, own, operate, repair, improve, and extend sanitary sewer systems to control wastes." The area to be included in the proposed District consisted of approximately 3,665 acres of land in Kaufman County. All of this land is owned by two businesses: Albite of Texas, a Texas Corporation, and Lemman Development, Ltd., a Texas Limited Partnership.

At the time the petition was submitted, only two individuals lived within the proposed District. Both individuals were registered to vote in Kaufman County, and both signed the Petition (Exhibit A). Neither of these individuals owned property within the proposed district. Two other individuals signed the petition as representatives of the two businesses owning property within the proposed district. The petition was not signed by any electors (whether defined as either eligible voters or registered voters) that owned land contained within the proposed District.

During December 2000, four additional individuals moved into the proposed district. Each filed a Request for Consideration of Appointment as Temporary Supervisor of the proposed district (Exhibit B). Each of these individuals listed their address as the same address given by the two electors that signed the petition. The four new residents became registered voters on January 12, 2001, and January 13, 2001, respectively (Exhibit C). These individuals did not sign the petition, but ultimately were named Temporary Supervisors for the proposed district.

On December 18, 2000, a hearing was held by Kaufman County Commissioners Court, at which the petition requesting the creation of Kaufman County Fresh Water Supply District No. 1 was considered. No action was taken at the hearing. A workshop concerning the petition was conducted on January 2, 2001.

At its next regular meeting, on January 8, 2001, the Commissioners' Court of Kaufman County issued an Order approving the petition submitted in November 2000 (Exhibit D). This order also provided that an election would be held to determine

¹ The petition was filed with the County Clerk for Kaufman County on November 28, 2000.

whether the proposed District should be created, but did not set a date for the election. The Order also appointed five of the six individuals residing in the proposed District as Temporary Supervisors.

At 1:21 p.m. on January 8, 2001, Mr. Tom Leonard² posted notice of a meeting to be held on Friday, January 12, 2001, at 6:00 p.m. (Exhibit E). Then, at 3:52 p.m. on the same day, Mr. Leonard posted notice of an organizational meeting for the proposed District to be held three hours and eight minutes later at 7:00 p.m. (Exhibit F). The notice provided that the meeting was to be held "pursuant to an urgent public necessity."

On January 9, 2001, an "Order Calling Confirmation and Supervisors and Tax Assessor and Collector Election" was filed in the Kaufman County Clerk's office. This notice established that on January 8, 2001, the Board of Directors for the District had met and voted to hold an election eleven days later on January 20, 2001, as authorized by the Temporary Board of Supervisors on January 8, 2001 (Exhibit G). Other than the Notice and Order filed with the Clerk on January 11th, no record is presently available concerning either the January 8th meeting of the Temporary Supervisors or its January 12th meeting.

On January 22, 2001, the District filed a notice of a "special" meeting to be held on January 25, 2001 (Exhibit H). The purpose of the meeting was to canvass the results of the election held. No documents are presently available that reflect the result of the election, but presumably the eligible voters of the proposed district, each of whom either signed the petition or were serving as temporary supervisors, approved the creation of the district.

DISCUSSION

QUESTION ONE:

Whether a petition to create a fresh water supply district under is sufficient if it is not signed by "50 or a majority of the electors of the proposed district who own land in the proposed district."

² Mr. Leonard signed the notice as attorney for the District. Arguably, at the time of the posting, the District had not actually been created. It seems unlikely that its Board (actually Temporary Supervisors) had formally authorized anyone to act as its attorney at the time of the posting.

A fresh water supply district is created "by petition, hearing and election." TEX. WATER CODE §53.001. To be sufficient, a petition must contain the signatures of "50 or a majority of the electors of the proposed district who own land in the proposed district." *Id.* §53.014. It is undisputed that the petition to create Kaufman County Fresh Water Supply District No. 1 was not signed by "electors of the proposed district who own land in the proposed district" as required by Section 53.014. Rather, the petition reflects the signatures of two residents who were electors but not property owners and the representatives of two property owners (a corporation and a limited partnership) who were not electors³ (Exhibit A). If the text of §53.014 is interpreted literally, it appears that the petition to create Kaufman County Fresh Water Supply District No. 1 failed to satisfy the statutory requirements.

QUESTION TWO

Whether the Commissioners Court has authority to approve a petition at a hearing held more than 30 days after the petition was presented.

The commissioners court must hold a hearing to consider the petition "not more than 15 nor less than 30 days" from the date the petition is filed. TEX. WATER CODE §53.016. The commissioners court is allowed, however, to "adjourn the hearing from day-to-day as is necessary to complete the hearing." *Id.* §53.019.

It is uncontested that the commissioners court placed the sufficiency of the petition on the agenda for consideration on December 18, 2000, and that this meeting was conducted within the statutory time frame. However, no action was taken to approve the petition at the December 18th meeting. The commissioners court conducted a workshop concerning the petition on January 2, 2001. Finally, on January 8, 2001 (approximately 47 days after the petition was submitted), the commissioners court approved the petition at a regular meeting.

If the action of the commissioners court is to be deemed timely, such a determination must be premised on a finding that the workshop on January 2nd and the deliberation and action on January 8th were part of the same hearing begun on December 15, 2000. The hearing scheduled for December 15, 2000 was not literally adjourned and taken up again the next day, and whether the commissioners court intended the delay to constitute adjourning the hearing from day to day is unclear. Assuming that it did so intend, please address whether the authority to "adjourn the hearing from day to day"

³ The statute does not contemplate that anyone can "sign" a petition through a representative. In addition, business entities are not eligible voters and could not, therefore, be deemed electors.

embraces the authority to recess without action, conduct a workshop approximately 17 days later and then consider the petition at a regular meeting held 6 days after the workshop.

QUESTION THREE

Whether the Temporary Supervisors appointed by the Commissioners Court have authority to schedule and administer the election to approve the creation of the proposed district.

At its January 8th meeting, the commissioners court approved the petition to create the district (Exhibit C). The court also appointed Temporary Supervisors as contemplated by §53.020. These Temporary Supervisors called and administered the election authorizing the creation of the district.

Prior to the 1995 amendments⁴, it was the duty of the commissioners court to administer the election. The sections imposing this duty were repealed, but the legislature did not empower any other entity to conduct the election. The only authority afforded the Temporary Supervisors is to "meet and organize". *Id.* §53.020(c). The only duty pertaining to the election that is still expressly imposed on the commissioners court is to provide the ballots. *Id.* §53.024.

In the wake of the 1995 amendments, the duty to administer the election is not clearly imposed on any entity. However, that the legislature intended the commissioners court to conduct the election is a conclusion that appears to be dictated by the express language of Section 53.011: "a district is created by petition, hearing and election." A proposed district is not an existing entity until *after* the election. As a logical matter, the Temporary Supervisors could not have acted on behalf of the District until after the District was created. Absent an express grant of authority for the Temporary Supervisors to conduct the election, it appears that only the commissioners court had the authority to do so. See TEX. ELECTION CODE §3.004.

QUESTION FOUR

If the Temporary Supervisors had authority to schedule and administer the election, whether the action taken by the "Board" on January 8, 2001 was in compliance with Open Meetings Act.

⁴ Acts 1995, 74th Leg., ch. 715, Section 42, eff. Sept. 1, 1995.

It is undisputed that the January 8, 2001 meeting of the District's Board of Directors convened just a few hours after the notice was posted. Therefore, the meeting was proper only if it met the requirements for an emergency meeting under the Open Meetings Act.

The Act allows a meeting to be held with only two hours notice if there is an urgent public necessity to do so. In this regard, the Act provides that.

(b) An emergency or an urgent public necessity exists only if immediate action is required of a governmental body because of:

(1) an imminent threat to public health and safety; or

(2) a reasonably unforeseeable situation.

(c) The governmental body shall clearly identify the emergency or urgent public necessity in the notice or supplemental notice under this section.

(d) A person who is designated or authorized to post notice of a meeting by a governmental body under this subchapter shall post the notice taking at face value the governmental body's stated reason for the emergency or urgent public necessity.

TEX. GOV'T. CODE Section 551.045. In order to justify proceeding on 2 hours notice, the Act requires that there be an urgent public necessity and that this urgent public necessity be identified in the notice. In the present case, it is questionable whether the "Board"⁵ meeting of January 8th satisfied either requirement.

The notice makes the assertion that the entire meeting is to be conducted pursuant to an urgent public necessity (Exhibit F). A fair reading of the notice reflects that all of the agenda items are being addressed pursuant to this urgent public necessity. However, nowhere within the notice is this emergency actually specifically identified. It appears, then, that the notice was insufficient. Even if it were not, it appears that, substantively, there was no urgent public necessity.

Prior to 1995, Section 53.020 required the election to approve the creation of the district to be held prior to the 30th day after the day the order approving the petition was made. However, there is presently no statutory deadline for holding the election. Therefore, there appears to have been no substantive basis for declaring any emergency.

⁵ While the notice identifies this as a meeting of the Board of Directors of Kaufman County Fresh Water Supply District No. 1, the District had not yet been created and there were no Directors, only temporary supervisors.

Even had the deadline been in place, it is undisputed that the "Board" called the election for January 20, only 12 days after the commissioners court's order approving the petition. Therefore, even if the election had to be held within 30 days, there would have been no "urgent public necessity" that prevented the Temporary Managers (meeting as the "Board of Directors" of the District) from waiting 72 hours as required by law. See *Piazza v. City of Granger*, 909 S.W.2d 529, (Tex. App.--Austin 1995, no writ)(the need for quick action, without more, is not an emergency).

It appears that the meeting of January 8, 2001 was not a proper emergency meeting. I respectfully ask the Attorney General for his opinion.

QUESTION FIVE

Whether, if the meeting of January 8th was not a lawful meeting, the "Board" had authority ratify the actions taken at that meeting at a properly noticed meeting held on January 12th?

On January 8th, the "Board" also posted notice of a meeting to be held on January 12th. This notice contemplated that the "Board" would ratify the actions taken at the emergency meeting held on January 8th. There is no doubt that this posting provided adequate notice in terms of time.

A governmental body may not ratify its prior illegal acts. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W. 2d 641, 646-47 (Tex. 1975). However, a governmental body that has voted or attempted to take formal action without complying with the Act may meet again and validate the action at a properly convened meeting of which the public has received adequate notice. *Id.* The action will be valid only from the date of the meeting that complies with the Open Meetings Act. *Id.*; *Ferris v. Texas Board of Chiropractic Examiners*, 808 S.W.2d 514, 518 (Tex. App.--Austin 1991, writ denied).

Whether any action taken by the Board on January 12th was effective or whether it was merely an ineffective attempt to ratify the acts of the January 8th meeting is difficult to determine without reviewing the minutes of these meetings. The minutes are not presently available to me. There may be problems, however, even if the January 12th meeting was effective to cure any ills arising from the January 8th meeting. For instance, it appears that the notice of the election given to the public was done pursuant to action taken at the January 8th meeting. This notice was given prior to the January 12th meeting may not have been given again thereafter. If this was the only notice afforded to the public, it may be that this election was not conducted according to law.

QUESTION SEVEN

Given the answers to Questions 1 – 5, whether a District was created?

In *Dallas County Fresh Water Supply Dist. No. 7 v. Mercantile Securities Corporation*, 110 S.W.2d 187 (Tex. Civ. App. –Dallas 1937), the court observed that if the boundaries of a proposed water district set forth in the petition did not satisfy the statutory requirements, the petition was insufficient, and no district was created. This holding suggests that unless the pertinent statutory requirements are satisfied, an attempt to create a district is void. Please offer an opinion on whether the attempt to create Kaufman County Fresh Water Supply District No. 1 was effective.

Thank you for your resolution of these issues. If my office can be of any assistance, do not hesitate to call.

Sincerely,



Tom Ramsay,
Chairman of County Affairs Committee