

Edwin Springer
First Asst. District Attorney

Ed Jendrzey
Asst. District Attorney

Steve de Lemos
Asst. District Attorney

Melissa D. Rowcliffe
Asst. District Attorney



Joseph A. Soane, III
Asst. District Attorney

Mel Koehler
Asst. District Attorney

Mary Yvonne (Von) Bunn
Asst. District Attorney

Michael Zamora
Asst. District Attorney

Darren Umphrey
Asst. District Attorney

Dib Waldrip
Comal County Criminal District Attorney
150 N. Seguin, Suite 307
New Braunfels, Texas 78130
830-620-5533
Fax - 830-620-5599 or 830-608-2008

September 20, 2002

Office of the Attorney General
Honorable John Cornyn
Opinions Section
P.O. Box 12548
Austin, Tx 78711

RQ-0610-JC

RECEIVED
SEP 23 2002

FILE # ML-42805-02
I.D. # 42805

OPINION COMMITTEE

Re: Request for Attorney General's Opinion--EXPEDITE

Dear General Cornyn,

- Issues:**
1. When is a "vacancy" created or established after two letters of resignation are submitted concurrently so as to require application of the Texas Local Government Code Section 22.010 (d) mandating a special election when two vacancies exist on the governing body of a type A general-law municipality?
 2. Does a decision of such a governing body to avoid holding a special election to fill a vacancy create a vacancy that "cannot be filled as provided by other law" thereby authorizing taxpaying voters residing in the municipality to properly petition the county commissioners court to order an election to fill the vacancy?

Factual Background: The Mayor and an Alderman of the City of Bulverde, Comal County, Texas recently resigned simultaneously in separate letters both of which stated that their independent resignations were effective two days subsequent to the submission date. "Bulverde" is a type "A" general-law municipality subject to the provisions of Chapter 22 of the Texas Local Government Code.

Section 22.010 (d) of the Texas Local Government Code specifies that if multiple vacancies exist simultaneously on the governing body a special election shall be ordered

to fill the vacancies. Section 22.012 of the Texas Local Government Code provides that a “resignation is subject to the approval and acceptance of the governing body.” The first issue arises as to when is a “vacancy” created or established.

The attorney for Bulverde advised the “Board” that two vacancies would exist only if the Board either: (1) accepted the first and then the second resignation prior to appointing a replacement for the first “vacancy”; or (2) if the Board allowed eight days to pass without acting on either resignation. Bulverde’s attorney relied upon Section 201.023 of the Texas Election Code and a 1981 Attorney General’s Opinion—No. MW-401 (1981).

On their attorney’s advise, the Board accepted only the resignation of the Alderman within eight days and, pursuant to Section 22.010 (a) of the Texas Local Government Code, appointed a replacement on the basis that only one vacancy purportedly existed. The Board allowed the eight days to run on the Mayor’s resignation. At a subsequent meeting, the Board passed a motion allowing the Mayor pro tem to continue to serve as acting Mayor until such time as either: (1) a suitable replacement was found who could be appointed; (2) a special election was called by the Board; or (3) the next regular municipal election in May of 2003.

Subsequently, the Comal County Commissioners Court was petitioned, pursuant to Section 22.011 of the Texas Local Government Code, to order an election. Thus, the second issue arises as to what acts of the Board authorize taxpaying voters residing within the municipality to properly petition commissioners court to order an election to fill a vacancy that “cannot be filled as provided by other law”.

Analysis: Reliance on Section 201.023 of the Texas Election Code to define the existence of a vacancy upon submission of a resignation is expressly disavowed by the Texas Supreme Court as a violation of the separation of powers doctrine. **Angelini v. Hardberger**, 932 S.W.2d 489, 492 (Tex. 1996). Consequently, Bulverde’s use of this statute is misplaced in this context and is contrary to the law of Texas.

There are no cases directly on point. Also, the cases that tangentially affect resolution of these issues are not dispositive and were decided prior to codification of the Election, Government and Local Government Codes. Further, the legislative history of the source bill (SB 896—1987) for Section 22.010 of the Texas Local Government Code provides little insight.

In Section 311.021 of the Texas Government Code, it is presumed that the Legislature intended the entirety of a statute to be effective, intended “a just and reasonable result”, and intended “a result feasible of execution”. In properly construing a statute, several matters are to be considered, including but not limited to: the object sought to be attained; consequences of a particular construction; and administrative construction of the statute. Tex.Gov’t.Code Section 311.023. Conflicts which appear between a general and a specific provision are to be construed to give effect to both if possible. Tex.Gov’t.Code Section 311.026.

As to the first issue, the construction of the applicable Local Government Code provisions by Bulverde circumvents any possible effectiveness of the multiple vacancy section of the Code. Further, Bulverde reads the provisions as if no conflict exists thereby thwarting the Legislature's intended just and reasonable result of ensuring voters an opportunity to fill multiple concurrent vacancies. Additionally, reliance upon the "subject to acceptance" provision of Section 22.012 of the Texas Local Government Code prohibits feasible execution of the result intended by Section 22.010 (d).

Likewise, the object of the Legislature to be attained by specifically providing that two concurrent vacancies shall be filled by special election will be completely avoided by Bulverde's construction of the statutes. Otherwise, there would have been no reason or objective for the Legislature to differentiate between the actions to be taken when faced with either one or multiple vacancies. As a result, it appears that a conflict does, in fact, exist. Therefore, if possible, the conflicting provisions should be construed so as to give effect to both.

Thus, even though Section 22.012 of the Texas Local Government Code provides that a resignation is "subject to acceptance" by the governing body, the Legislature also sought, in Section 22.010 (d), to prevent the possibility of the remaining members of the governing body to "pack the court", so to speak. Otherwise, the Legislature would not have found it necessary to differentiate between permissibly allowing for a special election for a single vacancy in Section 22.010 (c) ("may") versus mandatorily requiring a special election for multiple vacancies in Section 22.010 (d) ("shall"). To sanction the action taken by Bulverde would result in Section 22.010 (d) being a waste of ink and paper—a consequence not likely intended by the Legislature.

The cases interpreting the "subject to acceptance" provision regarding resignations or similar language in other laws clearly indicate that such provisions are designed to be used as a shield to protect the governing body, its qualified officers and/or its constituents and not to be used as a sword by the governing body to manipulate applicability of other laws. *Compare generally, Angelini, supra; Sawyer v. San Antonio*, 149 Tex. 408, 234 S.W.2d 398 (1950); *State v. Cocke*, 54 Tex. 482 (Tex. 1881); *Garcia v. Angelini*, 412 S.W.2d 949 (Tex.Civ.App. Eastland 1967, *no writ*); *Collins v. Board of Firemen, et al.*, 319 S.W.2d 174 (Tex.Civ.App.—San Antonio 1958, *writ ref'd*); *Gambill v. Denton*, 215 S.W.2d 389 (Tex.Civ.App.—Fort Worth 1948, *writ disp'd*); *Plains Common Consol. School District No. 1 of Yoakum County v. Hayhurst*, 122 S.W.2d 322 (Tex.Civ.App.—Amarillo 1938, *no writ*); *Keen v. Featherson*, 29 Tex.Civ.App. 563, 69 S.W. 983 (Tex.Civ.App. 1902, *writ ref'd*); & *McGhee v. Dickey*, 4 Tex.Civ.App. 104, 23 S.W. 404 (Tex.Civ.App. 1893, *no writ*) (defensive use of resignation acceptance as a shield); *with Jones v. City of Jefferson*, 66 Tex. 576, 1 S.W. 903 (Tex. 1886) (offensive use of resignation acceptance as a sword). The last cited case is the only case found wherein a municipality was attempting to use "subject to acceptance" language regarding resignations as a sword to attempt to avoid an issue otherwise required by law, and the Texas Supreme Court found such a use to be in error. *See Jones, supra.*

Similarly, Bulverde's offensive use of the "subject to acceptance" resignation provision of Section 22.012 of the Local Government Code is in error. Bulverde is using the "subject to acceptance" language as if it has a choice to accept or reject the resignation—it does not. **Texas Democratic Executive Committee v. Rains**, 756 S.W.2d 306, 307 (Tex. 1988). *See also* Tex.Elect.Code Section 201.001 (submitted resignation must be accepted). Consequently, the previous Attorney General's Opinion by the Honorable Mark White should be reconsidered because it is contrary to the cited authority thereby misleading type A general-law municipalities in a manner that tempts abuse of the law. *See* AG Op. MW-401 (1981).

In order to properly give effect to both of the conflicting provisions, it seems most reasonable to construe the "subject to acceptance" provision of Section 22.012 of the Texas Local Government Code as applicable to defensive situations in which either a governing body, a qualified officer and/or its constituents needs to be appropriately protected. On the other hand, the existence of effective concurrent resignations, accepted, approved or not, requires a special election to fill those multiple vacancies pursuant to Section 22.010 (d) of the Texas Local Government Code. Such a construction gives effect to the entire statute and not just one part thereof as required by Section 311.021 (2) of the Texas Government Code.

Consequently, each of the resignations in question technically created a "vacancy" on the effective date provided by the resigning officer. If such a construction is correct, both resignations were effective simultaneously; thus, two vacancies existed at the same time. As a result, the Board was without authority or discretion to appoint a replacement for either position as an election is mandated by law. If the Board fails to order the election, the State may compel the election through mandamus. **Yett v. Cook**, 115 Tex. 205, 281 S.W. 837 (1926).

As to the second issue, certain residents of Bulverde have petitioned Comal County Commissioners Court to order an election to fill the vacant position of Mayor due to the acts of the Board. The basic question is: are those acts consistent with the Legislature's intent that the mayoral vacancy is one that "cannot be filled as provided by other law"? Tex.Loc.Gov't.Code Section 22.011.

Again, there is no authority directly on point. This provision states that a commissioners court "shall" order an election. Since the mandatory "shall" language was used by the Legislature, Texas law generally requires that if the prerequisites in the statute are found the order by commissioners court becomes a ministerial function.

In the establishment of Section 22.011 of the Texas Local Government Code, the Legislature created a method and right on behalf of residents to petition for an election. By doing so, a check-and-balance system is available to the voters of this municipal subset of our republic form of government. Thus, it is most reasonable that the Legislature intended that any action or inaction of the governing body of a type A general-law municipality, whether lawful or not, precluding, avoiding or delaying the filling of a

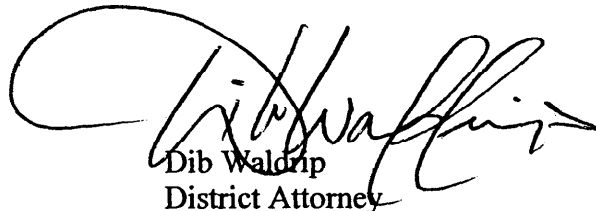
vacancy is a vacancy that “cannot be filled as provided by other law”. Such a construction comports with the general tenets of the Code of Construction Act cited above. *See generally*, Tex.Gov’t.Code Chapter 311.

Pursuant to the review of these issues, the Bulverde Board unlawfully precluded, avoided and delayed a statutorily required election. *See* Tex.Loc.Gov’t.Code Section 22.010 (d). As a result, the appointment of the replacement Alderman is potentially voidable—if not void. Likewise, the action taken allowing the Mayor pro tem to serve as acting Mayor until a later time also unlawfully precluded, avoided and delayed a statutorily required election. As a result, either vacancy should be cognizant of application of Section 22.011 of the Texas Local Government Code wherein a vacancy “cannot be filled as provided by other law”.

Assuming all other petition requirements were met, the petitioners did properly seek to have the Comal County Commissioners Court order an election to fill the Mayoral vacancy and could properly petition for an election to fill the Alderman’s vacancy.

Request to Expedite: Should an election for either or both vacancies be necessary, the earliest opportunity to allow the voters to do so is at the November General Election. To call a special election for that date, the election must be called by the 7th day of October, 2002. Due to this expediency, I respectfully request that your opinion be forwarded to this office with sufficient time to post an agenda for an open meeting to consider calling the election to be held in November.

Respectfully submitted,



Dib Waldrip
District Attorney

cc: Danny Scheel, Comal County Judge
Commissioners Court of Comal County
Mayo Galindo, Bulverde City Attorney
Bulverde Board of Aldermen

Edwin Springer
First Asst. District Attorney

Ed Jendrzej
Asst. District Attorney

Steve de Lemos
Asst. District Attorney

Melissa D. Rowcliffe
Asst. District Attorney



Joseph A. Sonne, III
Asst. District Attorney

Mel Koehler
Asst. District Attorney

Mary Yvonne (Von) Bunn
Asst. District Attorney

Michael Zamora
Asst. District Attorney

Darren Umphrey
Asst. District Attorney

Dib Waldrip
Comal County Criminal District Attorney
150 N. Seguin, Suite 307
New Braunfels, Texas 78130
830-620-5533
Fax - 830-620-5599 or 830-608-2008

October 1, 2002

Honorable John Cornyn
Office of the Attorney General
c/o Susan Gusky, Chief
Opinions Committee
P.O. Box 12548
Austin, Tx 78711-2548

RECEIVED
OCT 01 2002
OPINION COMMITTEE

Via Fax: 512-472-6538 FILE # ML-42805-02

Re: Bulverde Election I.D. # 42819

General Cornyn,

Since the time I submitted my request for an opinion regarding the possible election of officers to fill vacancies in a type-A general-law city, the Bulverde Board of Aldermen has met and voted to hold a special election in November to fill both the vacant position of Mayor and the position of alderman that was filled by appointment. The replacement "appointed" to the vacant Alderman spot has also resigned his seat.

As a result, the second issue I submitted for your consideration may be moot to the point that you deem it not appropriate for review currently. That issue was: What constitutes a vacancy that "cannot be filled as provided by other law"? For a type-A general-law municipality, the Local Government Code provides that taxpaying voters residing in the municipality may petition commissioners' court to order a special election to fill a vacancy that cannot be filled as provided by other law.

Initially, the Bulverde Board of Alderman voted to delay a decision upon the issue of filling the vacancy. From the perspective of the petitioners, any action to delay filling a vacancy results in a vacancy that cannot be filled by other law. Although a petition was filed with the Comal County Commissioners Court, the subsequent decision by Bulverde

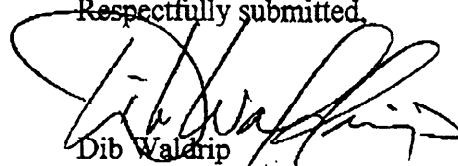
to hold an election at the next available date negates the need for Commissioners Court to act on the petition.

As to the first issue—what defines the existence of multiple vacancies for the purposes a mandatory election, reconsideration or clarification of a prior Attorney General's opinion remains a pertinent question. See MW-401 (1981). Bulverde voted to hold the special election due in part to the inability to secure an Attorney General's opinion within a time frame that would also allow, if necessary, the calling of a special election in November. Due to subsequent development of the law as cited in the original request, reconsideration or clarification of the opinion is warranted.

For more specific reference to the statutory provisions pertinent to resolution of these issues, please see the initial request for an Attorney General's opinion.

Please feel free to contact me at any time if I can provide additional information.

Respectfully submitted,



Dib Waldrip
Comal County District Attorney

cc: Mayo Galindo, Attorney for Bulverde