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February 22, 2006

FILE # ML-44644-06  
I.D. # 44644

The Honorable Greg Abbott  
Texas Attorney General  
P. O. Box 12548  
Austin, Texas 78711-2548

RQ-0456-GA

re: Request for Attorney General Opinion

Dear General Abbott:

As Brazos County Attorney I am requesting an Attorney General Opinion regarding the corporate status of a local municipality, Millican.

**Question:**

Millican, Texas has existed in Brazos County for many years by all accounts as a municipality. However, the question of Millican's corporate status has recently been raised and the Brazos County Attorney requests the help of the Attorney General in resolving this question.

**Introduction:**

Millican was incorporated under either general law, via local citizen election, in 1866 or by special act of the legislature in 1871. With the exception of one mayor, Millican has no history of elected officials. Millican collects no taxes to support city projects such as law enforcement, city street repair and other public services. Brazos County Commissioners are hesitant to provide county services until the issue of the city's corporate status is determined.

## STATEMENT OF FACTS

The area had been known as Millican since it was settled by Robert Hemphill Millican and his son Dr. Elliott McNeil Millican in the 1820s. By 1845 the place was known as Millican Crossroads. In 1849 the community received a post office, and by 1850 a stagecoach line extended from Houston through Millican. Dr. Elliott Millican sold the northern part of his land grant, three miles north of the site of the older Millican Crossroads community, on December 14, 1859, and the new townsite was named in his honor. From 1860 to around 1867 the town was the terminus of the Houston and Texas Central Railway; the prosperous community built churches and schools. At this time Millican was reportedly the largest city north of Houston and Galveston. During the Civil War years the town became the site of a training camp for 5,000 Confederate troops. In 1864 Millican was incorporated and its population reached 3,000. Millican declined when the railroad resumed its northward expansion to Bryan around 1866; businesses moved north with the railroad. In 1867 the Millican population was further reduced by a yellow fever epidemic. Millican had 1,200 residents in 1868; that year race riots in the community cost more lives. In 1883 the town had a cotton gin, two steam gristmills, four churches, and a school, which in 1904-05 had eighty pupils and two teachers. In the 1920s the Phillips Petroleum Company drilled a 17,000-foot-deep well into a nearby salt dome, but no oil was found. Highway 6 bypassed Millican in 1930, and by 1940 its population had dwindled to 200. In 1990 Millican had a population of 100, a community center, a volunteer fire station, three churches and two cemeteries, a modern post office, and a fertilizer plant.<sup>1</sup>

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<sup>1</sup> *Handbook of Texas Online*, s.v. "MILLICAN, TX," <http://www.tsha.utexas.edu/handbook/online/articles/MM/hlm71.html> (accessed November 10, 2005).

On December 12, 1865, the Commissioners Court recorded the petition by Millican Community citizens and ordered an election on the question of municipal incorporation. The Commissioners' Court ordered the election to be held on January 8, 1866.<sup>2</sup> The minutes record the passage of the election and the incorporation of the municipality of Millican on January 8, 1866.<sup>3</sup> Apparently, the vote to incorporate and the incorporation occurred under the authority of the first general law pertaining to the incorporation of cities and towns.<sup>4</sup> Although the Commissioners' Minutes reflected the act of municipal incorporation, no mention was made of any subsequent election to choose a mayor or alderman, until 1868 when G. A. Wheat served as mayor. Mayor Wheat appears to be Millican's only elected mayor, although several mayors were appointed by Governor E.J. Davis under authority granted him by the legislature.

On March 13, 1871, Millican was again incorporated, this time as a "special law" municipality.<sup>5</sup> Under an act to provide for the appointment by the Governor of certain officers to fill vacancies, Governor E. J. Davis appointed Alfred Burgess mayor along with five alderman.<sup>6</sup> On July 20, 1871, B.F. Boldridge was appointed by the governor to serve as mayor but declined and A.S. Heath accepted the appointment along with five alderman.<sup>7</sup> With these exceptions, Millican had no local elections from 1871 until the present.

In 1897 the legislature passed an act relating to the election of officers and the dissolution of municipalities: "where such town or city has been chartered by special act of the legislature and such town or city contains more than 200 and less than 5000 inhabitants and the offices of

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<sup>2</sup> Volume A, page 138, Minutes – Brazos County Commissioners' Court

<sup>3</sup> Volume A, page 142, Minutes – Brazos County Commissioners' Court

<sup>4</sup> Act approved March 13, 1858, 7th Leg., R.S., ch. 61, 1858 Tex. Gen. Laws, *reprinted in* 4 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 at 941 (Austin, Gammel Book Co. 1898).

<sup>5</sup> Act approved March 13, 1871, 12th Leg., R.S., ch. 42, 1871 Tex. Gen. Laws, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 at 1149 (Austin, Gammel Book Co. 1898).

<http://texinfo.library.unt.edu/lawsoftexas/pdf/law09011.pdf>

<sup>6</sup> History of Brazos County

<sup>7</sup> History of Brazos County page 342

such town or city have been vacant for a period of ten years or more, such charter of said town or city shall become void and forfeited, and no election of officers in such town or city shall be had; but the inhabitants of such town or city may reincorporate under the general laws of this State relating to towns and cities in the manner as now or may hereafter be prescribed by the laws of this State."<sup>8</sup>

## DISCUSSION

Millican was first incorporated by its citizens in 1866 and later by act of the Texas Legislature in 1871. "There can not be at the same time, within the same territory, two distinct corporations exercising like powers and jurisdictions..."<sup>9</sup> It is generally recognized that a "dually incorporated" Millican cannot exist; Millican could survive as a general law municipality (incorporated in 1866); a special law municipality (created by the Texas Legislature in 1871); or, not at all because of the consequences of an act by the Texas Legislature in 1897.<sup>10</sup>

A discussion of the nature of Millican's corporate status entails a review of two issues:

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<sup>8</sup> Act approved April 30, 1897, 25th Leg., R.S., ch. 114, 1897 Tex. Gen. Laws, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 at 1213 (Austin, Gammel Book Co. 1898).

<http://texinfo.library.unt.edu/lawssoftexas/pdf/law09011.pdf>.

<sup>9</sup> State v. Larkin, 90 SW 912, 1905 Tex. App.

<sup>10</sup> There are three kinds of municipalities in Texas: special-law, general-law municipalities, depending on population) and home-rule. **Special-law municipalities** are those cities created by local laws enacted by the Congress of the Republic of Texas or by the legislature from 1836 to 1912. Since their charters were in effect written by the Congress or the legislature, they owed their existence and powers to the specific legislation creating them. General-law cities are those incorporated under the general laws of the state as a result of the voluntary action of their inhabitants but as in the case of special-law cities, their powers are limited to those specifically granted by the legislature as enumerated in the relevant statutes. In 1912, the home-rule amendment (Article XI, Section 5) to the Constitution was adopted. This permitted cities having populations of more than 5,000 persons to adopt new charters, or amend existing charters, which could include any provision not inconsistent with the Constitution or the general laws of the state. Home-rule enabling legislation was enacted in 1913 which established the procedures by which cities could become home-rule. For an interesting and informative commentary, see Trueman O'Quinn's History, Status, and Function of Cities, Towns and Villages at pp. XIII-XXXVIII at the beginning of Vol. 2A, Texas Revised Civil Statutes Annotated (Vernon 1963).

- (1) Is Millican a general law municipality or a special law municipality;
- (2) If Millican is a special law municipality, what is the effect of the act of 1897 on its corporate status.

### GENERAL OR SPECIAL LAW MUNICIPALITY

Millican was first incorporated by its citizens in 1866 and later by an act of the legislature in 1871. Neither form of local governance rooted and Millican failed to flower with the vibrancy it seemed to possess prior to the civil war. Although Millican elected only a few officials under both forms of government, its lack of elected leaders is not definitive of Millican's existence. The "power to create municipal corporations in this state being in the Legislature the inhabitants can not withhold their consent to the existence of the charter nor veto the law by neglect or refusal to act under it. Justice Moore, citing Dillon, section 23: *'Over such corporations the Legislature unless restrained by the Constitution has entire control, and unless otherwise provided in the act itself or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect.'*

"Hence it is the people of the locality who are erected into a corporation, not for private but for public purposes. The corporation is mainly and primarily an instrument of government. The officers do not constitute the corporation or an integral part of it. The existence of the corporation does not depend upon the existence of officers." Buford citing Dillon on Corporations, section 166. The question of Millican's city status turns not on its citizens' inaction but rather upon the effect of an act of the legislature: Did the legislative act of 1871 dissolve Millican as a general law municipality and incorporate it as a special law municipality? The 1888 Supreme Court of Texas case, Buford answers this question in the affirmative.

Buford v. State, 10 SW 401, 1888, Supreme Court of Texas, addressed the interaction of competing municipal incorporations. Under the Act of the Legislature, February 12, 1852, the town of Henderson was incorporated with limits of one-mile square. After several years, the inhabitants ceased to elect officers. Under a following Act of the Legislature, May 15, 1871, the geographical limits of the town were slightly reduced and another attempt was made to organize a government. The organization again lapsed. In 1888, a third effort was made to secure a government and the geographical limits were further extended two and one-half miles square. The district court held, and the Supreme Court affirmed, that the proceedings in 1888 were void because the charter of 1871 was in force. "This act, while not in terms repealing the act of 1852, did have the effect of supplying a new municipal government for the identical territory, except the corners of the square not included in the circle of same diameter and centre. This was inconsistent with and repealed the charter of 1852." Buford. Using Buford as the template, Millican ceased to exist as a general law municipality after the Texas Legislature incorporated it as a special law municipality in 1871. From 1871 until 1897, Millican existed as a special law municipality. Finally, in 1897 an act of the legislature resulted in the corporate failure of the city of Millican.

### **EFFECT OF THE ACT OF 1897 ON MILLICAN'S CORPORATE STATUS**

Millican forfeited its corporate charter on the effective date of the Act to amend Article 397, Chapter 2, Title 18, of the Revised Civil Statutes of the State of Texas.

**Section 1. Be it enacted by the Legislature of the State of Texas:  
That Article 397, Chapter 2, Title 18, of the Revised Civil Statutes of  
the State of Texas, be so amended as to hereafter read as follows:  
Article 397. Whenever a vacancy occurs by resignation or otherwise in  
the municipal offices of any incorporated town or city in this State so  
that the vacancy can not be filled under the charter of said town or city**

**or under the laws of this State now in force, then and in that event it shall be the duty of the commissioners' court of said county in which said town or city is situated, upon a petition of not less than 20 tax paying voters living in said city, to order an election to be held to fill such vacancy, giving notice of not less than ten days in the usual manner provided for such elections; *provided, where such town or city has been chartered by special act of the legislature and such town or city contains more than 200 and less than 5000 inhabitants and the offices of such town or city have been vacant for a period of ten years or more, such charter of said town or city shall become void and forfeited, and no election of officers in such town or city shall be had; but the inhabitants of such town or city may reincorporate under the general laws of this State relating to towns and cities in the manner as now or may hereafter be prescribed by the laws of this State.***

“The law, as it originally stood, provided a means whereby an incorporated town or city, whose offices had become vacant, and which vacancy could not be filled under its charter or the laws of the State, might again elect officers.” The State of Texas ex rel. v. Percy Larkin et al. 41 Tex. Civ. App. 253; 90 S.W. 912; 1905.

According to the act, the charter of a town shall become void and forfeited if:

(1) the town or city was incorporated by special act of the legislature - Millican ceased to exist as a general law municipality after the Texas Legislature incorporated it as a special law municipality in 1871;

(2) the town contains more than 200 and less than 5000 inhabitants - Millican had 1,200 residents in 1868 and by 1940 its population had dwindled to 200. According to available Brazos County historical records, Millican’s population stood between 200 and 5,000 inhabitants in 1897; and,

(3) the offices of such town have been vacant for a period of ten years or more - On July 20, 1871, B.F. Boldridge was appointed by the governor to serve as mayor but declined and A.S. Heath accepted the appointment along with five alderman. No record exists that anyone, after that term, was either elected or appointed to any office within the town of Millican. Arguably,

the offices of Millican had been vacant for a period of ten years prior to the legislative act of 1897.

**CONCLUSION**

The town of Millican forfeited its corporate charter as a result of Article 397, Chapter 2, Title 18, of the Revised Civil Statutes of the State of Texas and the community is free to incorporate under the laws of Texas should it wish. Alternatively, if the Attorney General disagrees with the County Attorney's analysis of this issue, it requests guidance regarding the best procedure for setting an election to fill the vacant positions of mayor and alderman in Millican.

Sincerely,



Jim Kuboviak