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May 14, 1982

Mr. H. P. Wright
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Election Law Opinion DAD-23
Re: When may an election
to fill a vacancy
pursuant to Article XI,
Section 11, Texas
Constitution, be held
when the constitutional
deadline has passed?

Dear Mr. Wright:

Reference is made to your letter to me of April 16, in which you ask my advice as to the proper date to hold an election to fill a vacancy pursuant to Tex. Const. art. XI, § 11, when the deadline set forth in that provision has passed.

This official election law opinion is rendered by me as chief election officer of the State in accordance with Tex. Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1982).

The pertinent provisions of Tex. Const. art. XI, § 11, are as follows:

"A Home Rule City may provide by charter . . . for a longer term of office than two (2) years of its officers . . . , but not to exceed four years

"Provided, however, if any of such officers, . . . shall announce their candidacy, or shall in fact become a candidate, in any . . . election, for any office of profit or trust under the laws of this State . . . other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held

" . . . [A]ny vacancy . . . occurring on such governing body . . . must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur." (Emphasis added.)

In view of the foregoing constitutional provisions, your basic question is: When is the proper date, if any, for you to hold a special election for a councilman's vacant seat when you were unable to legally call an election falling within the 120-day constitutional period?

"The general rule is that the time and place are of the substance of a municipal election. Hence, in order not to invalidate a municipal election, it is generally true that the election must be held at the time and place and in the manner provided by the constitutional provision . . . applicable." 3 E. McQuillin, Municipal Corporations § 12.08, at 77 (3d rev. ed. 1973). Several early Texas decisions have held that statutory provisions regarding the time for holding elections are mandatory. See, e.g., Cartledge v. Wortham, 105 Tex. 585, 152 S.W. 297 (1913); Clark v. Stubbs, 131 S.W.2d 663 (Tex. Civ. App.---Austin 1939, no writ); Gray v. Ingleside Independent School Dist., 220 S.W. 350 (Tex. Civ. App.---Ft. Worth 1920, writ dism'd).

A narrow exception to this rule has been stated, however. "Nevertheless, there may be circumstances rendering impossible performance as prescribed by the law, so that the place or time of holding the election may be other than that prescribed." 3 E. McQuillin, Municipal Corporations § 12.08, at 77 (3d rev. ed. 1973). And, "[S]tatutes fixing the time for holding an election have been held directory merely, and not mandatory, to the extent of permitting and authorizing an election or appointment at a later day than that named in the law, where the body whose duty it is to elect or appoint on a day certain neglects to perform the duty, and the obligation still remains." 62 C.J.S. Municipal Corporations § 471, at 907 (1949).

We believe the case of Castillo v. State, 404 S.W.2d 97 (Tex. Civ. App.---San Antonio 1966, no writ), is dispositive of the issue posed by your query.

In Castillo, the newly-incorporated City of La Grulla came into legal existence on March 30, 1965. Tex. Rev. Civ. Stat. Ann. art. 1158 (Vernon Supp. 1982) provides that the officials elected at an incorporation election shall serve until the first Tuesday in April following the incorporation. When the City of La Grulla came into

existence, however, an election could not legally have been called for April 6, 1965. One faction in Starr County decided to go ahead and hold an April 6 "election." In this "election," the faction calling it prevailed by 94 votes to zero. The City Commission, meanwhile, ordered an election be held on June 5, 1965, to elect a mayor and two commissioners. While this was not the date set by Article 1158, it did allow time for public notice, filing for office by candidates, selection of election judges, and for absentee voting, all of which are required by law. In upholding the validity of the June 5 versus the April 6 election, the court stated:

"It is apparent that a legal election could not have been held on April 6, 1965, and the City Commission of La Grulla did the only sensible and sound thing they could have done, and set the election at a time when the provisions of the election law could be fully complied with.

In Yett v. Cook, 115 Tex. 205, 251 S.W. 837, Cureton, C. J., speaking for the Supreme Court, said: 'However, the date named in the section quoted---the first Monday in February, 1925---was February 2d, a date at which it was impossible to hold an election in compliance with the general laws of the state. * * *

"The view here expressed, to the effect that an election of officers may be held in the city of Austin, although the charter day, February 2, 1925, has passed, is supported by the leading authorities. 38 Corpus Juris, pp. 721, 722; Dillon on Municipal Corporations, vol. 4, §§ 1495, 1496; * * *.'

"While the time and the place are generally held to be of the essence of an election, nevertheless, where, as here, it was impossible to hold the election at the time prescribed by the provisions of the laws regulating elections in this State, it should be held within a reasonable time thereafter. We cannot infer that the Legislature intended, if it was impossible to hold a legal election on April 6, 1965, then, and in that event, the election should never be held. State ex rel. Sisson v. Felker, 336 S.W.2d 419 (Mo.)." Id. at 98-99 (emphasis added).

Thus, Castillo stands as firm precedent for the provision that the City of Port Neches may still hold an election to fill the councilmanic vacancy, even though the April 20

constitutional deadline imposed by Article XI, Section 11, has passed.

In answer to your question concerning when the election must be held, elections must generally be held on one of the four uniform dates prescribed by Tex. Elec. Code Ann. art. 2.01b(a) (Vernon Supp. 1982). The next such uniform election date is August 14, 1982. We would point out, however, that Subsection (b) of Article 2.01b provides:

"When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a), unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists."

You are, therefore, advised that the election to fill the vacancy occasioned by Article XI, Section 11, may be held on either August 14 or on an earlier date, if the city council of Port Neches finds that a vacancy in one of its five councilmanic seats is an "emergency," and the Governor concurs.

SUMMARY

Pursuant to Article XI, Section 11, Constitution of Texas, a special election to fill a vacancy must be called within 120 days from the date the vacancy occurs. If it is impossible to legally call an election within the 120-day constitutional period, an election may be held on either the next uniform election date, pursuant to Article 2.01b(a), Texas Election Code, or on another date authorized by the Governor pursuant to Article 2.01b(b), Texas Election Code.

Sincerely,



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