

The State of Texas



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Hope Andrade
Secretary of State

August 5, 2010

Office of the Attorney General
Ms. Nancy Fuller, Chair
Opinions Committee
300 W. 15th Street
Austin, Texas 78701

Dear Ms. Fuller:

I am in receipt of a request for an opinion dated August 3, 2010 that State Representative Aaron Peña, Chairman of the House Select Committee on Emergency Preparedness, and Vice Chairman of the House Elections Committee, filed with your office. Chairman Peña requested an opinion as to whether a county may order a special election to fill a vacancy in an unexpired term of office for a county commissioner. Because the request concerns an important question of state election law and I am the state's chief elections officer, please accept this brief advising you of my opinion regarding Chairman Peña's question. For the reasons stated below, my office concludes that a county lacks legal authority to order such a special election.

Background

Chairman Peña's request for an opinion flows from the following key facts. The Hidalgo County Commissioners Court experienced a vacancy on March 9, 2010. The term of office for the vacant commissioner's seat expires on December 31, 2012. On May 20, 2010, the Hidalgo County Democratic District Executive Committee selected a nominee for that unexpired term and certified the name of the nominee to appear on the November general election ballot. However, on August 3, 2010, the Hidalgo County Commissioners Court ordered a "special election" to fill the vacancy.

Short Conclusion

The Texas Election Code (the "Code") sets forth general procedures to fill vacancies in state and county offices in Chapter 202. None of the general procedures set forth in that chapter include the mechanism of a special election. Rather, the Code specifies the instances where a special election is to be utilized such as for vacancies in the Legislature. Moreover, Texas case law and prior opinions from the Office of Attorney General have concluded that such specific authority must exist for an authority to call a special election. Accordingly, the Hidalgo County Commissioner's Court did not have the legal power to order a special election to fill a vacancy in that court. Finally, complications for the county such as the need to create new election

procedures and obtain Voting Rights Act preclearance from the United States Department of Justice will result, if the special election proceeds as planned.

Applicable Law and Extended Analysis:

Texas law requires both the appointment of a temporary replacement for a departed county commissioner and an election to fill the remainder of the term the departed commissioner vacated. The county judge must appoint the temporary appointee, who must meet specified qualifications of office, to serve until he or she is either elected or replaced by an elected officeholder. TEX. LOC. GOV'T CODE ANN. § 87.042 (Vernon 2008). Chapter 202 of the Code then governs the election of the person to complete the unexpired term. Initially, section 202.004 of the Code provides that if a vacancy occurs in state or county office on or before the 74th day before the general election for state and county officers (in this case, August 20, 2010), then the remainder of the unexpired term shall be filled at the next general election. TEX. ELEC. CODE ANN. § 202.002 (Vernon 2003). Depending on the timing of the vacancy, Chapter 202 includes different provisions for the selection of candidates. For example, political parties may make nominations by primary election (or, in the case of minor parties, make nominations by convention), or may make nominations by executive committee. *Id.* §§ 202.004 - .006. Additionally, the Code provides means for independent candidates and write-in candidates to seek a vacated commissioner's court seat. *See* Tex. Elec. Code Ann. § 202.007 (Vernon 2003) (dealing with independent candidates) and Tex. Elec. Code Ann. § 146.021 *et. seq.* (Vernon 2003) (permitting write-in candidacies).

Other provisions of the Code or provisions in other state laws specify when a special election is the mechanism to fill a vacancy. For example, state legislative vacancies must be filled by special election. *See* TEX. ELEC. CODE ANN. § 203.002 *et. seq.* (Vernon 2010). Also, schools and municipalities must utilize a special election in specified circumstances. *See* TEX. EDUC. CODE § 11.060(c) (Vernon 2006), Tex. Const. Art. XI, Section 11 (Vernon 2007) and TEX. LOC. GOV'T CODE ANN. §§ 22.010(c) and 24.026(b) (Vernon 2008).

Critically, no provision of state law provides for special elections to fill a county commissioner's seat. This is fatal to Hidalgo County's planned special election because, as your office has opined on several occasions, there is no right to vote or hold an election in the absence of some statutory or constitutional provision which specifically authorizes the election. *See* TEX. ATT'Y GEN. OP. NO. DM-172 (1992) and C-380 (1965), citing *Smith v. Morton Independent School*, 85 S.W. 2nd 853 (Tex. Civ. App. 1935, error dism.).

Finally, should Hidalgo County proceed as planned with an election process never intended or authorized for the circumstances at issue, there will be complications. The county will need to invent entirely new procedures to implement the election such as ordering a filing deadline, filing fee, number of petition signatures needed in lieu of a fee, filing officer, determining whether the election requires a majority or plurality vote, and other matters. And these new procedures would be subject to the preclearance requirements of Section 5 of the federal Voting Rights Act.

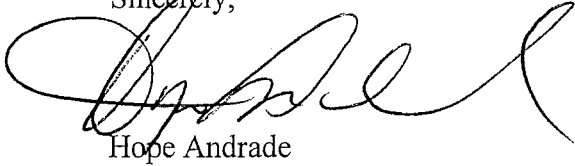
Conclusion

State law provides mechanisms for filling a county commissioner's seat. Those mechanisms do not include the use of a special election. State law cites specific vacancies for

which a special election is the proper election vehicle. And state law requires specific authority to hold a special election. For these reasons, the unexpired term of office for the Hidalgo County Commissioner's Court seat at issue must appear on the November general election ballot in accordance with the appropriate provisions of the Code (found in Chapter 202 of Code). Any other process is contrary to state law and will result in unwarranted complexities.

By copy of this letter, we are sharing our legal analysis with the Hidalgo County Judge and Chairman Pena. We hope this brief is helpful to them and to your office.

Sincerely,



Hope Andrade

AM/ehw

c: The Honorable René A. Ramirez
Hidalgo County Judge

Chairman Aaron Pena
Texas House of Representatives