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RQ-1095-GA

October 24, 2012

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Request for an opinion regarding designating the day of the week which a county commissioners court shall convene in a regular term

Dear Attorney General Abbott:

I am requesting your opinion regarding the authority of a county commissioners court to set the day of the week to convene during the current fiscal year if it has already picked the day to convene at the last meeting of the previous fiscal year. The question presented is:

Does a commissioners court abuse its discretion by designating the day of the week it shall convene in a regular term during the current fiscal year if, at its last meeting of the previous fiscal year, it already designated a different day of the week on which it shall convene in a regular term during the next fiscal year in compliance with section 81.005 of the Local Government Code?

Background

On September 24, 2012, the Caldwell County Commissioners Court held its final meeting of the 2011-2012 fiscal year.¹ At that meeting, acting on advice of legal counsel, the commissioners court voted 3-1 to designate Monday as the day of the week it shall convene in a regular term during the 2012-2013 fiscal year, as required by section 81.005 of the Local Government Code.² At the behest of the county judge, who was absent from the September 24 meeting, commissioners reconsidered this issue at their October 8, 2012 meeting.³ The county judge wanted to designate Tuesday as the day of the week the commissioners court shall convene in a regular term during the 2012-2013 fiscal year, even though the commissioners had previously designated Monday as the meeting day. Legal counsel gave his opinion that the commissioners court could not designate a different day to meet after it had already chosen a day at its last meeting of the fiscal year under section 81.005 of the Government Code. The commissioners court then voted 3-2 to direct legal counsel to seek an Attorney General opinion on this issue, and the commissioners court tabled the matter until the Attorney General issues a response.

Legal Arguments and Authorities

A county commissioners court's jurisdiction and powers are delegated by constitutional or statutory sources. *See* TEX. CONST. art V, § 18(b). In carrying out its duties under state law, a county has broad discretion to perform those responsibilities. *Wichita County v. Bonnin*, 182 S.W.3d 415, 420 (Tex. App.—Fort Worth 2005). However, this discretion is not unlimited. The state constitution grants a district court “appellate jurisdiction and general supervisory control over the County Commissioners Court, with the exceptions and regulations prescribed by law.” TEX. CONST. art V, § 8; *see also* *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993), Gov't Code § 24.020.

The Supreme Court of Texas has held that an aggrieved party may invoke a district court's control over the commissioners court's actions only when the commissioners court extends beyond its jurisdiction or clearly abuses its discretion conferred by law. *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997). In its review of a commissioners court's actions for abuse of discretion, however, the district court may not substitute its own discretion for that of the commissioners court. *Wichita County v. Bonnin*, 268 S.W.3d 811, 815 (Tex. App.—Ft. Worth 2008). In other words, the district court cannot tell the commissioners *how* to act, only that it *must* act. *Id.* After a commissioners court has taken action, a district court may then review the undertaking for abuse of discretion. *Id.* at 815-816. Once a commissioners court exceeds its authority in performing a legislative function, the district court's jurisdiction is invoked. *Cascos v. Cameron Co. Atty.*, 319 S.W.3d 205, 225 (Tex. App.—Corpus Christi 2010).

Section 81.005 of the Local Government Code states a county commissioners court, at the

¹Caldwell County's fiscal year runs from October 1 to September 30.

²The Caldwell County Criminal District Attorney's Office provides legal advice to the Caldwell County Commissioners Court and other county officials.

³The county gave notice for and conducted both meetings in compliance with the requirements of the Texas Open Meetings Act.

last regular term of the county's fiscal year, "shall designate a day of the week on which the court shall convene in a regular term each month during the next fiscal year". Local Gov't § 81.005(a) (emphasis added); *see also* Tex. Att'y Gen. Op. No. JC-0352 at 2 (2001). While subsection (h) of this statute also allows a commissioners court to "designate a day of the week on which the court shall convene in a regular term each month other than the day of the week designated under Subsection (a)," subsection (h) does not supersede other statutory requirements. *See* Local Gov't § 81.005(h) *see also* Tex. Att'y Gen. Op. No. DM-482 at 2 (1998). Furthermore, while subsection 81.005(h) lets a commissioners court designate another day of the week on which it may convene in a regular term, there is no provision of section 81.005 that allows a commissioners court to later change the day to convene it selected at the end of the fiscal year in accordance with subsection (a).

Although chapter 81 of the Local Government Code does not provide any penalty for noncompliance with section 81.005(a), the inclusion of the word "shall" makes this provision mandatory, not permissive. Under the Code Construction Act, the use of the word "shall" imposes a duty; the word "may," on the other hand, "creates discretionary authority or grants permission or a power." Gov't Code § 311.016(1), (2). The Supreme Court of Texas has held that the term "shall" in a statute is "generally recognized as mandatory, creating a duty or obligation." *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486 at 493, (Tex. 2001).

We acknowledge courts in certain cases have held the word "shall" to be directory instead of mandatory, *see, e.g., Tex. Mut. Ins. Co. v. Vista Community Medical Center, L.L.P.*, 275 S.W.3d 538, 552 (Tex. App.—Austin 2008), *Albertson's, Inc. v. Sinclair*, 684 S.W.2d 958, 961 (Tex. 1999). However, while courts have stated a lack of noncompliance penalty elsewhere in a statute usually makes a timing provision directory, *Helena*, 47 S.W.3d at 495, those cases appear to apply to courts' interpretation of agency rules and regulations. *See, e.g., Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976), *Markowsky v. Newman*, 134 Tex. 440, 136 S.W.2d 808, 812 (1940). Furthermore, "language that appears to impose a mandatory duty to be only directory when this interpretation is most consistent with the Legislature's intent." *Helena*, 47 S.W.3d at 493. In this case, a plain reading of the language of section 81.005 indicates the Legislature's intent that commissioners courts designate a day of the week on which they shall convene in a regular term each month during the next fiscal year. *See* Gov't Code § 81.005(a).

Most importantly, the Attorney General has interpreted the term "shall" in a previous version of section 81.005 to be mandatory. *See* Tex. Att'y Gen. Op. No. JM-871 (1988) (holding language stating commissioners court "shall" meet at county seat at courthouse "is clear and unambiguous, and requires [commissioners] to meet in the courthouse"). For the above reasons, we believe the commissioners court does not have discretion to change the day of the week on which it shall convene in a regular term after it has designated that day pursuant to section 81.005 of the Government Code.

Conclusion

I request your assistance in determining whether a commissioners court abuses its discretion by designating another day of the week on which it shall convene during the current fiscal year, after the court, at its last meeting of the previous fiscal year, designated a day of the week on which it shall convene during the next fiscal year as required by section 81.005 of the Government Code.

I respectfully request your opinion regarding this issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard R. Hicks III' with a stylized flourish at the end.

Richard R. "Trey" Hicks III
Caldwell County Criminal District Attorney
trey.hicks@co.caldwell.tx.us

cc: Caldwell County Judge Tom Bonn
Precinct 1 Commissioner John Cyrier
Precinct 2 Commissioner Fred Bucholtz
Precinct 3 Commissioner Neto Madrigal
Precinct 4 Commissioner Joe Roland