



DA. OP. 95-01

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MEMORANDUM

TO: Commissioner Walter Bielstein

CC: Judge Cyndi Taylor Krier
Commissioner Robert Tejeda
Commissioner Paul Elizondo
Commissioner Mike Novak

FROM: *SCH* Steven C. Hilbig
District Attorney, Bexar County, Texas

DATE: January 30, 1995

RE: Terms of Office for Alamo Area Council of Governments

You recently requested that I comment on the issue described below:

Issue

When do the terms of office begin for the three Bexar County currently appointed representatives to the Alamo Area Council of Governments ("AACOG")?

Background

Because there exists almost no case law regarding the creation and operation of regional planning commissions, and the Governor has apparently not issued any guidelines, directives or regulations, the legal analysis must necessarily depend upon a detailed consideration of the applicable statute. The following represents the salient legal matters used as a basis for this opinion:

1. AACOG is a regional planning commission created pursuant to Tex. Loc. Gov't Code Ann. §§ 391.001-.015 (Vernon 1994) (the "Commission").

2. Such a commission is established by mutual agreement among various counties and municipalities within a defined geographical region. Tex. Loc. Gov't Code Ann. § 391.003(a).

3. The Commission is a political subdivision of Texas, and the participating governmental units themselves are the constituent members of the Commission, acting cooperatively in the "planning, powers, and duties" of the Commission as they are permitted by law. Id. at § 391.003(c), (e).

4. The participating governmental units are authorized to create a governing body for the Commission. Id. at § 391.006.

5. The participating governmental units may jointly agree on the "number and qualifications of members" of the governing body. Id. at § 391.006(a).

6. The Commission has the power to contract with the constituent members to perform services for them, under certain conditions. Id. at § 391.005(a).

7. The Commission may also act on its own regarding its day-to-day operations such as owning, selling or buying property and employing staff. Id. at § 391.005(b).

8. The participating governments may jointly agree on the "manner of cooperation" between them, and for the "methods of operation of the Commission" Id. at § 391.005(c).

Based upon somewhat limited research, the following describes the factual context of the appointments to the AACOG's Board of Directors, as determined by existing documentation.¹

¹ These factual assumptions are based upon information provided by AACOG and Commissioners Court staff. The documentation provided is assumed to be both complete and accurate, but to the extent that is not the case, will necessarily effect the conclusions reached in this memorandum.

9. The document creating the Commission entitled "Agreement For Regional Planning Commission" (the "Agreement") is dated February 25, 1966, and provides that Bexar County has two "members" of the Commission. Strictly speaking, the participating governmental units are the "members" of the Commission, and would be represented by individuals. See Agreement at p. 3, § 6(A)(2).

10. The Agreement also provides that the County's two representatives shall serve on the Commission's governing body, called the "Executive Committee." See Agreement at p. 6, § 10(1).

11. Regarding the terms of the participating governments' appointed representatives, the Agreement provides that the "terms of members of the Commission who are elected officials shall run concurrently with their terms of elective office in their respective governmental units." See Agreement at p. 4, § 7.

12. The Agreement also provides that appointed representatives who are not elected officials serve at will. See Agreement at p. 4, § 7.

13. The parties amended the Commission's original charter document on December 15, 1967, entitled "Articles of Agreement of the Alamo Area Council of Governments" (the "Amended Agreement").

14. The Amended Agreement did not substantially alter the Agreement's terms regarding the terms of the participating governmental units' representatives. See Amended Agreement at p. 2, § VI (A); and p. 3, § VI (B).

15. The Amended Agreement states that the Commission shall conduct and oversee the organization and operation of AACOG through "by-laws," which are approved by the Commission and attached to the Amended Agreement. See Amended Agreement at p. 3, § VI (B), and attachment.

16. The Commission has the authority to amend or change the by-laws as expressly provided in the "By-laws," if not inconsistent with the Agreement, as amended.² See Amended Agreement at p. 3, § VII(c).

² Although later versions of the By-laws include language concerning the appointments to the Board, the Amended Agreement expressly negates any changes made in the By-laws which are inconsistent with the Amended Agreement. Thus, this memorandum considers only the language of the Amended Agreement, with the exception of certain matters in the By-laws which are clearly not inconsistent.

17. The By-laws restate the mistaken assumption that the Commission is made up of the governmental units' appointed representatives rather than the governments themselves. See By-laws at p. 1, §I(A).

18. The By-laws vest management and administration of the Commission in the Executive Committee, including two Bexar County representatives as members. See By-laws at p. 3, § III(A)(1).

19. The By-laws provide for their amendment by the Commission (which meets once a year) upon the affirmative vote of three-fourths of the total number of representatives.³ See By-laws at p. 4, § V.

20. The Commission has amended the By-laws at least once, effective January 1, 1995 (the "Amended By-laws"). A prior amendment of the By-laws purports to add one additional representative for Bexar County.

21. The Amended By-laws restate the mistaken assumption that the Commission is comprised of the individual representatives rather than the governmental units themselves. See Amended By-laws at p. 1, § I(A).

22. The Commission's governing body, formerly called the "Executive Committee, is now called a "Board," composed of certain of the governmental units' representatives, including three representatives from Bexar County. See Amended By-laws at p. 4, § III(A)(1).

23. The Amended By-laws define the board members' tenure to be concurrent with the term of office to which they are appointed or elected, or for two years, whichever is less. See Amended By-laws at p. 7, § III(B).

24. The Amended By-laws expressly provide for a board member's holdover in his position on the Board. Id.

25. Commissioners Court took action to make new appointments to the Board.

³ While the By-laws may be effective for the purpose of being the controlling document for the internal governance of AACOG, it is unclear if even a super-majority of the governmental representatives could adopt the By-laws as part of their joint agreement governing the appointment of representatives, without specific action by the governing bodies of the individual governments expressly incorporating, adopting or ratifying the By-laws as part of their joint agreement.

The minutes from December 21, 1994, reflect the following:

It is ordered by the Court that the re-appointment of County Commissioners Robert Tejeda and Paul Elizondo and the appointment of Mike Novak to the Alamo Area Council of Governments Board of Directors for terms of office to begin on February 1, 1995 and expire on January 31, 1997 be, and hereby are, approved.

26. It has been reported that Commissioners Court took action on January 25, 1995, to rescind the appointments made above.

Discussion

1. The terms of office of the County's representatives on the Board is partly controlled by statute, and partly controlled by the Agreement, as amended, and, to a much more limited extent, by the By-laws, as amended.

2. Section 391.006 of the Local Government Code permits the governmental units to set their representatives' terms on the Board by mutual agreement. Thus, the issue of terms and representatives' qualifications must properly be addressed in AACOG's Charter, the agreement among the constituent governments, rather than in the By-laws. While the By-laws may be "agreed to" in the sense that they are duly approved, they do not necessarily constitute an agreement among the governmental units as required by § 391.006.

3. The length of the terms is presently a maximum of two years, assuming that the provisions in the Amended By-laws are effective and that the Texas Constitution prohibits a governmental official from having a term greater than two years.

4. The applicable provision of the Amended Agreement provides:

The terms of the representatives, who are elected officials⁴, shall run concurrently with their terms of elective office in their respective governmental units

Amended Agreement at p. 3, § VI(B).

⁴ All the County's representatives are elected officials, thus it is irrelevant to consider any other scenario involving non-elected officials.

6. The most direct interpretation of the above quoted language means that the Board term of the government's representative runs from the date he takes office as an elected official, and extends to the end of his term, up to a maximum of two years. However, if the governing body of the governmental unit appoints the elected official at a date within his elected term of office, the official necessarily must take office after his elected term has already begun, then the Board term would begin on the date of appointment and run forward to the end of the elected official's term of elected office, or two years, whichever comes first.

7. If the elected official's term of elected office ends before the maximum two year term allowed for Board membership, then his tenure on the Board ends at the end of his elected term, and he continues to serve in a hold-over capacity until reappointed, or until the governmental unit makes a new appointment.

8. If the elected official is nominated to the Board before his term of elected office has begun, his term on the Board may begin on the first date of his term as an elected official, and runs for a maximum of two years thereafter. However, the governing body may set a beginning date for the term on the Board.

9. In this case Commissioners Court minutes reflect that the new board members were appointed for terms beginning February 1, 1995. While the action of Commissioners Court cannot alter terms of office otherwise set by law, the Court may set a date on which its actions become effective. Although Commissioners Novak and Elizondo were eligible to begin their service on the Board January 1, 1995, the language used by Commissioners Court appears to make their appointments effective beginning February 1, 1995.

10. Applying the above quoted language from the Amended Agreement to the present situation, and assuming that the Amended By-laws effectively limit the term to no more than two years, then the terms of the recent appointments, prior to the recent rescision, would have run as follows:

- a. Paul Elizondo - February 1, 1995 through January 31, 1997
- b. Robert Tejeda - February 10, 1995 through December 31, 1996
- c. Mike Novak - February 1, 1995 through January 31, 1997.

Conclusion

Considering that Commissioner Elizondo's last prior appointment occurred on February 10, 1993, his Board term ended on December 31, 1994, which is the date his last elected term of office ended. He is presently serving in a holdover capacity.

Commissioner Tejada's last prior term likewise began on February 10, 1993, and will extend two years to February 9, 1995, because, unlike Commissioner Elizondo, his tenure as a Board member was not cut short as a result of his term of office ending. He will continue to serve in a holdover capacity after February 10, 1995.

Finally, even though Commissioner Novak's elected term began on January 1, 1995, the Commissioners Court's appointment of Commissioner Novak to the Board does not begin until February 1, 1995. Thus, although eligible to begin his term on the Board sooner, his term would have begun on February 1, 1995, but for the action of Commissioners Court to rescind the previous appointments. This office has not had time to conduct sufficient research to express an opinion as to whether this position is now vacant or if former Commissioner Dutmer continues to serve in a "holdover" capacity.