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Office of the Lynn County Attorney

FEB 11 2008

OPINION COMMITTEE

February 5, 2008

FILE # ML-45548-08
I.D. # 45548

Attorney General of Texas
Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

RQ-0675-GA

Re: Request for Opinion

Dear Sirs:

The Commissioners' Court of Lynn County, Texas, instructed this office to seek an attorney general's opinion on two issues regarding the maintenance of separate offices within Lynn County.

- (1) Whether or not the Lynn County Commissioners are required to order an election pursuant to § 51.501(b) of the Texas Government Code to maintain separate offices of the County Clerk and the District Clerk following a decline in the population of the county to fewer than 8,000 residents, and whether these offices merge by operation of law following the expiration of the terms of the current officeholders.
- (2) Whether or not the Lynn County Commissioners are required to order an election pursuant to the provisions of Article VIII, Section 14 of the Texas Constitution to maintain separate offices of the County Sheriff and the County Tax Assessor-Collector following a decline in the population of the county to fewer than 10,000 residents, and whether these offices merge by operation of law following the expiration of the terms of the current Tax Assessor-Collector.

The Facts Surrounding the Issue

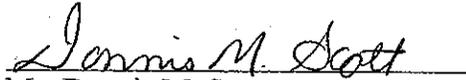
The minutes of the Commissioners' Court of Lynn County clearly reflect that a single clerk performed the duties of both a district and county clerk at the inception of Lynn County in the early 1900's. It is unclear when these offices became separate. According to US Census reports, the population of Lynn County declined to fewer than 8,000 residents

between 1980 and 1990. No election has since been held to allow voters to choose whether or not to maintain the offices of district and county clerk separately.

Likewise, the minutes of the Commissioners' Court of Lynn County clearly reflect that the Lynn County Sheriff also served as the County Tax-Assessor Collector during the early years of the County's existence. According to US Census reports, the population of Lynn County declined to fewer than 10,000 persons sometime between 1960 and 1970. The 2000 U.S. Census report indicated that the population of Lynn County was 6,550.

Thank you for your willingness to entertain these questions. Due to time limitations associated with ordering elections, time is of the essence. If we can be of any further assistance in this matter, please notify me.

Sincerely,

A handwritten signature in cursive script that reads "Dennis M. Scott". The signature is written in dark ink and is positioned above a horizontal line.

Ms. Dennis M. Scott,
Lynn County Attorney

MEMORANDUM OF LEGAL RESEARCH:

ARGUMENT AND AUTHORITIES, QUESTION #1:

- (1) Whether or not the Lynn County Commissioners are required to order an election pursuant to § 51.501(b) of the Texas Government Code to maintain separate offices of the County Clerk and the District Clerk following a decline in the population of the county to fewer than 8,000 residents, and whether these offices merge by operation of law following the expiration of the terms of the current officeholders.

The County Attorney has not found any court cases on point regarding this question, so must rely on the applicable statutes and prior opinions of the Attorney General for guidance. There is an issue regarding interpretation of the statute. Section 20 of Article V of the Constitution of Texas provides as follows:

“There shall be elected for each county, by the qualified voters, a County Clerk, who shall hold his office for four years, who shall be clerk of the County and Commissioners Courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners Court, until the next general election; provided, that in counties having a population of less than 8,000 persons there may be an election of a single Clerk, who shall perform the duties of District and County Clerks. “

Section 51.501 of the Texas Government Code provides as follows:

JOINT CLERKS. (a) Except as otherwise provided by this section, a county with a population of less than 8,000 shall elect a single clerk to perform the duties of the district clerk and the county clerk.

(b) The offices of county clerk and district clerk may remain separate if a majority of the qualified voters in the county vote to keep the offices separate at an election held for that purpose. The commissioners court of the county may hold a special election for that purpose on a uniform election date authorized by law that occurs not later than the 30th day before the date of the regular primary election that precedes the expiration of the constitutional term of office for the clerk. Notice of the special election shall be published in a newspaper of general circulation in the county not later than the 20th day before the date scheduled for the election. The question may be presented to the voters again immediately before the expiration of each subsequent constitutional term of office of the separate clerk. The special election may not prevent a county clerk, district clerk, or joint

clerk from serving the full term of office to which the clerk was elected.

(c) The commissioners court of a county that has a population of 6,000 to 6,125 shall determine whether the county shall have a joint clerk but may not take action to prevent a district clerk, county clerk, or joint clerk from serving the full term of office to which the clerk was elected.

Based on the word "remain" in subsection b, the County Attorney assumes that this provision refers to offices that have previously been separated. The population of Lynn County has been fewer than 8,000 since before 1990, according to the United States Census Report. Therefore, it is believed that the offices of Lynn County Clerk and District Clerk merge by operation of law at the end of their respective current terms of office.

Also, it is the County Attorney's position that the Lynn County Commissioners Court may present the issue to the voters in the manner provided for in subsection b, but are not required to do so. This position is a result of the operative word "may" in § 51.501(b) of the Texas Government Code.

ARGUMENT AND AUTHORITIES, QUESTION #2:

- (2) Whether or not the Lynn County Commissioners are required to order an election pursuant to the provisions of Article VIII, Section 14 of the Texas Constitution to maintain separate offices of the County Sheriff and the County Tax Assessor-Collector following a decline in the population of the county to fewer than 10,000 residents, and whether these offices merge by operation of law following the expiration of the terms of the current Tax Assessor-Collector.

The County Attorney has not found any court cases on point regarding this question, so must rely on the applicable statutes and prior opinions of the Attorney General for guidance. There is an issue regarding interpretation of the statute.

Section 14 of Article VIII of the Texas Constitution provides the following:

- "(a) The qualified voters of each county shall elect an assessor-collector of taxes for the county, except as otherwise provided by this section.**
(b) In any county having a population of less than 10,000 inhabitants, as determined by the most recent decennial census of the United States, the sheriff of the county, in addition to that officer's other duties, shall be the assessor-collector of taxes, except that the commissioners court of such a county may submit to the qualified voters of the county at an election the question of electing an assessor-collector of taxes as a county officer separate from the office of sheriff. If a majority of the voters voting in such an election approve of electing an assessor-collector of taxes for the county, then such official shall be elected at the next general election for the constitutional term of office as is provided for other tax assessor-collectors in this state.
(c) An assessor-collector of taxes shall hold office for four years; and shall perform all

the duties with respect to assessing property for the purpose of taxation and of collecting taxes, as may be prescribed by the Legislature.”

My research yielded an Attorney General’s opinion, WW-851, which deals with a similar situation in Childress County. The opinion references Attorney General Opinion 2249, which I have not been able to locate, and states the following:

“Primarily, and presumably, the sheriff of a county is prima facie ‘the collector of taxes therefor,’ and one claiming to the contrary has the burden of showing that such county comes within the exception provided for by the latter part of said Section 16 of Article 8 of our State Constitution.”

The opinion goes on to indicate that, where the population of the county has fallen to below 10,000 inhabitants, the voters of the county must authorize the addition of Assessor and Collector of Taxes to the list of authorized county officials. It should be noted that there is a handwritten notation on the first page of this opinion that reads, “Superseded by Art 29d V.C.S.” Due to the age of the opinion and our limited research materials, I have been unable to locate that particular provision.

Due to the fact that the latest U.S. Census reports the population of Lynn County to be 6,550 and based on opinion WW-851, it is the opinion of the County Attorney that the offices of Sheriff and Tax Assessor Collector will merge by operation of law at the expiration of Tax Assessor –Collector’s term of office. Further, it is believed that the Commissioners’ Court of Lynn County may order an election to determine whether the said offices should be kept separate, but are not required to do so. This position is taken as a result of the operative word “may” contained in Section 14 of Article VIII of the Texas Constitution.