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MEMO

TO: The Office of the Governor
FROM: Stephan L. Sheets
DATE: April 24, 2020
RE: Authority to Issue a Proclamation allowing a Political Subdivision to Hold its General Election Ordered for May 2, 2020 on a Nonuniform Election Date

Issue:

Does the Governor have the authority to issue a Proclamation allowing a political subdivision to order its general election scheduled for May 2, 2020 to be held on a date other than a uniform election date.

Background:

The Governor is authorized by Texas Government Code Section 418.014 to declare a state of disaster if he finds a disaster has occurred or that the occurrence of the disaster is imminent. Governor Abbott issued a Proclamation on March 13, 2020 certifying that COVID-19 poses an imminent threat of disaster in the state and declared a state of disaster for all counties in Texas. Once a disaster is declared, the Governor pursuant to Section 418.016(a) of the Texas Government Code, "*may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with the disaster.*" Under the authority of Section 418.016(a), Governor Abbott issued a Proclamation on March 18, 2020 suspending provisions of the Texas Election Code to: 1) allow political subdivisions to postpone their elections ordered for May 2, 2020 to the next uniform election date of November 3, 2020; and 2) allow counties to decline to provide election services for the May 2, 2020 elections.

Analysis:

    I.   Authority to suspend Section 41.001 of the Texas Election Code pursuant to Section 418.016(a) of the Texas Government Code.

The Governor clearly has the authority under 418.016(a) of the Texas Government Code to issue a proclamation suspending Section 41.001 of the Texas Election Code requiring that general and special elections be held on uniform election dates. Suspending Section 41.001 would allow political subdivisions to hold their elections ordered for May 2, 2020 on a date of their choosing rather than only on next uniform election date of November 2, 2020.

        A.   Powers granted under Section 418.016(a) of the Texas Government Code.

Section 418.016(a) of the Texas Government Code states, "*The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the order or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with the disaster[emphasis added].*" The use of the word "*any*"

makes it clear that no specific statute or category of statutes is exempt from suspension under Section 418.016(a).

In 2018, Governor Abbott issued a Disaster Declaration due to Hurricane Harvey and requested an opinion from the Attorney General's Office regarding whether the Governor's emergency powers authorize his suspension of relevant state election laws and allow him to call an expedited special election to fill a vacancy in a Congressional district (see attached Tex. Att'y Gen. Op. No. KP-0191 (2018)). The Attorney General's Opinion emphasized the *"extremely broad powers"* the Governor has to declare an emergency and deal with them. *Id.* at page 1. The Opinion stated:

> *"In managing a disaster, you possess express authority to 'suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.' TEX. GOV'T CODE§ 418.016(a). The state statutes discussed above prescribe deadlines and timing requirements for calling a special election and are therefore regulatory statutes that prescribe 'the procedures for conduct of state business.' Id. To the extent that the procedures in those portions of the Election Code 'prevent, hinder, or delay necessary action' in coping with the damage caused by Hurricane Harvey, the Legislature authorized you to temporarily suspend those provisions. Id." Id.* at page 4.

The analysis provided in the Attorney General's Opinion pertaining to the Governor's emergency powers to suspend a statute regarding a special election is applicable to a general election as well. The Governor possesses the same authority under Section 418.016(a) of the Texas Government Code to suspend 41.001 of the Texas Election Code because it is also a *"regulatory statute"* that *"prescribes deadlines and timing requirements"* for calling a general election and meets the additional requirements set forth in 418.016(a). *Id.* at page 4.

      B.   *Salmon v. Lamb* is not applicable.

On March 26, 1981, the Court of Appeals of Texas, Houston Division, held the following in the *Salmon v. Lamb* case:

> *"[A]rt. 6889-7, Sec. 5(g)(1), V.A.C.S., Disaster Act of 1975, empowers the governor to postpone a special election, but only to the next date prescribed by art. 2.01b(a), V.A.C.S., Election Code* [a uniform election date]." *Salmon v. Lamb*, 616 S.W.2d 296 (1981 Tex. App.).

The *Salmon* case is not applicable and does not in any way prohibit the Governor from suspending Section 41.001 of the Texas Election Code for the following reasons:

- In 1991, the Texas legislature nullified the *Salmon* ruling through Section 41.0011 of the Texas Election Code by explicitly giving the Governor the authority to order an emergency special election on a <u>non-uniform election date</u>. Section 41.0011 states, *"If the governor determines that an emergency warrants holding a special election before the appropriate uniform election date, the election may be held on an earlier nonuniform date."* The enactment of Section 41.0011 effectively repealed the *Salmon* case.

- The *Salmon* case only applied to a "special" election. The court did not include general elections, primary elections or any other types of elections in its legal analysis or its ruling. Any argument that the *Salmon* case ruling should be expanded to any other type of elections other than a special election is without any legal merit, as demonstrated by

Governor Abbott's March 20, 2020 proclamation postponing the runoff primary election date until Tuesday July 14, 2020, which is not a date permitted by Section 41.007 of the Texas Election Code.

- In the *Salmon* case, the acting Governor did not suspend a law as allowed pursuant to Section 418.016(a) of the Texas Government Code. Rather, the acting Governor issued a proclamation allowing for the postponement of a special election. *Id.* The acting Governor did not suspend Section 2.01b V.A.C.S. of the Texas Election Code which required that a special election be held on one (1) of the four (4) uniform election dates.

- The *Salmon* case was a 1981 case, where the Court of Appeals relied on a provision of the Disaster Act of 1975 which no longer exists (Art. 6889-7, Sect. 5(g)(1) V.A.C.S., Disaster Act of 1975); a provision of the Texas Election Code that no longer exists (Art. 2.01b V.A.C.S., Texas Election Code); and was decided before Section 41.011 was enacted in 1991 that is in direct opposition to the holding in *Salmon*. It is an outdated case that no longer has any applicability to special elections and never had applicability to any other type of election.

II. Authority under Section 41.011 of the Texas Election Code to order an emergency special election on a non-uniform election date.

The Governor clearly has authority under Section 41.0011 of the Texas Election Code to issue a proclamation or order for an emergency special election to be held before the next uniform election date at the request of a political subdivision if the Governor determines that an emergency warrants holding the election before the next uniform election date. Governor Abbott's recent *Proclamation Regarding Fort Worth Crime CPD Elections* issued April 2, 2020 and *Proclamation to Allow City of Sundown to Order its Special Election to Occur on July 14, 2020* issued April 8, 2020, utilize the authority provided by Section 41.011.

Although Section 41.0011 of the Texas Election Code specifies *"special"* elections, the elections ordered by political subdivisions to be held on May 2, 2020 are now all *"special"* elections as defined by the Texas Election Code and should be treated accordingly. Section 1.005(6) of the Texas Election Code defines a *"General"* election as *"an election, other than a primary election, that regularly recurs at fixed dates,"* and Section 1.005(18) defines a *"Special"* election as *"an election that is not a general or a primary election."* The COVID disaster coupled with Governor's Abbott's Proclamation suspending a county's duty to contract for the May 2, 2020 elections made it impossible for political subdivisions to proceed with conducting their elections on their *"fixed"* May uniform election date. In Governor Abbott's March 18, 2020 Proclamation, he allowed political subdivisions to move their May 2, 2020 elections to the next uniform election date of November 3, 2020, however, the November uniform election date is not most political subdivisions' *"fixed"* uniform election date when their general elections *"regularly recur."* An election moved from its *"fixed"* uniform election date is no longer a *"General"* election and then by default becomes a *"Special"* election pursuant to the definitions in the Texas Election Code.

Conclusion:

The Governor does have the authority to issue a proclamation allowing a political subdivision to order its May 2, 2020 general election be held on a date other than a uniform election date. There are two (2) ways this can legally be accomplished by the Governor:

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1) The Governor has authority under 418.016(a) of the Texas Government Code to suspend any statutes necessary during a declaration of disaster. Governor Abbott has already utilized this authority granted under 418.016(a) to issue several proclamations suspending various statutes, including multiple sections of the Texas Election Code for various types of elections. The Governor has the power to by proclamation suspend Section 41.001 of the Texas Election Code that requires all general and special elections be held on a uniform election date, to the extent necessary for a political subdivision to choose to hold its May 2, 2020 election on a date earlier than the November 3, 2020 uniform election date. Political subdivisions desiring to have their elections on the November 3, 2020 uniform election date will still be able to hold their elections on that date. The Governor can accomplish suspending Section 41.001 for all political subdivisions by issuing only one (1) proclamation rather than having to issue separate proclamations for each requesting political subdivision as required by Section 41.0011 for emergency special elections. Then the Governor could establish one date, such as August 8, 2020, or allow each political subdivision to choose its own date to suit its needs; or

2) All elections scheduled for May 2, 2020 are no longer *"general"* elections since they will not be occurring on a political subdivision's *"fixed"* date. All elections scheduled for May 2, 2020 are now *"special"* elections because they are *"not a general or primary election,"* therefore, the Governor has the authority under Section 41.0011 of the Texas Election Code to issue a proclamation at the request of a political subdivision, allowing a political subdivision to hold its previously scheduled general election on a date other than the next uniform election date of November 3, 2020. The Governor could choose to establish one uniform date, such as August 8, 2020, or each political subdivision could individually request the Governor issue a proclamation to allow the political subdivision to order an emergency election for a specific election date. In that case, the Governor would need to issue separate proclamations specific to each requesting political subdivision.

Respectfully submitted,

Stephan L. Sheets
Round Roc City Attorney

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