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# CONSTITUTIONAL BASIS OF COUNTY GOVERNMENT

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## **CONSTITUTIONAL BASIS OF COUNTY GOVERNMENT**

The following material is a general outline of some of the constitutional duties and powers of county government in Texas. Other portions of the program will deal with the specific statutory duties of county officials. This material is designed to promote discussion of county government issues and, accordingly, should not be relied upon for any other purpose. The sources of applicable law include the U. S. Constitution, U. S. Statutes, U. S. Court Decisions, Texas Constitution, Texas Statutes, Texas Court Decisions, and Texas Attorney General Opinions.

### **Federal Constitution and Statutes**

Under the U.S. Constitution federal statutes and court decisions are the “supreme law of the land.” Counties are subject to these laws and decisions. Federal courts have held that counties have quasi-independent policymaking authority. Therefore, counties may be sued if their policies violate federal civil rights laws. These federal actions may involve alleged violation of rights under the U. S. Constitution or violation of federal anti-discrimination statutes.

### **Redistricting**

In 1968, the U. S. Supreme Court in Avery v. Midland County determined that Texas Commissioners Courts are quasi-legislative bodies and are subject to the “one-person/one-vote” requirements of the U. S. Constitution. This decision requires that, following the federal census, the boundaries of commissioners precincts shall be adjusted to maintain a maximum 10% deviation between the largest and smallest precinct by population. Since Texas is also subject to the provisions of the Federal Voting Rights Act of 1965, the adjustments in commissioner precinct boundaries must be submitted to public hearings and must not improperly dilute or discriminate against minority voters.

When the new federal census numbers are released in 2021, each county must determine if its present commissioner precincts meet the 10% maximum deviation. If not, the Commissioners Court must revise the boundaries and complete this process by August 15, 2021, for the 2022 elections. Most counties retain expert consultants to assist in this process.

### **Texas Constitution and Statutes**

The Texas Constitution provides the structure of county government. “Our Constitution is the basic contract between the people of Texas and their government; it is essential that we all understand the terms of that contract.” W. Page Keeton, former Dean of the University of Texas Law School.

### **Historical Development**

Prior to the Texas Revolution of 1836, county government did not exist in the territory which now forms the State of Texas. Under Spain and Mexico, the territory was divided into

departments, districts, and municipalities.

When the Republic of Texas achieved independence, the Constitution of 1836 provided for counties in Art. IV, § 11:

The Republic shall be divided into convenient counties, but no new counties shall be established, unless it be done on the petition of one hundred free male inhabitants of the territory sought to be laid off and established; and unless the territory contain nine hundred square miles.

The Republic was originally organized into twenty-three counties. As the territory of the Republic and State of Texas was settled, the number of counties increased to the present number of 254. Counties were created to provide a court system within a day's horseback ride of the county seat. Besides providing a court system and law and order, early counties were responsible for roads, care for the indigent, and education.

### **Development of Commissioners Court**

The early Constitutions of Texas did not address the structure of county government. The state legislature determined the type and authority of county offices. Early statutes often combined judicial and administrative responsibilities.

During Reconstruction, the Constitution of 1869 divided each county into five justice precincts, which constituted a county court. This Constitution also granted broad powers to the Governor to centralize control over county officials.

The present Constitution adopted in 1876 required that each county have a commissioners court composed of the four precinct commissioners and the county judge. This established the Commissioners Court as the administrative body of the county. However, the Constitution of 1876 also created numerous independently-elected county officers. The delegation of specific duties to these offices prevented the centralization of power within any body or group.

### **The Relationship Between the State and the County**

The county is a subdivision of the state and receives its powers from the Constitution and the statutes adopted by the state legislature. Although a separate legal entity which can be sued and hold property, counties remain subject to the actions of the legislature. Counties are organized to perform governmental functions on behalf of the state and lack the independent ordinance authority of municipalities. While counties have been delegated certain powers by the state, they remain under full state control.

As a political subdivision of the state, the county is generally immune from liability under the doctrine of sovereign immunity. However, the state has waived this immunity in several important areas such as workers' compensation, tort claims, and the Texas Whistleblower Act.

## **County Business**

Although very basic, an important issue that comes before you (in Commissioners Court) involves the very nature of an appropriate agenda item. If in doubt as to whether the commissioners court has the authority to act, you should ask yourself:

### **Is the matter before us “county business”?**

Art. 5, Section 18 (b), Texas Constitution, is the law which authorizes your commissioners court to conduct what is known as “county business.”

(b) “Each county shall ...be divided into four commissioners precincts in each of which there shall be ...one County Commissioner, who shall hold his office for four years ... [C]ommissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.”

While Art. 5, Section 18 (b) does not list or describe what constitutes “county business,” it does provide you with a very fundamental principle which will serve as a guidepost to you during your term of office. As a member of the Commissioners Court, you will eventually be faced with the question of whether you have the authority to act on a particular item. On such important issues, you should determine what is before you and whether it is actually “county business.”

When our appellate courts have reviewed Art. 5, Section 18 (b), they have applied a broad and liberal interpretation of “county business” in terms of creating and conferring authority on the Commissioners Court to act. Glenn v. Dallas County Bois D’Arc Island Levee District, 275 S.W. 137, CCA Dallas, 1923. By statute (known as the Laney Act) the legislature authorized a Commissioners Court to appoint the members of an Appraisement Court. Parties objecting to the creating of the entity argued that Art. 5, Sec. 18 (b) confined the activities of a Commissioners Court to “county business.” The Court of Civil Appeals (Dallas) in reviewing the case rejected the argument and in its opinion stated the following concerning “county business”:

“...[w]e think it is proper to give to the term ‘county business’ a broad and liberal construction so as not to defeat the real purpose that was intended to be accomplished by the law...”

## **Employees of Other County Officers**

In Renfro v. Shropshire, 566 S.W.2d 688, CCA Eastland, 1978, the Travis County Commissioners Court had established a system that required its approval of personnel who were recruited to be hired by the Travis County Clerk, Ms. Shropshire. The system had the practical effect of the Commissioners Court determining who the County Clerk hired.

The commissioners court also required a form to be completed and submitted with the budget of each department, including the County Clerk's Office. Shropshire did not complete the form when she submitted her budget. The county auditor returned the budget to Ms. Shropshire based upon a letter from the County Judge and the Commissioners Court. It recited an alleged commissioners court policy (in Travis County) which was to require completed forms before a department's budget could be considered. A suit followed, and the Eastland Court of Appeals established the following rules of law in the case:

(1) the Commissioners Court has no legal right to prescribe the qualifications of persons to be employed and no legal right to screen applicants or to veto appointments made by the county clerk;

(2) the naming by the county clerk of personnel to be employed in the office of county clerk...is neither 'county business' nor authorized by statutes; and

(3) with regard to the letter sent by the auditor, the county can only act through the Commissioners Court. The individual commissioners (and judge) have no authority to bind the county by their separate actions. The Commissioners Court is a court of record, and speaks through its minutes, and not by the mouths of the members of the body.

These restrictions are now codified in Section 151.004, Texas Local Government Code.

## **Act of Single Member**

The act of a single member of the Commissioners Court does not bind the County. See Hill Farm, Inc. v. Hill County, CCA, Waco, 1968. In this case, it was claimed that a commissioner's oral authorization for the installation of a pipeline was sufficient to preclude the county from taking action to remove the pipeline from a public road. The Court, however, explained that the actions of a commissioners court are reflected in its minutes:

"... the acts of a single commissioner, unauthorized by the commissioners court, cannot create an estoppel against a county; and the purported oral authorization to lay and maintain the line by an individual commissioner is not effective. The court can act only as a body speaking through its minutes."

## **Supervision by District Court**

Article 5, Section 8. Jurisdiction of District Court.

Sec. 8. “[T]he District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.”

The rule concerning the general supervisory control that a District Court holds over the County Commissioners Court is restricted and only applies when the Commissioners Court acts beyond its jurisdiction or clearly abuses the discretion conferred on it by law.

An interesting case concerning the general supervisory authority of the district court over the commissioners court is H. T. Vondy v. Commissioners Court of Uvalde County. In this case, a duly elected constable sought a writ from the district court to compel the members of the commissioners court to set a reasonable salary for his office.

The Supreme Court of Texas instructed the district court to issue the writ sought by the constable. It found that Article 16, Section 61, Texas Constitution, mandates that the Commissioners Court compensate constables on a salary basis and that such salary be reasonable. The Supreme Court expressly rejected the following argument:

1. that the Commissioners Court had the discretion to set no salary at all;
2. that because no salary was set when the constable accepted the office he could not now claim one; and
3. that because no money was budgeted or available to pay the constable there was no requirement to provide compensation for his services.

The Commissioners Court, in response to the Supreme Court’s order, set the salary at \$40.00 per month and the constable appealed this decision. In its opinion, the San Antonio Court of Appeals held:

- (1) If the Commissioners Court does abuse its discretion, the district court has the power and authority to abrogate such actions (but the court noted that the district court did not have the authority to set the salary of the constable).
- (2) Setting the salary at \$40.00 per month was clearly arbitrary and capricious and the district court properly had the authority to review such actions. The Commissioners Court was ordered to pay the constable a reasonable salary.

The district courts can only exercise their general supervisory jurisdiction (power) over the Commissioners Court if they abuse their power or act in an arbitrary manner.

**Discretion of Commissioners Court**

In a case involving the allocation of county road and bridge funds to the respective commissioners' precincts of Hockley County, a suit was brought by the commissioner in Precinct No. 2 together with some residents of that precinct. The three other commissioners, the county judge, the auditor and the county treasurer were the defendants in the suit.

The plaintiffs sought to set aside an order of the commissioners court which distributed the road and bridge fund from the ad valorem tax among the four commissioners precincts at 25% each. The funds received from the highway tax money and the lateral road fund were apportioned to each precinct according to the following percentages: Precinct 1: 27%, Precinct 2: 19%, Precinct 3: 25%, and Precinct 4: 29%.

A statute controlled the allocation of funds among the precincts and provided in part: "The commissioners court shall see that the road and bridge fund of their county is judiciously and equitably expended on the roads and bridges of their county, and, as nearly as the condition and necessity of the roads will permit, it shall be expended in each county commissioners' precinct in proportion to the amount collected in such precinct."

The appellate court held that the commissioners court did not act arbitrarily and that the duty of allocating a road and bridge fund is solely that of the county commissioners court. The court further stated that although the main purpose of the statute governing the apportionment of a road and bridge fund required county commissioners court to expend funds in each commissioners precinct in proportion to an amount collected therein, the rule may be departed from if need and conditions of roads warrant. See H. C. James v. J. E. Morton, 385 S.W.2d 702, CCA, Amarillo, 1964.

Also see Stovall v. Shivers, (Tex.Civ.App.) 129 Tex. 256, 103 S.W.2d 363 (Opinion Adopted), where it was held that the commissioners court acted arbitrarily when it divided the road and bridge fund equally even though Precinct 1 paid 73% of the taxes collected for the road and bridge fund.

### **Express and Implied Authority**

Article 9, Section 1, Texas Constitution, Creation of Counties. "The Legislature shall have the power to create counties for the convenience of the people..."

Counties, as political subdivisions of the state, are created by the Legislature, and as such have only those powers which have been expressly granted by the Constitution of the statutes and those reasonably implied therefrom.

If our counties were exclusively dependent upon express statutory authority before they could act, it would be difficult for counties to be functional in the modern world. Our appellate courts have held that in the exercise of its powers, a commissioners court has implied authority to exercise broad discretion to accomplish intended purposes.

In Cosby v. Com'rs of Randall County, 712 S.W.2d 246 (Tex.App.-Amarillo 1986) a

citizen challenged the action of a commissioners court to demolish an old courthouse prior to a vote of the people in Randall County, Texas. The issue in the case was the authority of the commissioners court under a statute that provided that the "...commissioners court shall provide and keep in repair court houses, jails and all necessary public buildings."

The Amarillo appellate court held that the commissioners court had the implied authority to act as it did. "Necessary inference" (from the statute or constitution) was the key phrase the court used in holding that a commissioners court has implied authority to act. Thus, our commissioners courts are empowered with sufficient latitude to accomplish an authorized task.

### **Interlocal Cooperation Contracts**

Counties may contract with other governmental entities, including state agencies. Chapter 791. "Interlocal Cooperation Contracts, Government Code.

The purpose of the interlocal cooperation act is to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state. Sec. 791.001.

Specifically, as a member of the commissioners court, you should review Sec. 791.014. Approval Requirement for Counties. This statute provides that before beginning a project to construct, improve, or repair a building, road, or other facility under an interlocal contract, the commissioners court of a county must give specific written approval for the project. Other sections within Chapter 791 provide for specific interlocal contracting authority such as: Regional Correctional Facilities, 791.021; Regional Jail Facilities, 791.022; Community Corrections Facilities, 791.024; Water Supply and Wastewater Treatment Facilities, 791.026; Emergency Assistance, 791.027; and Contracts for Joint Payment of Road Construction and Improvements, 791.028.

### **Law Enforcement and Jails**

As a local unit of government, counties perform duties such as law enforcement. Traditionally, counties have constructed, maintained and operated a county jail for the purpose of holding pre-trial detainees and misdemeanor offenders.

The Texas Constitution, Art. 11, Sec. 2. Jails, courthouses, bridges and roads simply provides that "The construction of jails, ...shall be provided for by general laws."

Chapter 351, Local Government Code, deals with the subject of County Jails and Law Enforcement. Chapter 351 addresses Public Safety Provisions which apply to more than one type of local government such as municipal and county authority relating to jails.

Counties also perform several other local duties including the construction of roadways and bridges. Generally, Counties have rather broad discretion in the level of services they



render; however, a statute may specify a minimum standard of compliance.

### **Constitutional Fiscal Restraints**

Generally, counties are limited in their authority to levy taxes and expend funds. Taxes are required to be collected by general laws and for public purposes. See Art. 8, Sec. 3, Texas Constitution. Art. III, Sec. 52 (a) prohibits the Legislature from authorizing any county...to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation. Additionally, a county may not grant additional compensation for services that have already been performed. Art. III, Sec. 53. All expenditures must be limited to a public purpose.

### **Ordinance Making Authority of Counties and County Home Rule**

Counties are very restricted and limited in their ordinance authority. With each session of the legislature, additional requests are submitted to expand this authority. However, it is presently restricted to such matters as subdivision regulations, road and drainage construction, regulation of sexually-oriented establishments, septic tanks, certain flood plain development, and airport zoning.

In 1933, county home rule passed both houses of the legislature and was approved by the electorate. Any county having a population of sixty-two thousand or more could adopt a County Home Rule Charter. The amendment (Art. 9, Sec. 3) allowed the continuance of a county commissioners court as now constituted, or, may provide for a governing body otherwise constituted, which shall be elective, and service therein shall be upon such qualification ...as may be fixed by any such charter. The amendment was never utilized and was repealed in 1969.

Counties and municipalities derive their respective powers from state law. Home rule cities have the constitutional power to adopt any ordinance not in conflict with the constitution or the general laws of the state. Counties, however, have the primary responsibility for areas outside city limits, and yet they have limited authority to address health problems, make regulations for the safety of the public or adopt regulations for the general benefit of the county citizens.

For examples of Legislative authority granted by statute to county commissioners courts, see, "Ordinance-Making Authority for Texas Counties: A Local Option Approach (Texas Advisory Commission on Intergovernmental Relations, 1976).

What resources are available to help answer county law questions?

1. Your county library resources;
2. County Attorney;

3. Private Counsel;
4. County Judges & Commissioners Association of Texas (1-800-733-0699)
5. Texas Association of Counties and
6. Other County Officials

## **QUESTIONS ON CONSTITUTIONAL BASIS OF COUNTY GOVERNMENT**

1. Why were counties created?
2. Does the State control the County?
3. Does the Commissioners Court control the other county officers?
4. What are the limits on the policy making function of Commissioners Court?
5. Can the Commissioners Court hire and fire all county employees?
6. Can a Commissioner or County Judge bind the County?
7. Does the District Judge control the Commissioners Court?
8. Can the Commissioners Court do anything?
9. Why did I run for this office?
10. Where do I get help?