



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 24, 1998

The Honorable Tom O'Connell
Criminal District Attorney
Collin County Courthouse
210 South McDonald, Suite 324
McKinney, Texas 75069

Letter Opinion No. 98-070

Re: Whether a home-rule municipality is
authorized to create a retirement plan without
holding an election (RQ-1089)

Dear Mr. O'Connell:

On behalf of the City of Plano, you ask whether a home-rule municipality is authorized to create a section 401(a)¹ retirement plan for its appointed officers and employees and, if so, whether it may do so without obtaining voter approval. A brief attached to your request suggests that article 6243k, V.T.C.S., which authorizes an incorporated city to create a retirement system with voter approval, is inapplicable and, further, that a home-rule municipality has the implied authority to create such a plan without voter approval. While we disagree with the brief's analysis, we conclude that a home-rule municipality is authorized to establish a section 401(a) retirement plan without voter approval pursuant to Government Code section 810.001.

Article 6243k authorizes an incorporated city to "create a retirement . . . system for its appointive officers and employees if a majority of the qualified voters of the city . . . voting on the proposition approve the creation at an election called for that purpose."² A brief submitted by the

¹See 26 U.S.C. § 401(a).

²The complete text of article 6243k follows:

An incorporated city or town may create a retirement, disability, and death benefit system for its appointive officers and employees if a majority of the qualified voters of the city or town voting on the proposition approve the creation at an election called for that purpose. Each member of the system shall contribute to the system an amount determined by the city or town, which may not exceed 10 percent of the member's annual compensation paid by the city or town, and the city or town shall contribute for each member an amount that at least equals but is not more than twice the amount of the member's contribution. A member of a municipal system is eligible for disability benefits if he is disabled in the course of his employment with the city or town. A member is eligible for retirement benefits if he is 65 years old or older, or he is 60 years old but less than 65 years old and has been employed by the city or town for 25 years or more.

city suggests that article 6243k does not apply to a section 401(a) plan³ and that a home-rule municipality has the implied authority to establish a section 401(a) plan by virtue of its home-rule status. We disagree that a home-rule municipality has the implied authority to create a public retirement system or plan of any sort without express statutory authority. In Attorney General Opinion JM-1142, this office suggested that the very existence of article 6243k indicates that express legislative authority is necessary to authorize any political subdivision, including even a home-rule municipality, to create a retirement plan.⁴ As discussed below, however, Attorney General Opinion JM-1142 is not the end of our analysis.

Government Code section 810.001 authorizes a "political entity," which it defines to include a municipality,⁵ to establish and maintain a public retirement system for its appointive officers and employees within certain limitations and according to certain requirements.⁶ For purposes of section 810.001, the term "public retirement system" means a "continuing, organized program or plan (*including a plan qualified under Section 401(a) of the Internal Revenue Code of 1986*) of service retirement, disability retirement, or death benefits for officers or employees of a political entity."⁷ Section 810.001 does not require a political entity to obtain voter approval to establish a public retirement system. Based on its legislative history, we believe that section 810.001 must be construed to create an alternative to article 6243k and to authorize a home-rule municipality to establish a "public retirement system" without voter approval.

As noted above, this office suggested in 1990 in Attorney General Opinion JM-1142 that the legislature must specifically authorize any political subdivision to establish a retirement system or program. As the following background information from a bill analysis demonstrates, the legislature

³Given the existence of Government Code section 810.001 and the City of Plano's desire to forego an election, we need not determine whether article 6243k authorizes an incorporated city to establish a section 401(a) retirement plan.

⁴See Attorney General Opinion JM-1142 (1990) at 7-10; see also Attorney General Opinion JM-1068 (1989) (given detailed statutes authorizing certain political subdivisions to establish retirement plans, political subdivision lacking such express statutory authority may not adopt private retirement plan).

⁵Gov't Code § 810.001(a)(1).

⁶See *id.* § 810.001(b) - (f). Significantly, section 810.001(d) provides that section 810.001 is not applicable to a political entity that is required to participate exclusively in a particular retirement system or is prohibited from participating in any or a particular system by a specific statute. We are not aware of any such statute applicable to a home-rule municipality.

⁷*Id.* § 810.001(a)(2) (emphasis added).

adopted section 810.001⁸ in 1991 in direct response to that opinion and Attorney General Opinion JM-1068:

Hundreds of cities, counties, school districts and other political subdivisions participate in state-created pension systems, such as the Texas Municipal Retirement System and the Texas County and District Retirement System. In addition, hundreds of other political subdivisions operate under their other local retirement plans, separate and apart from the state wide systems.

Attorney General Opinions JM-1068 (1989) and JM-1142 (1990) held that the statutory law limits localities to three retirement options for their employees: Social Security; deferred compensation plans; and the Texas County and District Retirement System. The opinion further held that, since political subdivisions have no authority to create their own local retirement systems, such systems as currently exist are invalid.

The two opinions raise questions about the validity of the local retirement systems that now exist in hundreds of political subdivisions across the state. Also, the opinions raise questions about the benefits currently being paid to retirees under such systems; the status of the substantial contributions that have been received by those systems over the years; and the potential federal income tax consequences for the thousands of employees and retirees who participate in those systems.

House Comm. on Retirement and Aging, Bill Analysis, S.B. 798, 72d Leg. (1991). The bill analysis states that the bill's purpose was to "add a new Chapter 810 to the Government Code, to provide statutory authority for cities, counties, school districts, hospital districts and other political subdivisions to establish and maintain public retirement systems." *Id.* In addition, testimony of the bill's author before the Senate State Affairs Committee indicates that these attorney general opinions cast doubt on "pension programs" adopted by "river authorities, certain municipalities, et cetera" and that the purpose of the bill was to legitimate those programs.⁹ The bill contained a provision specifically validating "[a]ll acts and proceedings of political entities to establish, finance, or administer public retirement systems before the effective date of this Act that would have been authorized by Section 810.001, Government Code."¹⁰

⁸That bill, Senate Bill 798, created chapter 810 of the Government Code containing section 810.001. *See Act of May 21, 1991, 72d Leg., R.S., ch. 589, § 1, 1991 Tex. Gen. Laws 2118, 2119.*

⁹Hearings on S.B. 798 Before the Senate State Affairs Comm., 72d Leg. (April 8, 1991) (statement of Senator Carriker) (tape available from Senate Staff Services Office).

¹⁰Act of May 21, 1991, 72d Leg., R.S., ch. 589, § 2, 1991 Tex. Gen. Laws 2118, 2119-20.

This legislative history suggests that the legislature was aware that the attorney general opinions called into question the validity of municipal retirement plans not established in accordance with article 6243k and that the legislature sought to validate those plans and to provide an alternate means for a municipality to establish a retirement system or plan. Given this evidence of legislative intent, we conclude that the legislature intended section 810.001 to operate independently from article 6243k and to provide a completely separate basis for a municipality to establish a "public retirement system" as defined in that section.¹¹ For this reason, we conclude that Government Code section 810.001 authorizes a home-rule municipality to establish and maintain a plan qualified under section 401(a) of the Internal Revenue Code without obtaining voter approval as required by article 6243k.¹²

S U M M A R Y

Government Code section 810.001 authorizes a home-rule municipality to establish and maintain a plan qualified under section 401(a) of the Internal Revenue Code without obtaining voter approval as required by article 6243k, V.T.C.S.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

¹¹See Gov't Code § 810.001(a)(2). Our opinion is limited to a section 401(a) plan, which a municipality is plainly authorized to establish under section 810.001. We need not address whether any other type of plan is authorized by section 810.001 or article 6243k or neither or both of them.

¹²Of course, all limitations and requirements set forth in section 810.001 would apply. We express no opinion regarding the legality under section 810.001 of the specific plan proposed by the City of Plano or whether the proposed plan would qualify under section 401(a) of the Internal Revenue Code.