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Opinion Committee

February 9, 1998

Hon. Dan Morales  
Attorney General  
State of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

*RQ 1089*

FILE # ML 40086-C  
I.D. # 40086

Re: Request for an Attorney General's Opinion

Dear Attorney General Morales:

The City of Plano, Texas, is considering adopting a 401(a) retirement plan for its appointed officers and employees. It is uncertain as to whether it has such authority and, if so, whether voter approval would be required. The City has prepared a brief supporting and conclusion that it does have the authority.

Please accept this as my request for a formal Attorney General opinion on the questions. If there is anything else you need, please let me know. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom O'Connell".  
Tom O'Connell  
Criminal District Attorney

**BRIEF TO ACCOMPANY REQUEST FOR  
ATTORNEY GENERAL'S OPINION**

**QUESTIONS**

1. Is it lawful for the City of Plano to create and contribute to a retirement plan for the benefit of its appointive officers and employees the terms of which provide that contributions are discretionary on the part of the City, that members of the retirement plan are permitted but not required to make contributions, that the retirement plan is designated a "profit-sharing plan" in order to comply with federal tax law, and that the City's contributions are allocated among the member's accounts in the retirement plan in proportion to 10% of the amount of their unused sick leave in excess of 1,040 hours (1,456 hours for firefighters on shift duty)?
2. If so, is it also lawful for the City of Plano to create such a retirement plan without holding an election on the proposition?

**BACKGROUND**

The City of Plano (population 192,000) is a home rule charter city. Article 2, Section 2.01 of the city charter reads:

The City of Plano... shall have all powers granted to cities by the constitution and laws of the State of Texas, together with all the implied powers necessary to carry into execution all the powers granted.

During the summer of 1997, the City Employees Benefits Task Force studied the feasibility of a 401(a) plan for city officers and employees. This plan would be in addition to the City's participation in the Texas Municipal Retirement System (TMRS) program. Under TMRS, each employee contributes 7% of their salary and the city matches it with 14%.

The Task Force recommended to the City Manager that the City make a cash contribution to a 401(a) Money Purchase Retirement Plan by allowing employees to convert a portion of their sick leave balance to the plan. The City would deposit up to 10% of an employee's sick leave balance in excess of 1040 hours (1456 hours for firefighters on shift duty) to the plan. The annual amount contributed by the City through this conversion could not exceed the equivalent of one year's accrual (120 hours for regular employees and 180 hours for firefighters on shift duty).

Currently 197 regular employees and 45 firefighters are eligible to participate in this program for an estimated first year cost of \$200,000. A City of Plano employee earns 15 days of sick leave a year or 120 hours (180 hours for firefighters on shift duty). Assuming that an employee does not use any sick leave, it would take 8.67 years to earn 1040 hours of sick leave and thus eligibility to participate in the proposed plan.

### **PERTINENT LAW**

Article XI, Section 5 of the Texas Constitution allows cities with a population greater than 5,000 to adopt home rule charters. Home rule charter cities are granted legislative authority so long as the charter or any ordinance passed under that charter are not "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State." The courts have held that "Home-rule cities possess full power of self-government, provided that no ordinance shall contain any provision inconsistent with the State Constitution or statutes, and such city looks to the legislature not for power to act, but only to determine whether the legislature has limited its broad constitutional power." *City of Dallas v. Dallas Merchants & Concessionaires Ass'n*, 823 S.W.2d. 347 (Tx. Civ. App. - Dallas 1991)

The Texas Legislature has addressed retirement, disability and death benefit systems for appointive city officers and employees at V.T.C.S., Article 6243k, which reads as 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.

Article 6243k may or may not apply specifically to a 401(a) plan as proposed here. If it does not, then it is assumed that the plan would not need to be approved by an election.

The City of Plano argues that on at least two occasions, the Attorney General issued opinions concerning retirement plans. (See Opinion No. JM-1068 and JM-1142). Both opinions dealt with the right of appraisal districts to offer retirement plans to its employees. These opinions are not dispositive of the city's issues because an appraisal district is a political subdivision of the state without home rule authority and hence must look to the legislature for their authority to act. These opinions do, however, seem to imply that a city could enter into a retirement plan such as is being considered by the City of Plano.

#### **SUMMARY**

The City of Plano maintains that it has the authority to provide a retirement plan to its appointive officers and employees. That authority is limited only by the Texas Constitution and state statutes. There is no Texas Constitutional limitation and it appears that the proposed City of Plano 401(a) retirement plan would not conflict with V.T.C.S., Article 6243k.