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October 22, 2018

The Honorable Donna Campbell, M.D.
Chair, Committee on Veterans Affairs &
Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0221

Re: Whether a municipality with authority to adopt and enforce land regulations near a military base pursuant to section 43.0117 of the Local Government Code may impose fees and fines under that authority, and whether the City of San Antonio's proposed annexation ballot language meets the requirements of state law (RQ-0246-KP)

Dear Senator Campbell:

You initially ask two questions regarding the City of San Antonio's (the "City") proposed annexation of two separate parcels of land adjacent to Camp Bullis and Lackland Air Force Base, respectively.¹ You ask:

1. Whether it is permissible for a city to impose fees and fines on an unincorporated area within the city's extra-territorial jurisdiction within five miles of a military base as part of the regulations suggested by a Joint Land Use Study[; and]
2. Whether San Antonio's proposed annexation ballot language . . . meets the standard of definiteness and certainty set forth by the Texas Supreme Court in *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165 (Tex. 1888)[.]

Request Letter at 1. In a supplemental request, you also ask whether the language—"[l]eaving the ballot blank or voting for both Option 1 and 2 will result in the authorization of Option 2"—is consistent with state law concerning how a ballot is counted.²

¹See Letter from Honorable Donna Campbell, M.D., Chair, Comm. on Veterans Affairs & Border Sec. to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Aug. 27, 2018), <https://texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

²See Letter from Honorable Donna Campbell, M.D., Chair, Comm. on Veterans Affairs & Border Sec. to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Oct. 8, 2018), <https://texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Supplemental Request").

Your questions stem from changes the Legislature made in 2017 to municipal annexation authority. *See id.*; *see also* Act of August 13, 2017, 85th Leg., 1st C.S., ch. 6, §§ 1–57, 2017 Tex. Gen. Laws 4505, 4505–4526. Senate Bill 6 placed new restrictions on annexation by municipalities of a certain size.³ Generally, municipalities in a county with a population of 500,000 or more, including the City, may now annex property only with the approval of a majority of voters in the territory to be annexed. *See* TEX. LOC. GOV'T CODE § 43.0691(1) (requiring such a municipality to hold an election to annex an area with a population of 200 or more).

The Legislature made an exception to its new rules for annexations near active military bases. *See id.* § 43.0117(b). While the Legislature gave other voters the option to reject annexation outright, for an area within five miles of an active military base, subsection 43.0117(b) gives voters a choice between annexation or lesser municipal land regulation. *See id.* Subsection 43.0117(b) specifically provides that

[t]he annexation proposition shall be stated to allow the voters of the area to be annexed to choose between either annexation or providing the municipality with the authority to adopt and enforce an ordinance regulating the land use in the area in the manner recommended by the most recent joint land use study.

*Id.*⁴ In so providing, subsection 43.0117(b) creates an unusual choice for voters. *Compare id.* § 43.0117(b), *with id.* § 43.022(b)(4) (providing annexation proposition language with a “for or against” vote), *and* TEX. EDUC. CODE § 13.104(b) (providing ballot language for the creation of a new school district with a “for or against” vote). Instead of calling for a yes or no vote on annexation, subsection 43.0117(b) requires a municipality to present to the voters in the territory around a military base a choice between two regulatory options. Under subsection 43.0117(b), regardless of the election outcome, some form of municipal regulation will occur in the territory after the election: either annexation or the imposition of land use regulations. Under this unique framework, we consider your questions.

Your first question concerns fines and fees. *See* Request Letter at 1. A municipality generally must possess express authority to regulate land development in its extraterritorial jurisdiction. *See Bizios v. Town of Lakewood Vill.*, 453 S.W.3d 598, 600–02 (Tex. 2014). By its plain language, subsection 43.0117(b), though dependent upon the voter’s choice, expressly “provid[es] the municipality with the authority to adopt and enforce an ordinance regulating the land use in the area.” TEX. LOC. GOV'T CODE § 43.0117(b); *see also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (“Our objective in construing a statute is to give effect to the Legislature’s intent, which requires us to first look to the statute’s plain language” and to interpret the statute accordingly.). And a municipality has express authority, as a necessary component of

³Senate Bill 6 established two tiers of counties and municipalities based on population. *See* TEX. LOC. GOV'T CODE § 43.001(2) (defining a “tier 1 county” as “a county . . . with a population of less than 500,000”), (3) (defining a “tier 2 county” as “a county that . . . is not a tier 1 county”), (5) (defining a “tier 2 municipality” as “a municipality . . . wholly or partly located in a tier 2 county”). The City of San Antonio’s 2010 census population is 1,327,407. *See* https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Oct. 18, 2018).

⁴You describe a joint land use study as “the resulting report of a cooperative planning effort conducted as a joint venture between an active military [installation] and surrounding jurisdictions.” Request Letter at 1.

land use regulation, to enforce its ordinances monetarily. In chapter 54 of the Local Government Code, the Legislature authorizes municipalities to “enforce each rule, ordinance, or police regulation of the municipality” by fines or penalties. See TEX. LOC. GOV’T CODE § 54.001; see also *City of Dallas v. TCI W. Ent, Inc.*, 463 S.W.3d 53, 57 (Tex. 2015) (construing provisions in chapter 54 broadly so as to not be limited by “health and safety” limitation). No language in section 43.0117 limits that enforcement authority within the extraterritorial jurisdiction. See TEX. LOC. GOV’T CODE § 43.0117; cf. *id.* § 212.003(b) (providing that a fine or criminal penalty of a plat and subdivision ordinance adopted under section 212.002 “does not apply” in the extraterritorial jurisdiction). Accordingly, a court would likely conclude that a municipality annexing territory within the area described by subsection 43.0117(b) may impose fines and penalties that are adopted under and enforce an ordinance adopted pursuant to that subsection provided the ordinance is consistent with the most recent joint land use study.⁵

Your second question concerns the sufficiency of the City’s proposed annexation ballot language. See Request Letter at 1. You refer us to the standard established by the Texas Supreme Court in *Reynolds Land & Cattle Co. v. McCabe*. See Request Letter at 1. In the *Reynolds* opinion, the Texas Supreme Court concluded that, where not prescribed by statute, the “language of the proposition submitted is not material, provided it substantially submits the question which the law authorizes with such definiteness and certainty that the voters are not misled.” *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165, 165 (Tex. 1888). In 2015, the Texas Supreme Court clarified the standard set forth in *Reynolds*. See *Dacus v. Parker*, 466 S.W.3d 820, 825–26 (Tex. 2015). The court concluded in *Dacus* that the *Reynolds* standard meant that “the ballot must identify the measure by its chief features, showing its character and purpose.” *Id.* at 825. The court said a ballot description could be inadequate in one of two ways: the language (1) “may affirmatively misrepresent the measure’s character and purpose or its chief features;” or (2) “it may mislead the voters by omitting certain chief features that reflect its character and purpose.” *Id.* at 826 (concluding, under the facts, that the ballot did not identify a central aspect of the amendment—drainage charges—to be imposed on real property owners across the city and thus fell short of identifying the measure as the funding mechanism and fiscal burden on property owners).

Resolutions adopted by the City on August 2, 2018, contain the following proposed ballot language:

CITY OF SAN ANTONIO PROPOSITION A

OPTION 1

YES ANNEXATION: SHALL THE CITY OF SAN ANTONIO ANNEX FOR LIMITED PURPOSES, WHICH INCLUDES THE AUTHORITY TO IMPOSE RELATED FINES, FEES AND OTHER CHARGES, CERTAIN AREAS IN THE CITY’S EXTRATERRITORIAL JURISDICTION WITHIN FIVE MILES OF THE [BOUNDARY OF THE SPECIFIED MILITARY BASE] AND WITHIN THREE

⁵You do not ask about a specific fee or fine, and this opinion addresses only the general authority of the City. Whether a specific fee or fine imposed is consistent with the City’s authority would require independent analysis.

YEARS FOLLOWING CITY COUNCIL APPROVAL ANNEX FOR FULL PURPOSES TO PROVIDE CITY SERVICES AND IMPOSE TAXES?

OPTION 2

NO ANNEXATION BUT WITH LAND USE REGULATIONS: SHALL THE CITY OF SAN ANTONIO BE PROVIDED WITH THE AUTHORITY TO ADOPT AND ENFORCE AN ORDINANCE REGULATING THE LAND USE IN THE CITY'S EXTRATERRITORIAL JURISDICTION WITHIN FIVE MILES OF THE BOUNDARY OF THE [SPECIFIED MILITARY BASES] IN THE MANNER RECOMMENDED BY THE MOST RECENT JOINT LAND USE STUDY, FOR THE PURPOSE OF PROTECTING THE MILITARY MISSIONS, INCLUDING THE AUTHORITY TO ADOPT AND IMPOSE RELATED FEES, FINES AND OTHER CHARGES?

OPTION 1

OPTION 2

See City of San Antonio Resolution, "Camp Bullis," #2018-08-02-0032R-A (Aug. 2, 2018) at 3–4; City of San Antonio Resolution, "Lackland Air Force Base," #2018-08-02-0032R-B (Aug. 2, 2018) at 3–4.⁶ This language presents the voters with the choice, as required by the Legislature in Local Government Code subsection 43.0117(b), between a limited purpose annexation or a municipal ordinance regulating the land use in the area surrounding the military bases. *See* TEX. LOC. GOV'T CODE § 43.0117(b). The proposed ballot language does not obscure this chief feature from the voters. Moreover, the ballot language identifies the financial consequences of each option. As another chief feature of the annexation proposition, the ballot does not misinform or mislead the voters of the financial consequences of their votes. Thus, a court would likely conclude that the ballot language is sufficient under *Reynolds* and *Dacus*.

Your supplemental question involves language in the annexation resolutions stating that "[I]eaving the ballot blank or voting for both Options 1 and 2 will result in authorization of Option 2." City of San Antonio Resolution, "Camp Bullis," #2018-08-02-0032R-A (Aug. 2, 2018) at 3; City of San Antonio Resolution, "Lackland Air Force Base," #2018-08-02-0032R-B (Aug. 2, 2018) at 3; *see also* Supplemental Request at 1. Under the language at issue, it appears the City will count a ballot containing a mark for both options as a vote for Option 2. Similarly, it appears the City will count a ballot left blank and reflecting a no vote for either proposition as a vote for Option 2. Counting the votes in this manner conflicts with Election Code section 65.009, which provides that a "vote on a . . . measure shall be counted if the voter's intent is clearly ascertainable." TEX. ELEC. CODE § 65.009(c); *see also id.* § 64.006 ("A vote on a particular measure must be indicated by placing an 'X' or other mark that clearly shows the voter's intent."). In the instance of a ballot with a mark for both propositions, the voter cannot vote for the two options at the same time (much like in an election between two candidates, a voter cannot vote for both candidates).

⁶*See* <https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3585046&GUID=BA11A4E6-E80F-458C-8896-944B55AD0CD4&Options=&Search=> (attachments 14 and 15) (last visited Oct. 18, 2018).

In the instance of an unmarked or blank ballot, the voter might have intended to signal to the City that the voter opposed either type of regulation, might have misunderstood the instructions, or might have simply neglected to mark a choice. In either instance, it is impossible for the counting officials to clearly ascertain the voter's intent, much less a clear intent to vote for Option 2.⁷ See generally Tex. Att'y Gen. LO-89-61 (1989) at 3. Because of a lack of a clearly ascertainable intent, ballots left blank or with both options marked should not be counted. See *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex. App.—Corpus Christi 1993, writ dism'd w.o.j.) (recognizing that where the intention cannot be ascertained, the court should not count the vote in favor of one party or another).

⁷Because of the nature of the Legislature's proposition in subsection 43.0117(b), if every voter in the territory except one leaves both options blank in protest of any regulation, but that one voter votes for Option 1, Option 1 prevails. See TEX. LOC. GOV'T CODE § 43.0691(1) (allowing annexation only if a majority of "votes received at the election approve the annexation").

S U M M A R Y

A court would likely conclude that a municipality acting under Local Government Code subsection 43.0117(b) may impose fines and penalties that are adopted under and enforce an ordinance adopted pursuant to that subsection provided the ordinance is consistent with the most recent joint land use study.

A court would likely conclude that the ballot language adopted by the City of San Antonio's resolution calling the election under subsection 43.0117(b) is sufficient under Texas Supreme Court precedent.

Election Code section 65.009 provides that a vote for a measure shall be counted if the voter's intent is clearly ascertainable. The City's plan to count ballots voting for both propositions or left blank as a vote in favor of Option 2 is contrary to this provision because such ballots do not indicate a clearly ascertainable intent for Option 2.

Very truly yours,



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