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ATTORNEY GENERAL OF TEXAS

January 7, 2019

The Honorable John Zerwas, M.D.  
Chair, Committee on Appropriations  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0231

Re: Issues related to quorums and city council  
member absences (RQ-0233-KP)

Dear Representative Zerwas:

You seek our opinion on two questions regarding whether the City of Fulshear (the "City") city council violated the city charter.<sup>1</sup> As an initial matter, we note that the question whether a specific law or charter provision is violated in specific circumstances requires the determination of facts and cannot be answered in an attorney general opinion. *See* Tex. Att'y Gen. Op. No. GA-0431 (2006) at 2 (declining to determine whether specific laws or charter provisions were violated). Additionally, such a question requires the construction of the particular charter provision with respect to the facts, and this office does not ordinarily construe city charter provisions in attorney general opinions. *See id.* However, we can advise you generally on the legal principles relevant to your questions.

Your first question relates to the number of votes required to approve action by the council. You cite a charter provision, which provides:

Unless otherwise provided by this Charter or other law, each vote, order, decision, or other action taken by the City Council shall require the affirmative vote of a majority of the full City Council, provided that any abstention not required by law shall be counted as a vote against the matter under consideration . . . . For purposes of this subsection, a majority shall mean an integer greater than one-half of the full City Council, provided that any one or more Council Members required by law to abstain from voting on a particular matter shall be excluded for purposes of determining the majority.

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<sup>1</sup>*See* Letter from Honorable John Zerwas, M.D., Chair, House Comm. on Appropriations, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (May 23, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

Request Letter at 1–2 (citing FULSHEAR, TEX., CITY CHARTER, art. III, § 3.09(c) (2016)).<sup>2</sup> You tell us the City adopted its home-rule charter in 2016 and is transitioning from its original incorporation as a general-law city. *Id.* at 1. You inform us about a recent city council meeting, when the city council comprised six members, at which four council members were present, one member was absent, and one seat was vacant due to a resignation.<sup>3</sup> *See id.* Of the four present council members, one recused herself on a particular agenda item due to a filed conflicts disclosure statement. *See id.* The agenda item passed by a vote of three to zero. *See id.* You ask whether the vote violated the City’s charter and whether the vote should be considered valid. *See id.* at 2.

The City defines a majority to mean “an integer greater than one-half of the full City Council.” FULSHEAR, TEX., CITY CHARTER, art. III, § 3.09(c) (2016). Whether the City’s council consists of six members or seven, the integer greater than one-half is four. Yet, a proviso in the definition of majority excludes from a majority “any one or more Council Members required by law to abstain from voting on a particular matter.” *Id.* Thus, the question whether the vote of the city council with less than four votes constitutes a majority vote depends on whether any council member was “required by law to abstain from voting” on the matter. While the charter does not define the phrase, its plain meaning could include the several provisions in state statutes requiring a local government official to abstain from voting on particular matters. *See, e.g.,* TEX. LOC. GOV’T CODE § 171.004 (requiring a local public official with a substantial interest in a business entity or real property in a matter before the governmental body involving the interest to file an affidavit and abstain from voting in certain circumstances); *see Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014) (“We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context[.]”).

The City informs us in its brief that a member of the city council filed a conflicts disclosure statement under section 176.003 of the Local Government Code in the matter that was the subject of the vote. *See* City Brief at 2. Section 176.003 requires a local government officer to file a conflicts disclosure statement with respect to a vendor if the local government has entered into or is considering entering into a contract with a vendor and the vendor has certain employment or business relationships with the local governmental officer. *See* TEX. LOC. GOV’T CODE § 176.003(a)(1), (2). Section 176.003 does not require the government official to abstain from voting on the contract. *See id.* Accordingly, section 176.003 does not apply.

The City also asserts that the council member is an attorney bound by the Texas Disciplinary Rules of Professional Conduct (“Rules”), which are promulgated by the Texas Supreme Court. *See* City Brief at 2–3. It states that Rule 1.10(e)(1) required the council member to abstain from the vote. Rule 1.10(e)(1) provides that

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<sup>2</sup>*See* [https://library.municode.com/tx/fulshear/codes/code\\_of\\_ordinances?nodeId=PTICH](https://library.municode.com/tx/fulshear/codes/code_of_ordinances?nodeId=PTICH).

<sup>3</sup>According to the City’s charter, the council is made up of seven council members, and the Mayor votes only in the event of a tie. *See* FULSHEAR, TEX., CITY CHARTER, art. III, §§ 3.03, 3.04, 3.09(c) (2016). We understand from briefing submitted by the City that it is transitioning to a seven-member council. *See* Brief from Byron L. Brown, Randle Law Office, Ltd., L.L.C., City Att’y, City of Fulshear at 2 n.7 (June 25, 2018) (“City Brief”) (on file with the Op. Comm.). Under the charter, the majority for a seven-member council is the same as for a six-member council.

[e]xcept as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not . . . [p]articipate in a matter involving a private client when the lawyer had represented that client in the same manner while in private practice or nongovernmental employment . . . .

TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.10(e)(1), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9). Rules promulgated by the Texas Supreme Court have "the same force and effect as statutes." *In re Silver*, 540 S.W.3d 530, 534 (Tex. 2018). Thus, if the council member is required by Rule 1.10(e)(1) or other rule or statute to abstain from voting on the matter at issue, the council member could be considered as being "required by law to abstain from voting" under the charter. Whether in fact the charter language is so construed and whether the council member is bound by Rule 1.10(e)(1) are questions beyond the purview of an attorney general opinion. *See* Tex. Att'y Gen. Op. No. GA-0651 (2008) at 7–8 (stating that the question whether particular conduct violates the rules of professional conduct is a question requiring the resolution of fact questions and cannot be decided by this office). Thus, we cannot determine as a matter of law whether the vote in question is valid. *See* Tex. Att'y Gen. Op. No. GA-0431 (2006) at 2, 3 (declining to opine on violation of city charter).

Your second question involves another charter provision, which provides:

If the Mayor or a Council Member is absent for three (3) consecutive regular meetings, then the Mayor's or Council Member's office, as applicable, is considered vacant unless:

- (1) They are sick and the absence is excused afterward; or
- (2) They have first obtained a leave of absence at a regular meeting.

Request Letter at 2 (citing FULSHEAR, TEX., CITY CHARTER, art. III, § 3.10(d) (2016)). You tell us the council member who was absent from the recent meeting had "previously notified the city that he would be absent due to being out of state for work, and this was his third consecutive absence." *Id.* You also explain that the city attorney ruled the council member absent at the conclusion of the meeting instead of at the beginning. *Id.* You ask whether the seat should now be considered vacant and whether his notification to the City prior to the meeting would require the council to consider him absent at the beginning of the meeting. *See id.*

The City refers us to statutory provisions supporting its position that the absence is properly determined at the conclusion of a meeting. *See* City Brief at 4, and attached Memorandum dated Apr. 20, 2018, at 3–4. The City cites section 551.127(a-2) of the Government Code, which provides that when a meeting of a governmental body is held by videoconference call, a member who participates in the meeting remotely by means of a videoconference call "shall be counted as present at the meeting for all purposes." TEX. GOV'T CODE § 551.127(a-2). By its terms, subsection 551.127(a-2) applies to only an open meeting during which some members participate by videoconference call. *See id.* The City also cites subsection 22.041(c) of the Local Government

Code, which provides that “a member of a governing body is also considered absent . . . if the member is not present at the adjournment of a meeting.” TEX. LOC. GOV'T CODE § 22.041(c). Yet, subsection 22.041(c) does not apply to home-rule municipalities. *See id.* § 22.001 (“This chapter applies only to a Type A general-law municipality.”).

Neither provision dictates when an absence at a meeting of a governmental body of a home-rule city should be determined. And no other statutory provisions direct when an absence at a meeting must be determined. Without any requirement from a statute or the City's charter, it is within the discretion of the city council to determine when to declare a council person absent from its meetings. *See Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (discussing “broad powers” of home-rule cities that are subject only to limitations enacted by the Legislature). Consequently, we cannot determine as a matter of law whether the seat was vacant at the beginning of the meeting. *See Tex. Att'y Gen. Op. No. GA-0431* (2006) at 2, 3.

S U M M A R Y

To the extent a city council member is required by Rule 1.10(e)(1) of the Texas Disciplinary Rules of Professional Conduct to abstain from voting on a matter, the council member could be "required by law to abstain from voting" under the City of Fulshear's charter. The questions whether the charter language is so construed and whether a council member is bound by Rule 1.10(e)(1) are questions beyond the purview of an attorney general opinion.

Without any requirement from a state statute or a city charter, it is within the discretion of a home-rule city council to determine when to declare a council person absent from its meetings.

Very truly yours,



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