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September 11, 2000

The Honorable John Cornyn
The Attorney General
P.O. Box 12548
Austin, Texas 78711

RECEIVED
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OPINION COMMITTEE

FILE # ML-41638-00
I.D. # 41638

Re: Request for Attorney General's Opinion

Dear General Cornyn;

This office has been requested to approach your Office for an opinion expressed by the attached documents.

Please contact the following for clarification or further information:

City of Georgetown
City Attorney Marianne Banks
113 East 8th Street
Georgetown, Texas 78626
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Sincerely,

Wayne Porter
Wayne Porter
First Assistant County Attorney

PROPOSED OPINION

FACT SITUATION:

The City of Georgetown, a home rule municipality, through the office of Williamson County Attorney Gene Taylor, has asked for an opinion, interpreting and applying the provisions of Article XI, Section 11 of the Texas Constitution.

In 1992, Georgetown citizens approved a Charter revision which extended the terms of the Mayor and Councilmembers from two to three year terms. (Charter Article II, Section 2.01) The May 1999 election was the first election since the Charter amendment in which a sitting Councilmember had filed to run for Mayor.

Councilmember Ferd Tonn was elected to a three-year term for the District 7 seat in 1998. On March 12, 1999, with more than one year remaining on his council term, Councilmember Tonn filed to run for mayor. The election was held May 1. Mr. Tonn was not elected Mayor. It has recently come to the attention of Mr. Tonn and the City Attorney that Article XI, Section 11 of the Constitution of the State of Texas may prevent Mr. Tonn from serving the remaining portion of his term of office. Questions have arisen with regard to the proper procedures and requirements which should be followed at this point since more than 120 days have elapsed since Mr. Tonn announced his candidacy and there is less than one year remaining in his term.

QUESTION ONE

Is the office of Mayor an "office of profit or trust" as contemplated by Article XI, Section 11 of the Constitution?

Paragraph 2 of Article XI, Section 11 states,

"Provided, however, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special or primary election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled." (Emphasis added)

The term "any office of profit or trust" has not been expressly defined as it pertains to Article XI, Section 11; however, the same or similar language has been construed under other provisions of the Constitution. In *Willis v. Potts*, 377 S.W. 2d 622 (Tex. 1964), the court was asked to interpret Article III, Section 19 of the Texas Constitution, which provided, in part, that any person holding a lucrative office under the United States or this

State is ineligible for the legislature during the term for which he was elected or appointed. In Willis, the mayor received \$10 per meeting, not to exceed \$520 a year. The Court, in holding that the position was lucrative, cited additional authority as follows, "An office to which salary, compensation, or fees are attached is a lucrative office, or, as it is frequently called, an 'office of profit.'" (citing Baker v. Board of Commissioners, 9 Wyo. 51 (1900)). See Whitehead v. Julian, 476 S.W.2d 845 (Tex. 1972). In Dawkins v. Meyer 825 S.W.2d 444 (Tex.1992), the Court followed Willis, *supra*, and ruled that an office is lucrative if the office holder receives any compensation, no matter how small.

In Attorney General opinion MW-360, a board member was found not to occupy an office of profit under Article XVI, Section 12 of the Texas Constitution, where he received reimbursement for expenses, but received no salary. Inasmuch as the Mayor of Georgetown receives a salary of \$400 per month, the office is one of profit. Furthermore, the office is also one of trust. In Attorney General Opinion JM-395, Article XVI, Section 65 of the Texas Constitution was interpreted to state that a member of the city council of a general law city holds an office of trust under the laws of this state within this section. In JM-553, this interpretation of an office of trust was applied to a city councilmember of a home rule city. "He engages in government activities and exercises a portion of the sovereign powers of the states and thus occupies an office of trust with Article XVI, Section 65." The rationale applied to determine that the office of city councilmember is one of trust would also apply to the determination that the office of mayor is, likewise, a position of trust.

QUESTION 2

When an officeholder is deemed to have resigned his position by becoming a candidate for an office of profit or trust, how is the vacancy to be filled? Should a municipal office be filled pursuant to law in the same manner as other vacancies for the office are filled, as stated in Paragraph 2 of Article XVI, or must a municipal office be filled in the manner set out in paragraph 3 of that section?

Paragraph 2 of Article XI, Section 11 provides:

"Provided. However, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special or primary election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled."

Paragraph 3 provides:

“A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.”

Section 2.03 of the Georgetown City Charter provides that vacancies in the Council, or in the office of Mayor, arising from any cause shall be filled by majority vote of the remaining members for the unexpired term or until the next City general election. No Attorney General opinions or other citations are found which address the language in paragraph 2 allowing the vacancy to “be filled pursuant to law.” Inasmuch as the City of Georgetown has provisions to fill this vacancy pursuant to the law set forth in its Charter, paragraph 2 of Section 11 would apply to allow a majority vote of the Council to fill the City Council seat for the unexpired term.

QUESTION 3

When a municipal officer’s resignation is automatic pursuant to Article XI, Section 11 and by the time the City becomes aware of the resignation, there is less than one year remaining on the term, can the officer to remain as a “de jure” officer until the next election where no public policy would be served by calling a special election?

Attorney General opinion WW-788 explained at length the purpose and policy considerations that gave rise to the “resign to run” provisions in the Constitution. Among those reasons given were that terms of office were lengthened so that officials did not spend half of their terms running for office. The “resign to run” amendments were intended to prevent an officer from engaging in a political campaign for another office at any time except the last year of his term. Here, no public purpose would be served by calling a special election. Councilmember Tonn entered the Mayor’s race after inquiring about the impact it would have on his current office. Regrettably, he was given incorrect information. City staff members were not aware of the provision until recently. Now, with less than one year remaining in the term, it would serve no purpose to require the City to incur the expense of a special election. By the time the city could hold a special election and fill the position, there would be approximately four to six months remaining in the term. Presently, the office is not being occupied by one campaigning for office. The office is being held by the individual elected to that office by the citizens of Georgetown. It is also of note that Mr. Tonn has served as City Councilmember since May 1990. When Mr. Tonn last filed to run for City Council (in May 1998), all City Council candidates were unopposed and no election was held. In the particular fact situation of this case, it is in the public’s best interest and it is consistent with the intent of the Constitution for Councilmember Tonn to retain his position as a “de jure” officer until the next general election.

QUESTION 4

If a special election is required to fill a vacancy occurring under this "resign to run" provision of the Constitution, what is the proper date to hold such a special election when the 120-day provision from date of vacancy has run and there is less than one year remaining on the term?

Election Law Opinion DAD-23, addressed the question of when an election to fill a vacancy pursuant to Article XI, Section 11 should be held if the 120-day deadline had passed. In DAD-23, the Secretary of State found that when it is impossible to legally call an election within the 120-day constitutional period, an election may be held on either the next uniform election date, or on another date authorized by the Governor, pursuant to emergency election provisions. The opinion did not address a factual situation where less than one year remained in the term. In the instant case, the next uniform election date is in November. Election Code, Section 41.001.

CONCLUSION

Paragraph 2 of Article XI, Section 11 allows for vacancies in office to be filled in the manner prescribed by law. Here, where the City of Georgetown has provided for the filling of vacancies by appointment or election, the City Council is allowed by law to fill this position by appointment or election. Alternatively, where there is less than one year remaining on the original term and no public purpose is served by the calling of a special election, the officer is allowed to remain as a "de jure" officer until the next general election in May 2001.