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OPINION COMMITTEE

April 17, 2002

Honorable John Cornyn  
Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

RQ-0537-JC

Re: Request for Attorney General Opinion

FILE # ML-42571-02  
I.D. # 42571

Dear Mr. Cornyn:

I am writing to request your opinion on the following issue:

Can a city official who is subject to the "resign to run" rule referenced in Article XI, Section 11 of the Texas Constitution, and who has more than one year remaining in his or her term of office, become a candidate for the office of precinct chair of a political party without automatically resigning the city office?

The background facts are as follows. Two members of the San Marcos City Council recently filed as candidates for election to two separate party precinct chair positions in Hays County. The City of San Marcos is a home-rule municipality and, by charter, has adopted three year terms of office for all members of the city council except for the mayor. The two council members who filed for the precinct chair positions each have three year terms of office, and they had more than one year left in their terms of office at the time they filed for the precinct chair positions. One of the council members was unopposed, and was declared elected to the precinct chair position by certification of this fact in accordance with TEX. ELEC. CODE ANN. ' 171.0221. The other was elected by a majority vote of the persons voting in the party primary in that precinct. The San Marcos City Charter does not authorize partisan nominations for elective city offices.

Two distinct provisions of State law appear to address this situation. The first is statutory, and the other is constitutional.

**STATUTORY ELIGIBILITY TO SERVE AS A LOCAL PARTY OFFICIAL**

TEX. ELEC. CODE ANN. ' 161.005(a) states as follows:

To be eligible to be a candidate for or to serve as a county or precinct chair of a political party, a person must:

(1) be a qualified voter of the county; and

of the federal, state, or county government.

It appears that this provision does not bar a person holding a city elective office from serving as a party precinct chair. This conclusion is supported by the legislative history of the predecessor statute to TEX. ELEC. CODE ANN. §161.005, TEX. ELEC. CODE ANN. Art. 3.04, Subdivision 3. Prior to 1977, the predecessor statute provided as follows:

No one shall act as chairman or as member of any district, county, or city executive committee of a political party who is not a qualified voter, or who is a candidate for public office or who holds any office of profit or trust, either under the United States or this state, or any city or town in this state.

Two attorney general opinions interpreting this statute, Op. Tex. Atty. Gen. No. H-698 (1975) and Op. Tex. Atty. Gen. No. H-876 (1976), concluded that a mayor, a school district trustee, a trustee of a special district, a city council member, a deputy sheriff and a constable were prohibited from acting as chairman or as a member of any district, county, or city executive committee of a political party. H-876 also concluded that a person holding a local party office automatically vacates that office if he becomes a candidate for one of the public offices described above. The predecessor statute was amended by the legislature in 1977 in Senate Bill 707, as follows:

No one shall act as chairman or as member of any district, county, or city executive committee of a political party who is not a qualified voter, or who is an officeholder of or a candidate for nomination to or election to any office that would appear on a general election ballot ~~a candidate for public officer or who holds any office of profit or trust, either under the United States or this state, or any city or town in this state.~~

The intent of Senate Bill 707 apparently was to broaden the group of persons eligible to serve as election officers or party officers. City and other local officials, other than county officials subject to election at general elections, were removed from the prohibition against serving as local party officials.

#### **CONSTITUTIONAL RESIGN TO RUN RULE**

The other relevant provision of State law is Article XI, Section 11 of the State Constitution, which provides that city officers whose terms of office are longer than two years “are subject to Section 65(b), Article XVI, of [the] constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies.”

Article XVI, Section 65(b) of the Constitution states as follows:

If [an officer subject to this subsection] 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.

The automatic resignation provisions of Article XI, Section 11 and Article XVI, Section 65 “were both adopted by the voters in 1958 for the same purpose – to ensure that officeholders serving terms that had been lengthened from two years would give their undivided attention to their offices without campaigning until their last year in office.” Op. Tex. Atty. Gen. No. JC-0318 (2000). This opinion concluded that a city council member with a three year term of office who announced his candidacy for mayor at a time when there was more than one year remaining in his term of office automatically resigned by virtue of Article XI, Section 11.

The issue under the Constitution appears to be this: Is a local political party office such as that of a precinct chair an “office of profit or trust under the laws of this State”?

The answer to this issue involves the nature and legal status of political party offices in Texas. The Texas Supreme Court addressed this issue in the case of *Carter v. Tomlinson*, 227 S.W.2d 795 (Tex. 1950), holding that state courts have no jurisdiction to hear matters related to the membership of a party’s state executive committee. The Court, in discussing the issue of whether officers of political parties hold “public offices,” stated

In this State political parties have not by law been created either State or governmental agencies, and in the absence of a statute covering the matter, committees of any political party in acting for the party's interests are not acting as officers of the State. And it is held that officers of a political party, such as chairmen of the County Executive Committees and precinct committeemen, although provided for by election laws, are not regarded as public or governmental officers.

*Id.* at 799. Likewise, in *Martinez v. Democratic Committee for Responsible Government*, 521 S.W. 2d 284 (Tex. Civ. App.—Eastland 1975, writ ref’d n.r.e.), it was held that campaign contribution laws applicable to public offices do not apply to candidates for party precinct chair, since party offices are not “public offices”.

It is also instructive, with respect to the involvement of political party officers in municipal elections, that state law requires a candidate for election to a municipal office to appear on the ballot “only as an independent,” unless a city by charter authorizes nominations of partisan candidates. TEX. ELEC. CODE ANN. §§143.002, 143.003. The San Marcos City Charter does not authorize partisan nominations for elective city offices.

The Texas Election Code provides various duties and roles for the party precinct chair, including designation of the precinct chair as the temporary chair of the precinct convention (§174.025), as a member of the precinct executive committee (§§171.072, 171.073), and as a member of the county executive committee (§171.022). The activities of the precinct chair as defined in the Election Code appear to focus on local party primary elections, rather than being ongoing or continuous in nature.

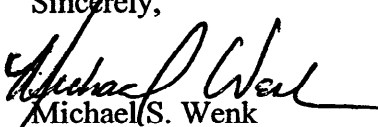
The duties and roles of the precinct chair with respect to party primary elections do not appear to conflict with the duties and role of members of the San Marcos City Council, as defined in Article 3 of the San Marcos City Charter, a copy of which is attached. Finally, state law provides that a general election for city officers must be held on a date that is distinct from the date set for general and runoff primary elections. *Compare* TEX. ELEC. CODE ANN. §41.001(d) *with* TEX. ELEC. CODE ANN. §41.007.

I would note for you that it is the belief of the San Marcos City Council, and the opinion of the San Marcos City Attorney, that the “resign to run” rule for city officials is not triggered in the circumstances presented here.

Please provide me with your opinion on whether a city official who is subject to the “resign to run” rule referenced in Article XI, Section 11 of the Texas Constitution, and who has more than one year remaining in his or her term of office, can become a candidate for the office of precinct chair of a political party without automatically resigning the city office.

Thank you for your assistance in this matter.

Sincerely,



Michael S. Wenk  
Hays County Criminal District Attorney

cc: Mark B. Taylor, San Marcos City Attorney