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The Senate of the State of Texas

Jane Nelson

Senate District 12

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December 17, 2003

RQ-0156-GA

The Honorable Greg Abbott
 Attorney General of Texas
 Opinions Division
 P.O. Box 12548
 Austin, TX 78711-02584

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DEC 23 2003

OPINION COMMITTEE

RE: Request for Opinion

FILE # ML-43390-03
 I.D. # 43390

Dear Attorney General Abbott:

As a person authorized to request a written opinion from the Attorney General on a question affecting the public interest, I hereby request your opinion on three issues concerning a recall election to be held in Haltom City on February 7, 2003.

Background

Haltom City is a home rule municipality in Tarrant County Texas. Attached is a copy of the Haltom City Charter.

The City Council consists of a Mayor who is elected from the City at large and seven (7) City Council Members who are elected to individual places, designated by number, from the City at large. In each odd numbered year the Mayor and three (3) Council Members are elected. In each even numbered year four (4) Council Members are elected. The Mayor and places 1, 2 and 7 are elected in odd numbered years and places 3, 4, 5 and 6 are elected in even numbered years. (Section 3.01, City Charter).

The City Charter provides that a quorum at any City Council meeting will be established by the presence of at least five members, and that the Mayor's presence may not be counted toward a quorum. (Section 3.08, City Charter)

Article VI of the City Charter contains provisions about the recall of elected officers. Section 6.02 provides that if sufficient voters sign a petition demanding that the recall of an elected

officer be placed on the ballot, and the City Secretary certifies to the City Council under Section 6.05 that the petition contains a sufficient number of valid signatures, this certification constitutes the initiation of the election process. Section 6.07 provides that if the officer whose removal is sought does not resign, then it becomes the duty of the City Council to order a recall election and fix a date for holding the election. The date of such election shall be the next state uniform election date. Section 6.09 provides that if the majority of the votes cast at a recall election is for the recall of the person named on the ballot, he shall, regardless of any technical defects in the recall petition, be removed from office and the vacancy shall be filled as vacancies on the City Council are filled. Section 3.06 provides that when a vacancy occurs in the office of Mayor or City Council Member from any cause whatsoever, a special election shall be held at the next state uniform election date that allows time to hold the election as provided by state law.

The Recall Petition

A voters petition was presented to the City Secretary of Haltom City seeking the recall of the five following members of the City Council:

Tracy Henderson, Place 2 (term expires May 2005)

John Williams, Place 3 (term expires May 2004)

Trae Fowler, Place 4 (term expires May 2004)

David Averitt, Place 5 (term expires May 2004)

Mayor Pro Tem Bob Hurley, Place 6 (term expires May 2004)

The City Secretary examined the petition and determined that it contained a sufficient number of valid signatures to require that an election be held concerning the recall of each of the five City Council Members. On December 2, 2003, the City Council received the petition at a regular City Council meeting and each of the five City Council Members declined to resign from office. At the same meeting, the City Council adopted a Resolution calling a special recall election to be held on February 7, 2004.

Questions Presented

If one or more of the five City Council Members are removed by the voters at the recall election to be held on February 7, 2004:

(1) Will a City Council Member who is recalled by the voters continue to serve in office under Article 16, Section 17 of the Texas Constitution until his successor is elected and qualifies at the next regular election in May of 2004?

(2) If the answer to question (1) is "yes", what recourse does the City have if a City Council Member who is recalled by the voters refuses to continue to attend meetings or to serve in office after being recalled?

(3) If the answer to question (1) is "no", and the voters recall three or more City Council Members, does a quorum of the City Council exist to conduct business until the May 2004 election even though Section 3.08 of the City Charter states that a quorum consists of five members of the City Council, not counting the Mayor?

Applicable Law

(1) Will a City Council Member who is recalled by the voters continue to serve in office under Article 16, Section 17 of the Texas Constitution until his successor is elected and qualifies at the next regular election in May of 2004?

Article 16, Section 17 of the Texas Constitution states:

Section 17 - Officers to Serve Until Successors Qualified.

“All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.”

This Section of the Constitution is mandatory and is self-executing. The purpose of the Section is to prevent vacancies in office and the consequent cessation of the functions of government. The Section requires an officer to continue to serve until his successor qualifies even if he has resigned and his resignation has been accepted. *Plains Common Consol. School Dist. No. 1 of Yoakum County v. Hayhurst*, 122 S.W.2d 322 (Tex. Civ. App. - Amarillo 1938, no writ). Also *Op. Tex. Att’y Gen. H-161* (1973). The commentary in Vernon’s Texas Constitution concerning this Section states that the purpose of the Section is “to prevent public convenience from suffering because of a vacancy in the office.”

On the other hand the courts have held that the right to hold over does not reside in one who has been removed from office. *Manning v. Harlan*, 122 S.W.2d 704 (Tex. Civ. App.-El Paso 1938, writ dismiss.); *Lipscomb v. Randall*, 985 S.W.2d 601 (Tex. Civ. App.- Fort Worth 1999, dismiss. as moot) *A. J. Hyde v. State of Mississippi*, 52 Miss. 665 (Miss. 1876).

This issue was addressed by the San Antonio Court of Appeals in an unpublished opinion in the recent case of *Willman et al. v. City of San Antonio*, 2003 WL 22295328 (Tex. App.- San Antonio 2003, no writ). In *Willman* the court held that several municipal court judges who had been removed from office and replaced by other judges did not hold over in their positions. After citing the *Manning v. Harlan* case, the court referred to the commentary to Article 16, Section 17 indicating that the purpose of the Section, in part, is to prevent public convenience from suffering because of a vacancy in office. The Court of Appeals then stated:

Because appellants were removed from office, Article 16, Section 17 does not apply to the instant circumstances. The facts, as agreed to by the parties, reflect that there were the same number of judges after appellants’ terms had expired as there were when appellants were in office. Therefore, no vacancy occurred in the office of municipal court judge that resulted in public inconvenience to warrant the application of Article 16, Section 17 of the Texas Constitution.

Based on the *Manning* and *Willman* cases, the rule is that when a person is removed from office, he does not continue to serve under Article 16, Section 17 of the Texas Constitution, unless there is “inconvenience” that the public would suffer if the officer does not continue to serve until the next election. The question in the Haltom City situation is: Would a “public inconvenience” exist if City Council Members are removed from office by the voters at a recall election and do not continue to serve? If they do not continue to serve, a situation could occur where less than five Council Members remain in office and there are not sufficient members to constitute a quorum.

(2) If the answer to question (1) is “yes”, what recourse does the City have if a City Council Member who is recalled by the voters, but continues to serve in office under Article 16, Section 17 of the Texas Constitution, refuses to attend meetings or to serve in office after being recalled?

The Texas courts have held that mandamus is the proper remedy if a government official refuses to perform a duty that he is required by law to perform. It is well settled, however, that mandamus will never lie to control how an official exercises his or her discretion. *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971); *Graves v. City of Dallas*, 532 S.W.2d 106 (Tex. Civ. App. - Dallas 1975, writ ref. n.r.e.).

If a member of the Haltom City Council is required to continue to serve in office and refuses to do so, mandamus should lie to require him to continue serving, but cannot control how he exercises his discretion. If he fails to serve after being ordered by mandamus to do so, the writ can be enforced through contempt proceedings.

(3) If the answer to question (1) is “no”, and the voters recall three or more City Council Members, does a quorum of the City Council exist to conduct business until the May 2004 election even though Section 3.08 of the City Charter states that a quorum consists of five members of the City Council, not counting the Mayor?

If the City Council Members who are recalled do not continue to serve, and this leaves less than five Council Members in office, there would not be the five members who are required to constitute a quorum under Section 3.08 of the City Charter. The question is: will the number required to constitute a quorum be reduced by the number of City Council positions left vacant by the recall election? If not, the City government could not continue to function.

In *Nalle v. City of Austin*, 93 S.W. 141 (Tex. 1906), the Texas Supreme Court held, in determining what constituted a “majority of the whole council” in a vote to adopt a tax levy ordinance, that a vacant position caused by the death of a council member should not be included in determining the number of positions on the city council. In *City of Alamo Heights v. Gerety*, 264 S.W.2d 778 (Tex. Civ. App.- San Antonio 1954, writ ref. n.r.e.), the San Antonio Court of Appeals held, in determining what constituted a three-fourths vote of all members of the legislative body of the municipality in a zoning case, that the position of a member who was disqualified from voting would be treated as vacant and would not be counted.

Based on the above authorities, and because public policy should not require Haltom City to cease operating, it is arguable that the number of City Council Members required to constitute a quorum should be reduced by the number of positions that are vacant because the incumbents have been recalled. Their positions could remain vacant until they have been filled at an election. Under this scenario, there would not be any “public inconvenience” as discussed in question 1 above because although the removed Council Members do not continue to serve, a quorum would still exist and there would be no cessation of the functions of government.

Conclusion

I am requesting your guidance in resolving the above issues. Since the recall election will be held on February 7, 2004, I would appreciate an expedited response.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jane Nelson". The signature is written in a cursive style with a large, looping initial "J".

Senator Jane Nelson

Enclosure