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January 14, 2004

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OPINION COMMITTEE

The Attorney General of the State of Texas
Supreme Court Building
Attn: Opinions Committee
Post Office Box 12548
Austin, Texas 78711-2548
CERTIFIED MAIL NO: 7000 1530 0001 7588 2335

FILE # ML-43435-04
I.D. # 43435

Re: Request for Attorney General's opinion relative to Article XI, Section 11 of the Texas Constitution "Resign to Run" provision

Dear Sir/Ma'am:

Facts: The mayor/councilmember was elected to his two year term in May 2003. The Judge was appointed at the same time. The City of Pearsall is a Home Rule City and the position of mayor/councilmember is a non paying position. These officials have over a year left on their term and they have filed for the office of Frio County Commissioner/Constable. We also have three (3) police officers who have filed for the offices of County Constable/Sheriff. The council wants to know whether these officials may continue to hold their respective office after becoming a candidate for the office of County Commissioner/County Constable/Sheriff.

Information::

Section 3.02 Home Rule Charter (HRC) states as follows:

"If a member of the City Council shall file to become a candidate for nomination or election to any public office, other than that of member of the Council, he or she shall immediately vacate his or her place on the Council and the vacancy thereby created shall be filled as provided in Section 3.09 herein.

Section 3.03 Home Rule Charter (HRC) states as follows:

"If the Mayor shall become a candidate for nomination or election to any public office, other than Mayor, he or she shall vacate immediately his or her place as Mayor and the vacancy thereby created shall be filled as provided in Section 3.09.

Section 3.09 Home Rule Charter (HRC) states as follows:

“Vacancies in the City Council and the position of Mayor, where the same do not exceed two at any one time, shall be filled by a majority vote of the remaining councilmembers and shall serve only until the next general City Council election.

Section 9.02 Home Rule Charter (HRC) states as follows:

“The City Council may remove the Municipal Court Judge for the reasons and in the manner provided by state law.”

Section 8, Paragraph D of the Pearsall Police Department Policy Manual and Code of Conduct states as follows:

“No employee shall become a candidate for nomination or election of any public or political office.”

The focus in Sections 3.02 & 3.03 HRC is “shall immediately, vacate.” So what does that mean? Section 3.09 HRC describes a procedure by which the remaining members of the Council shall fill the vacancy by majority vote at a called council meeting. So at first glance, it appears that the council can easily remedy the vacant position, however there is more to the Charter to consider. In fact Section 2.03 HRC states as follows:

“The City shall have and exercise all powers conferred upon cities by what is known as the Home Rule Amendment, Article XI, Section 5, of the Constitution of the State of Texas”

Article XI, Section 5 of the Texas Constitution states as follows:

“The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Article XI, Section 11 of the Texas Constitution contains a “resign to run” provision applicable to an elected or appointed municipal officer whose term of office exceeds two years. This Article XI, Section 11 of the Texas Constitution pertains specifically to the term of office of City officers. It includes a provision for automatic resignation of elected or appointed municipal officials who become candidates for another office under certain circumstances. Article XI, Section 11 of the Constitution provides in part:

“A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

“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 of 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.

Discussion:

Deducing from the law, the Texas Constitution Article XI, Section 11 automatic resignation provision applies only to municipal officers whose term of office exceeds two years. Applying this law to our situation should these officials have to automatically resign? The law says No. Consider AG Opinion No. M-586 which concluded that “since the term of office of the Mayor of the City of Amarillo had not been extended beyond two years, Article XI, Section 11 of the Texas Constitution, did not effectuate an automatic resignation as mayor upon his candidacy for County Judge of Randall County. Similarly, AG Opinion No. JM-553 concluded that under Article XI, Section 11 of the Texas Constitution the mayor of a city whose term of office is 2 years does not automatically resign that office be becoming a candidate for County Judge at a time when his unexpired term of office as mayor exceeds one year. This particular opinion involved the mayor of Crystal City who was also a Justice of the Peace when he announced his candidacy for County Judge. Note that the “Automatic Resignation” provision did not apply simply due to the fact that if the person only serves a 2 year term he is not subject to the provisions of Article XI, Section 11 of the Texas Constitution for automatic resignation. What is the problem with this limitation? Sections 3.02 & 3.03 HRC states “Shall immediately vacate.” while Article XI, Section 11 Texas Constitution states that if the person only serves a 2 year term then he is not subject to the automatic resignation provision. HRC Section 21.05 states “if any provision of this charter is in conflict with existing Federal and/or State law, the applicable existing federal and/or state law shall govern and shall be reconciled with the remaining applicable charter provisions. Article XI, Section 5 Texas Constitution provides that no Home Rule Charter shall contain any provision inconsistent with the Texas Constitution. As noted in AG Opinion No. JC-0318 the constitutional requirement prevails over a provision in a home rule city charter.

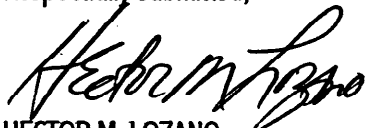
Conclusion:

Therefore, after due consideration of the issue and applicable law, this office takes the position that these officials do not have to resign their respective positions when they in fact become a candidate for another position at the County level. Even though Sections 3.02 & 3.03 HRC states the person “shall immediately vacate” the position, that clause is inconsistent with the “resign to run” provision of Article XI, Section 11 of the Texas Constitution which applies to city officers whose term of office exceeds 2 years. The Constitution states that these officials do not automatically resign because the term of office has not been extended beyond 2 years. There is no question that a conflict exists between the charter provisions HRC 3.02 & 3.03 and the Texas Constitution Article XI, Section 11 resign to run provision. The law is clear that the constitutional provision prevails in this conflict as authorized by HRC 21.05 and Article XI, Section 5 Texas Constitution.

Some of the council members disagree with this firm's opinion, TML's opinion and the Attorney General Opinions rendered in M-586, JM-553 and JC-0318 (see attached request). Therefore, we respectfully request an opinion from your office regarding the following issues:

1. Whether an uncompensated council member elected to a term of 2 years and who has more than 1 year remaining of his unexpired term who announces his candidacy for office of County Commissioner/Constable automatically resigns his office under Article XI, Section 11 of the Texas Constitution.
2. Whether Article XI, Section 11 of the Texas Constitution, the resign to run provision prevails over a Home Rule Charter provision stating "shall immediately vacate" under Article XI, Section 5 of the Texas Constitution.
3. Whether the appointed Judge, who serves a term of 2 years with compensation and has more than 1 year remaining of his unexpired term, who announces his candidacy for office of County Constable automatically resigns his office under Article XI, Section 11 of the Texas Constitution or under any other applicable provision.
4. Whether the Police officers fall within Article XI, Section 11 of the Texas Constitution and whether the resign to run provision applies to them. If said Article XI, Section 11 does not apply, whether these officers have to resign their position upon announcing their candidacy for an elected position.

Respectfully submitted,



HECTOR M. LOZANO

HML/ymm

xc: Files

Encl: as stated