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OPINION COMMITTEE

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April 1, 2016

(Via E-mail: Opinion.Committee@texasattorneygeneral.gov
and Certified Mail, RRR)

General Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for an Attorney General Opinion

Dear Attorney General Paxton:

Please accept this letter as a request for an Attorney General Opinion with respect to the following legal question:

Whether a member of the Board of Trustees of an Independent School District may simultaneously serve as a member of the City of Laredo Planning and Zoning Commission (hereinafter "Planning and Zoning Commission") where the two governmental entities share overlapping jurisdictional boundaries? The City of Laredo is a home rule municipality.

I submit the following legal brief on the issue for your consideration.

Both positions (trustee and planning and zoning commission member) should be considered public (civil) offices. The Board of Trustees is responsible for the "management of the (school) district." See, Tex. Educ. Code §11.051(a)(1). It may levy and collect taxes and issues bonds. *Id.* §11.152; authorize the sale of property held in trust for public school purposes, *Id.* 11.154; and adopt policies providing for employment and duties of school district personnel. *Id.* 11.1513. The Texas Supreme court has stated the following test for determining whether an

individual holds a public office: "The determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him (her) for the benefit of the public largely independent of the controls of others." *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955). A school board trustee should be considered a public officer within the test stated by the Texas Supreme Court in *Aldine*.

You should next consider whether members of the Planning and Zoning Commission are public officers. Zoning authority is delegated to municipalities by Local Government Code, chapter 211. To exercise the power authorized by this subchapter, the governing body of a home-rule city shall appoint a zoning commission. *See*, Tex. Loc. Gov't Code Ann. §211.007 (Vernon 1999). The legislature has authorized a city to delegate some parts of its sovereign power to the zoning commission it creates. *See, id.* 211.006(f) (city council may provide that vote of three-fourth of its members is required to overrule zoning commissioners' recommendation to deny proposed change to regulation or boundary); 211.007(b) (governing body of a home-rule city may not take action on a matter until it receives the final report of the zoning commission. In at least two Attorney General Opinions, your office has concluded that members of a planning and zoning commission were considered "civil officers of emolument" or "local public officials". *See*, Tex. Att'y Gen. Op. Nos. JM-704 (1987) and DM-309 (1994).

If the Planning and Zoning Commission exercises governmental powers delegated to it by the City of Laredo City Council, its members should also be considered public officers. The Planning and Zoning Commission of Laredo consist of nine (9) citizens of Laredo who are appointed by the city council for a term of four years. *See*, Chapter 24-1.1.1(a) of the Code of Ordinances for the City of Laredo. Among other things, the Planning and Zoning Commission is responsible for final approval of plats under chapter 212, Subchapter A of the Local Government Code. *See*, Tex. Loc. Gov't Code Ann. section 212.006 (Vernon 1999); Chapter 24-1.1.1.3(3) of the Code of Ordinances for the City of Laredo. As a final authority on plat approvals, members of the Planning and Zoning Commission clearly exercise a sovereign function of the government "for the benefit of the public largely independent of the control of others" within the *Aldine* test and should therefore also be considered be public officers.

Since both school trustees and city and planning and zoning commission members would be considered public officers under the above analysis, you should next consider whether holding both offices (school board trustee and planning and zoning commission member) violates Article XVI, section 40, of the Texas Constitution. Article XVI, section 40 of the Constitution prohibits an individual from holding more than one office of emolument. *See*, Tex. Const. art. XVI, §40. A member of the UISD Board of Trustees does not hold an office of emolument because the office of school trustee is not a compensated position. *See*, Tex. Educ. Code Ann. §11.061(d) (Vernon 1996) ("[t]he trustees [of a school district] serve without compensation. Similarly, members of the Planning and Zoning Commission serve without pay. *See*, Chapter 24-1.1.1.2 of the Code of Ordinances for the City of Laredo. Thus, Article XVI, section 40 should not be a bar for a person to hold both offices under consideration in this opinion request.

Absent a constitutional prohibition (Article XVI, section 40 of the Texas Constitution) against dual office holding, you should next consider the common-law doctrine of

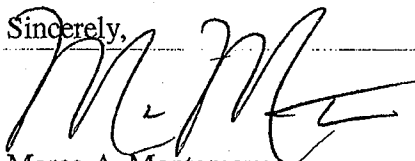
incompatibility which may prevent this dual service *i.e.* serving as both trustee and a member of the Planning and Zoning Commission. The doctrine of incompatibility has three facets. First, the common-law doctrine of incompatibility disqualifies all officers who have appointing power from appointing themselves to a different position. *See, Ehlinger v. Clark*, 3 S.W.2d 666, 673-74 (Tex. 1928). It is because of this obvious incompatibility courts have declared that all officers who have the appointing power are disqualified for appointment to the offices to which they appoint. *Id.* The common-law doctrine of incompatibility also prevents one person from holding an office and public employment if one is subordinate to the other. *See, Tex. Att'y Gen. Op JM-203* (1984). This self-employment aspect prohibits a person from holding both an office and an employment that the office supervises. *See, Tex. Att'y Gen. Op. No. GA-536* (2007). Because neither of the offices discussed in these Opinion request appoints or employs the other, you should next examine the question under *the conflicting-loyalties* incompatibility analysis to see if the individual can serve both offices. *See, Tex. Att'y Gen. Op. No. GA-328* (2005) (*emphasis added*).

The doctrine of conflicting-loyalties incompatibility prevents one person from holding two positions if the duties are inconsistent or in conflict. *See, Tex. Att'y Gen. Op. GA-307* (2005). In determining whether two offices are incompatible, the "crucial questions is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other." *See, State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). As discussed above, one of the powers and duties of the Planning and Zoning Commission involves final approval of plats. The United Independent School District, through its school board and from time to time, purchases real property. The real property is usually within the city limits of Laredo or within its extraterritorial jurisdiction. The development of such school district property will eventually involve the property being platted for development which must be approved by the Planning and Zoning Commission. Should a UISD School Board Trustee be appointed to the Planning and Zoning Commission the trustee may be faced with conflicting loyalty issues should the school district come before the Planning and Zoning Commission for a plat approval. If appointed to the Planning and Zoning Commission, the trustee's abstention when UISD platting issues are before the Planning and Zoning Commission would not resolve the conflicting loyalty issue.

Please be advised that if a person holds an office (school board trustee) and is appointed to another office (Planning and Zoning Commission) where the two offices cannot be legally held by the same person, such acceptance and qualification to the second office (Planning and Zoning Commission) may operate as a resignation of the former office (school board trustee). In other words given the two incompatible offices, the occupant of one office who assumes another will be held to have adopted or resigned the first. *See, Pruitt v. Glen Rose Independent School District No. 1*, 84 S.W.2d 1004, 1006, opinion adopted by (Tex. Comm'n App, 1935); *see also Tex. Att'y Gen. Op JM-133* (1984).

Given, the above brief, my office respectfully requests the Attorney General to render an Opinion regarding this issue on whether a UISD school board trustee can simultaneously hold the position of school trustee and also be member of the City of Laredo Planning and Zoning Commission. Please feel free to let us know if you require any further detailed information regarding this request. Thank you in advance for your assistance and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Montemayor', written over a horizontal line.

Marco A. Montemayor
Webb County Attorney

Enclosure: City of Laredo Code of Ordinances, Chapter 24 "Planning"