



Office of the
SECRETARY OF STATE

John Hannah, Jr.
SECRETARY OF STATE

June 11, 1992

EXECUTIVE DIVISION
P.O. Box 12697
Austin, Texas 78711-2697
(512) 463-5701

ELECTIONS DIVISION
P.O. Box 12060
Austin, Texas 78711-2060
(512) 463-5650

Disclosure Filings
P.O. Box 12070
Austin, Texas 78711-2070
(512) 463-5704

DATA SERVICES
DIVISION
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5609

SUPPORT SERVICES
DIVISION
Financial Management
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

Staff Services
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

STATUTORY FILINGS
DIVISION
Corporations
P.O. Box 13697
Austin, Texas 78711-3697
(512) 463-5555

Statutory Documents
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5654

Texas Register
P.O. Box 13824
Austin, Texas 78711-3824
(512) 463-5561

Uniform Commercial Code
P.O. Box 13193
Austin, Texas 78711-3193
(512) 475-2705

Ms. Diana L. Granger
City Attorney
City of Austin
Department of Law
Norwood Tower
114 West 7th Street
P. O. Box 1088
Austin, Texas 78767-8828

Election Law Opinion JH-3

Re: Application of the Texas Election Code to article IV,
section 6, of the Charter of the City of Austin

Dear Ms. Granger:

By letter of May 8, 1992, you requested my opinion, as chief election officer of the State of Texas, and asked what ballot format was required by the Texas Election Code (the "Code") in light of the Austin City Council's submission of an initiated ordinance and an alternative ordinance to the voters of the city on August 8, 1992.

Article IV, section 5, subsection (c), of the Austin City Charter allows the city "[a]t such election [to] submit to a vote of the qualified voters of the city [an] initiated ordinance without amendment, and an alternative ordinance on the same subject proposed by the council." The second paragraph of article IV, section 6, of the Charter provides as follows:

Where an initiated ordinance and an alternative ordinance proposed by the council are submitted, the ballot shall state the captions of each ordinance, clearly designating them "Ordinance No. 1" and "Ordinance No.

2," respectively, and shall set forth below the captions on separate lines the words "For Ordinance No. 1," "For Ordinance No. 2," and "Against Both Ordinances." Where an initiated ordinance and an alternative ordinance are submitted, each voter shall vote "For" only one ordinance or "Against Both Ordinances," and a vote for one ordinance shall be counted as a vote against the other ordinance.

(Emphasis added.)

The City of Austin is a home rule city and, as such, possesses all the rights and prerogatives set forth in its charter, which was adopted pursuant to the Texas Constitution. The constitution provides, in pertinent part, as follows:

Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. . . . 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

. . . .

Tex. Const. art. XI, § 5 (amended 1912 & 1991) (emphasis added).

Section 52.073 sets forth the law for voting squares and ballot instructions for propositions as follows:

(a) On a ballot on which a proposition is to appear, "FOR" and, below it, "AGAINST" shall be printed to the left of the proposition.

(b) A brace or other suitable device shall be printed to indicate which proposition each "FOR" and "AGAINST" applies.

(c) A square for voting shall be printed to the left of each "FOR" and each "AGAINST."

(d) Immediately above the propositions, the following instruction shall be printed: "Place an 'X' in the square beside the statement indicating the way you wish to vote."

(e) The authority responsible for prescribing the wording of a proposition may substitute "YES" and "NO" on the ballot for "FOR" and "AGAINST" if the authority considers those words more appropriate.

Tex. Elec. Code Ann. § 52.073 (Vernon 1986).

A conflict between the code and the Charter is apparent when one compares the underscored provisions of article IV, section 6, of the Charter, *supra*, with section 52.073. The courts, on numerous occasions, have rendered invalid home rule charter or ordinance provisions that were in conflict with subsequently adopted general laws enacted by the legislature. See, e.g., *Huff v city of Wichita Falls*, 48 S.W.2d 580, 582-83 (Tex. 1932); *City of Baytown v. Angel*, 469 S.W.2d 923, 925 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.).¹

Although the Code does not specifically address alternative propositions, it is our opinion that section 52.073 mandates a uniform propositional ballot format to be utilized in all elections in the State of Texas. A municipal election law authority has stated that "A municipality is preempted from acting on a matter about which the Election Code is silent if the municipal action would be contrary to a plan or scheme established by state law or if state law manifests a legislative intent to completely occupy the field of legislation of which the matter is a part." Glen G. Shuffler, *Texas Municipal Election Laws* § 1.03, at 4 (1992-93 rev. ed.) (citations omitted).²

¹We take notice of the fact that article IV, sections 5 and 6, of the Charter were adopted on January 31, 1953, and that article IV, section 6, was amended, in a fashion not germane to your inquiry, on April 1, 1967. We also take notice that section 52.073 was codified in the Code as of January 1, 1986. Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 13, 1985 Tex. Gen. Laws 802, 1076. We take further notice that the precursor of section 52.073, namely article 6.05, subdivision 8, of the former Texas Election Code of 1951, was added to that code as of August 28, 1967. Act of May 25, 1967, 60th Leg., R.S., ch. 452, 1967 Tex. Gen. Laws. 1026, 1030, repealed by Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 9(a)(1), 1985 Tex. Gen. Laws 802, 1076.

²For expositions by the courts on the doctrine of preemption, see generally:

It is well established that cities are precluded by [article XI, section 5, of the constitution] and by statute [sections 9.001-9.002, 9.005 of the Texas Local Government Code] from entering a field of legislation which has been occupied by general legislative enactments.

City of Baytown v. Angel, 469 S.W.2d 923, 925 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.) (citations omitted);

The charter and ordinances of a home rule city must be construed in light of constitutional and statutory provisions as they pertain to the charter provisions relating thereto. No home rule charter or ordinance passed under the home rule statute shall contain any provision inconsistent with the laws of the state.

The Texas Legislature has narrowed local control over ballot format, as demonstrated by legislative history. The current Code provides that "[e]xcept as otherwise provided by law, the authority ordering the election shall prescribe the wording of a proposition that is to appear on the ballot." Tex. Elec. Code § 52.072(a) (Vernon 1986) (emphasis added). In the precursor to that subsection, article 6.07 of the former Texas Election Code of 1951, the legislature gave a great deal of flexibility to municipalities in preparing the ballot format for the submission of propositions:

The form in which any proposition or question to be voted on by the people of any city, county or other subdivision of the State shall be submitted, shall be prescribed by the local or municipal authorities submitting it.

Act of May 30, 1951, 52nd Leg., R.S., ch. 492, § 1, art. 63, 1951 Tex. Gen. Laws 1097, 1123, repealed by Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 9(a)(1), 1985 Tex. Gen. Laws 802, 1076. Thus, when the current Austin City Charter was adopted in 1953, the provisions of article IV, section 6, were consistent with the broad language of the Code as it then existed.

In 1967, however, the legislature amended article 6.07 by adding a new subdivision 3 thereto to clarify that municipal authorities prescribe the form in which a local proposition is to be submitted only when the form has not been prescribed by statute, charter, or ordinance:

The form in which any proposition or question to be voted on by the people of any city, county or other subdivision of the State shall be submitted, unless prescribed by statute, city charter, or ordinance, shall be prescribed by the local or municipal authorities submitting it.

Act of May 25, 1967, 60th Leg., R.S., ch. 452, § 3, 1967 Tex. Gen. Laws 1026, 1030, repealed by Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 9(a)(1), 1985 Tex. Gen. Laws 802, 1076. In a case involving the City of Austin, a court relied on this language and

City of Corpus Christi v. Unitarian Church of Corpus Christi, 436 S.W.2d 923, 927 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.);

Under circumstances in which the state has a sovereign interest or general concern and has enacted constitutional and legislative regulations covering those interests, our courts have held that a municipality is prohibited from passing ordinances in conflict with these state regulations.

Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407, 411 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

stated that "In general, the form of ballot proposition to be submitted to the voters of a city is prescribed by municipal authority unless such form is governed by statute, city charter, or ordinance." Bischoff v. City of Austin, 656 S.W.2d 209, 211-12 (Tex. App.—Austin), issuance of mandate conditionally stayed, 662 S.W.2d 156 (Tex. App.—Austin 1983), appeal dismissed and cert. denied, 466 U.S. 919 (1984). Whatever latitude a municipality may have had in prescribing a propositional ballot format under former article 6.07, or, arguendo, under former article 6.07, subdivision 3, ceased to exist with that article's repeal and the advent of the current Code in 1985. Act of May 13, 1985, 69th Leg., R.S., ch. 21, § 9(a)(1), 1985 Tex. Gen. Laws 802, 1076.

Under the unambiguous wording of article XI, section 5, of the constitution, the provisions of a city's charter must, therefore, not be in conflict with the Code. The Code itself states that "This code supersedes a conflicting statute outside this code unless this code or the outside statute expressly provides otherwise." Tex. Elec. Code Ann. § 1.002 (Vernon 1986). The procedures in home rule city charters for conducting elections must be in consonance with those set forth in the Code. Vela v. State, 572 S.W.2d 128, 130 (Tex. Civ. App.—Corpus Christi 1978, no writ). Moreover, a court has specifically held the provisions of section 52.073 to be mandatory, and not directory. Wright v. Graves, 671 S.W.2d 586, 590 (Tex. App.—Beaumont 1984, no writ). Thus, in the event of a conflict between a city charter ballot format and the Code, the former must yield to the latter.

We have examined the proposed ballot formats submitted with your letter as Attachments II, III(a), III(b), and III(c) and find each of them to be defective as a matter of law. First, Attachments II and III(a) do not comport with the requirement of section 52.073(a)-(c) that, to the left of each proposition, "FOR" and, below it, "AGAINST", must be printed. Second, none of the attachments comports with section 52.073(d) because each of them contains additional ballot instructions that are not authorized by the Code. The court's view of the ballot in Wright, supra, could well be said of the ballot format and instructions found on the attachments:

The basic fault of this ballot is that the voter must vote for one of the propositions to vote against the other. Therefore, obviously the submitted ballot did not give the voters all the alternatives to which they were legally entitled.

671 S.W.2d at 590.

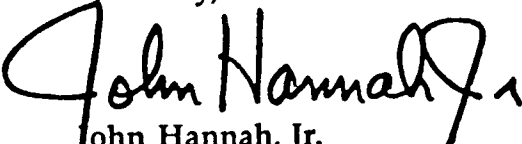
Accordingly, you are advised that section 52.073 of the Code requires that alternative ballot propositions authorized by your charter cannot legally be presented to the voters in an "either-or" fashion. Rather, such propositions must be submitted in a "for or against" format. This format requires that the voters must be given the choice of voting for or against each proposition, even though the propositions may be mutually exclusive and might not be capable of being enforced simultaneously. This opinion does not address the consequences of placing inconsistent or mutually exclusive propositions on

the ballot. In the past, we have advised cities against placing conflicting propositions on the same ballot.

SUMMARY

Under the express terms of article XI, section 5, of the Texas Constitution, the provisions of a city charter must not be inconsistent with the Texas Election Code. The Texas Election Code mandates that propositions on a ballot appear in a "for or against" format and not in an "either-or" format. To the left of each proposition, "FOR" and "AGAINST" must be printed. The ballot instruction must be that authorized by section 52.073(d) of the Texas Election Code, and no additional or conflicting ballot instructions are authorized.

Sincerely,


John Hannah, Jr.
Secretary of State

Audrey Selden
Assistant Secretary of State

Prepared by Austin C. Bray, Jr.
Assistant General Counsel
Elections Division

APPROVED:
OPINION COMMITTEE
Tom Harrison, Chair
Melanie Best
Tony Brocato
Ann McGeehan
Fortunato Paredes
Cindy Stapper