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House of Representatives

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Opinion Committee

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FILE # 11-40123-98

I.D. # 40123

RQ-1104

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attn: Opinions Committee

Re: Request for Attorney General's Opinion regarding the Constitutionality of Acts 1997, 75th Leg., Ch. 1349, Section 75, Effective September 1, 1997

Dear General Morales:

Among the bills passed during the 1997 Legislative Session which became effective September 1, 1997 was H.B. 331 (Chapter 1349, Tex. Gen. Laws) entitled "An Act Relating to Certain Election Processes and Procedures." Section 75 of Chapter 1349 added Section 49.072 to the Texas Water Code. That section reads as follows:

§ 49.072. Director's Candidacy for Other Office: Ineligibility

- a. A person serving as a director of a district who becomes a candidate for another office is no longer qualified to serve as a director.
- b. In this section, "candidate" has the meaning assigned by Section 251.001, Election Code.

Texas Water Code Ann. §49.072.

On its face, this new statute appears to be a self-executing provision. It would automatically remove a sitting water district director from office who is otherwise qualified to serve simply by virtue of his or her becoming a "candidate" for any other office. The section does not contain any provision for judicial review or action in connection with the "removal" of the sitting office holder. The section also fails to make any distinction between directors who may have become a "candidate" prior to the effective date of the statute, September 1, 1997, and those directors who became a "candidate" after that date.

I am concerned that on its face, the statute may run afoul of the separation of powers doctrine under the Texas Constitution and, in particular, the provisions of Article XV, Section 7 of the Texas Constitution. Additionally, in light of the penal nature of the statute, I am concerned about the use of the definition of "candidate" from Section 251.001 of the Election Code. That definition is extremely broad and, if relied upon as the basis for the automatic disqualification of sitting office holder without any opportunity for or recourse to the due process afforded through judicial review, it would seem to be unconstitutionally vague.

Finally, I am concerned that the statute fails to clarify whether it applies to directors who are not "elected." As you know, there are certain directors who are appointed to their office, e.g., directors of river authorities. As the statute was enacted in a bill dealing with changes to the Election Code, and relies upon the Election Code for its definition of "candidate," it seems doubtful that it would apply to a director who was appointed not elected.

As a result of the issues raised by the statute, I am writing to request your opinion with regard to the following questions:

1. **Is §49.072 of the Texas Water Code unconstitutional on its face because it violates the exclusive removal requirements mandated by Article XV, Section 7 of the Texas Constitution insofar as §49.072 appears to be self-executing and automatically remove an otherwise qualified director, and does not provide for a trial or judicial removal of directors as required by the Constitution .**
2. **Assuming that §49.072 is not unconstitutional on its face as being in violation of Article XV, Section 7 of the Texas Constitution, is §49.072 unconstitutional or otherwise invalid if applied retroactively to a qualified director who became a "candidate" before the effective date of the statute, i.e., September 1, 1997.**
3. **Assuming that §49.072 is not unconstitutional or otherwise invalid, does a director who becomes "disqualified" continue to serve until a successor director becomes "qualified"?**

To assist you in your analysis of the issues presented, and the discussion below, I have set forth my understanding of the applicable law that gives rise to my concern regarding the constitutionality of the statute. I have addressed each question separately in the order presented above. I am also attaching a copy of a memorandum I received from Steve Collins in the Legislative Council's office in response to my inquiry. While I generally concur with Mr. Collins' conclusions to question numbers 2 and 3, I am not comfortable with his answer to question number 1. Because the potential application of this statute may impact the more than 5000 water district directors around the State, I thought it prudent to seek your counsel on these issues. As the statute is now in effect, the favor of a prompt response from you would be greatly appreciated.

1. **Is §49.072 of the Texas Water Code unconstitutional on its face because it violates the exclusive removal requirements mandated by Article XV, Section 7 of the Texas Constitution insofar as §49.072 appears to be self-executing and automatically remove an otherwise qualified director, and does not provide for a trial or judicial removal of directors as required by the Constitution .**

Article XV, Section 7 of the Texas Constitution provides as follows:

The Legislature shall provide by law for the trial and removal from of office of all officers of this State, the modes for which have not been provided in this Constitution.

Tex. Const. Art. XV, §7 (emphasis added). The broad applicability of this constitutional limitation was expressed by the Austin Court of Civil Appeals in Knox v. Johnson. In that case the court was called upon to construe the authority of "Board of Control" to remove the superintendent of the State School in San Antonio based upon its own determination pursuant to former Articles 691 and 3184, Texas Revised Civil Statutes. At issue, in part, was whether the superintendent was an "officer of the state" within the meaning of Article XV, §7 of the Texas Constitution. In reaching its conclusion, the Court opined that "[t]he language and necessary implication of Sec. 7, art. XV of the Constitution itself negatives any restriction of the term 'all officers of this state'." See Knox v. Johnson, 141 S.W.2d 698, 701 (Tex. Civ. App. - Austin 1940, error ref'd).

The Knox Court had followed the Supreme Court's rationale in a 1934 ruling declaring that the Speaker of the House did not have the power to remove a member of the Texas Relief Commission he had appointed, notwithstanding express statutory authorization. See Dorenfield v. State, 73 S.W.2d 83, 86 (Tex. 1934). In Dorenfield the Court quoted the language of Article XV, Section 7, and explained that "no other meaning can be reasonably ascribed to the Texas Constitution than as requiring trial to precede removal," because of the safeguards provided by trial. See id. at 86 (emphasis added).

Finally, in the Commentary following Article XV, Section 7 in Vernon's Constitution of the State of Texas Annotated, the "authority" of the Governor to remove state officials pursuant to statute is seriously questioned. After quoting the provisions of Article 5967, Texas Revised Civil Statutes, the commentator notes:

It is very doubtful whether the governor, under the authority if this statute has any independent power for removal of state officials, for this section of Art. 15 [Section 7] definitely provides for "trial and removal" and it is questionable if any method of removal which does not make provision for a trial would be recognized by the courts as complying with the constitution.

See Vernon's Constitution of the State of Texas Annotated - Commentary to Article XV, Section 7.

2. Assuming that §49.072 is not unconstitutional on its face as being in violation of Article XV, Section 7 of the Texas Constitution, is §49.072 unconstitutional or otherwise invalid if applied retroactively to a qualified director who became a "candidate" before the effective date of the statute, i.e., September 1, 1997.

Article I, Section 16, of the Texas Constitution prohibits "retroactive legislation." See Tex. Const. Art. I, §16. Under the rules of statutory construction developed by Texas Courts and codified by the Legislature in the "Code Construction Act," a statute is presumed to be prospective in its operation, unless expressly made retrospective. See Tex. Gov't Code Ann. §311.022; Reames v. Police Officers' Pension Bd., 928 S.W.2d 628, 631 (Ct. App. - Houston [14th District] 1996, no writ); Davis v. State, 846 S.W.2d 564, 569-570 (Ct. App. - Austin 1993, not writ); Houston I.S.D. v. Houston Chronicle Pub. Co., 798 S.W.2d 580, 585 (Ct. App. - Houston [1st District] 1990, error denied). Accordingly, Section 49.072 presumptively does not apply to a director who became a "candidate" before September 1, 1997.

In Opinion H-226 (1974), Attorney General John Hill was called upon to interpret the "retroactive" aspect of Senate Bill 807 (Acts 1973, 63rd Leg., ch. 635, p. 1748) relating to the qualifications for membership on the governing boards of certain districts created pursuant to Article III, Section 52 and Article XVI, Section 59 of the Texas Constitution. The legislation, in part, contained language that declared a person to be "disqualified to serve on the board of a district in five situations." At issue was whether the provision could be interpreted to apply to a director who was sitting on a board of directors prior to the effective date of the legislation, August 27, 1997.

According to H-226, application of the disqualification provisions to a director elected to the board before the effective date of the legislation "would be considered unconstitutional by the courts as violative of Article 1, [Section] 16, of the Texas Constitution, which disqualifies retroactive legislation adversely affecting vested rights." See Tex. A.G. Op. H-226, p. 4 (1974) (citing Deacon v. City of Euless, 405 S.W.2d 59 (Tex. 1966); compare Childress County v. Sachse, 310 S.W.2d 414 (Tex. Civ. App. - Amarillo), writ ref'd n.r.e., 312 S.W.2d 380 (Tex. 1938)). Recognizing the judicial rule of construction that assumes the Legislature intended a statute to be applied in a manner which does renders its implementation constitutional, General Hill opined that reasonable construction of the act was that it was to be applied "prospectively." See Tex. A.G. Op. H-226 (1974).

Based upon this prior opinion construing a similar disqualification statute and the express language of Section 311.022, Gov't Code, it would appear that if Section 49.072 is not in violation of Article XV, Section 7, that it is to be applied prospectively. Accordingly, a director of a water district that became a "candidate" for another office prior to September 1, 1997, is not disqualified to continue to serve as a director.

3. Assuming that §49.072 is not unconstitutional or otherwise invalid, does a director who becomes "disqualified" continue to serve until a successor director becomes "qualified"?

Article XVI, Section 17, of the Texas Constitution provides:

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

See Tex. Const. Art. XVI, §17. The constitutional "holdover" provision should prevail.

The purported "disqualification" created by the statute is neither a case of "dual office holding," which is prohibited by Art. XVI, §40 of the Constitution, nor is it a "removal" from office that would preclude the director from continuing to hold office until a successor qualified. See generally Manning v. Harlan, 122 S.W.2d 704 (Tex. Civ. App. - El Paso 1938, writ dism'd). Accordingly, assuming that Section 49.072 serves to "disqualify" a director of a district, pursuant to Article XVI, Section 17, it would appear that the director would continue to "holdover" in office and perform his duties until such time as a replacement director qualified for the office. See Tex. A.G. Op. H-1224 (1978).

Again, as the validity of Section 49.072 may significantly impact the orderly business of water districts across the state, I would request that you consider the issues presented herein on an expedited basis. Your assistance and guidance in resolving these issues is greatly appreciated. Should you have any questions about the matters outlined herein, please feel free to call me.

Sincerely,



Ron Lewis
Chair, County Affairs Committee
Texas House of Representatives