



The State of Texas  
House of Representatives

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OPINION COMMITTEE

FILE # ML-42871-02

I.D. # 42871

RQ-0626-jc

October 24, 2002

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

Re: Request for Attorney General Opinion; Proposed ethics provisions for City of Seguin

Dear General Cornyn:

The City of Seguin, Texas (the "City"), is a home rule city organized under the laws of the State of Texas. The City has a city manager form of government, overseen by a nine-member council of elected officials, including the mayor. Over the past few months, the Seguin City Council has been debating the passage of an ethics ordinance, the first of its kind for the City.

Two provisions of the proposed ordinance have been the cause of particularly heated debate. The first, which would prohibit a councilmember who serves on the board of a non-profit organization from voting on funding requests for that organization, specifically provides as follows:

*Nonprofit board membership.* While membership is encouraged, a councilmember who serves on the board of a public or private nonprofit organization shall have a voice but no vote on any funding request or contract by that organization, unless the organization has a board of directors or trustees appointed in whole or in part by the city council.

The second provision would prohibit councilmembers from participating in certain political activities on behalf of other municipal candidates, as follows:

*Political activity.*

1) *General rule.* Current members of city council who are seeking reelection may engage in any campaign activity on behalf of their own campaign efforts. However, councilmembers are prohibited from taking part in the management, affairs, or political campaign of any other municipal candidate. The following activities are the only activities that councilmembers may engage in on behalf of a municipal candidate:

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- The placement of campaign signs on premises owned by the councilmember.
- The placement of bumper stickers on personal vehicles.
- Attendance at a political rally or function for a city council candidate, so long as the councilmember does not actively participate in the rally or function.
- The donation of a political contribution that does not exceed the statutory limit for nonreportable contributions.

Local research by various interested parties into the legality of these proposed provisions has resulted in inconclusive and often conflicting opinions. For example, as to the first provision relating to non-profit board membership, Tx. Atty Gen Op. No. H-1309 (1978) seems to indicate that the proposed provision merely restates what already constitutes a common law conflict of interest. Opponents of the provision have argued that it conflicts with Section 171.009 of the Texas Local Government Code, which states that it is lawful for a local public official to serve as a member of the board of a private, nonprofit corporation, as long as they received no compensation or other remuneration.

As to the provision restricting the political activity of councilmembers on behalf of other municipal candidates, at first glance the provision seems to inhibit constitutionally protected rights of free speech and association, calling for strict scrutiny. See, e.g., Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). On the other hand, the provision closely tracks the language of the federal Hatch Act and other state provisions restricting political activity by state employees and appointees, which have been found to withstand strict scrutiny by the courts and the Texas Attorney General. See United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 412 U.S. 548 (1973); Tx. Atty. Gen. Op. No. DM-408 (1996); Tx. Atty. Gen Op. No. MW-243 (1980); Tx. Atty. Gen. Op. No. MW-149 (1980). Admittedly, however, the provision at hand is different in that it relates to the political activities of elected officials.

Given this lack of clarity on the issues, the Seguin City Council has asked that I submit the following questions:

As to the provision relating to non-profit board membership:

- Does the prohibition against a city councilmember voting on funding requests for non-profit organizations upon which he or she sits as a board member already exist in the common law or elsewhere?
- If enacted, would this provision unlawfully prohibit a councilmember from sitting on the board of a non-profit organization which receives funding from the City?

As to the provision relating to political activities of councilmembers on behalf of municipal candidates:

- Does the prohibition of certain political activities by councilmembers violate any

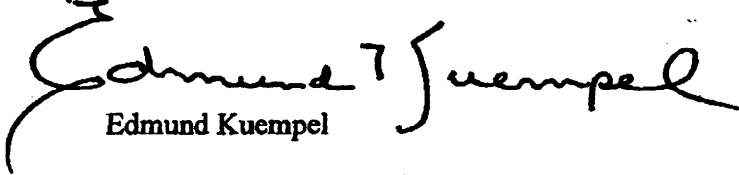
constitutional right of free speech or association?

And finally:

- In general, are there any other legal reasons why either of the above two provisions could not be enacted by the Seguin City Council?

If you require any further information, please do not hesitate to contact Kerri Davidson in my office at 463-0602.

Sincerely,



Edmund Kuempel

EK:kd

xc: Seguin Mayor Mark Stautzenberger (via fax (830) 401-2499)  
Seguin City Manager Jack Hamlett (via fax (830) 401-2499)  
Seguin City Attorney Angela Dickerson-Nickel (via fax (830) 379-7228)