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April 29, 2004

The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-12548

Re: Request for Attorney General Opinion

FILE # ML-43689-04  
I.D. # 43689

Dear Attorney General Abbott:

I am seeking an opinion from your office on behalf of the City of Garland (the "City"). Please accept this letter as a request for your opinion on the following questions:

1. Whether under the current language of Article XI, Section 11, of the Texas Constitution, a Garland Council member automatically resigned from his seat by filing for election to the position of Mayor, notwithstanding City Charter provisions to the contrary?
2. If so, whether the City is required to hold a special election in advance of the May 15, 2004, general election to fill the unexpired term of the Council member?
3. Whether Article XI, Section 11, requires that such a special election be held at large rather than by the voters of the single district represented?

#### Statement of Facts

The City of Garland is a home-rule municipality having a "Council-Manager" form of government. The City Council consists of a Mayor who is elected at large and eight Council members who are elected within single-member districts. Each council member is required to be a resident of the district in which he or she resides. The City has been electing its Councilmembers from single-member districts since 1978.

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At the beginning of the year 2000, the City Charter provided that the Mayor and Council members serve for two-year terms. It also provided that any Council member filing as a candidate for another office, including the office of Mayor, resigned his or her seat on the City Council. In May of 2000, the City of Garland held a special home-rule election to amend the City Charter.<sup>1</sup> The proposed amendments modified the “resign to run” provision, allowing Council members to become candidates for Mayor without resigning their Council seats. The impetus behind this proposed change was a series of prior elections where several Council members resigned to run for Mayor, including one instance where three of the eight positions were resigned concurrently. Garland citizens had expressed their displeasure that their elected representatives on the Council were not allowed to continue their representation and requested the change. The 2000 amendments also expanded the terms of office for the Mayor and Council members from two years to three years. The citizens of the City of Garland adopted these amendments in the May 2000 election.

Under these newly amended provisions, Michael Holden was elected to a three-year term as the Garland City Council’s District 1 representative in the May 2001 general election.<sup>2</sup> In the following year, Council member Holden filed as a candidate for the office of Mayor. That general election was held in May 2002. Mr. Holden’s bid for the office of Mayor was not successful.

Mr. Holden has continued to act as a member of the City Council since that time. The question recently has been raised as to applicability of the 2000 Charter provisions in view of Article 11, Section 11, of the Texas Constitution – both the former language of that section with the Attorney General’s interpretation of the same and the language of the 2001 amendment of that section. Specifically, the issues are, in light of the amended language and the provisions of the City Charter, whether Mr. Holden had effectively resigned his position on the Garland City Council by filing to run for Mayor. If so, the question then arises as to whether the City is now required to hold a special election to fill the empty seat, given that Mr. Holden’s term expires in May of this year and a general election to fill the seat will be held in less than 120 days.<sup>3</sup> A third issue is whether such a special election is required by the language of Article XI, Section 11, as amended, to include all qualified voters of the City, at large, rather than solely the voters of the district represented.<sup>4</sup>

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<sup>1</sup> Both the single-member districts and the 2000 charter changes were reviewed and cleared by the United States Justice Department prior to the May 2000 election.

<sup>2</sup> Council member Holden’s election was also certified by the U.S. Justice Department.

<sup>3</sup> The upcoming general election date is May 15, 2004, little more than 60 days from the date of this request. Mr. Holden has filed as a candidate for reelection to the same seat.

<sup>4</sup> It should be noted that the Garland City Council has placed an amendment to the City Charter on the May ballot which would reverse the changes made in 2000. If adopted by the citizens of Garland, the amendments would reinstate the “resign to run” provision for the office of Mayor and shorten terms of office to two years.

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## **Constitutional and Charter Provisions**

Below are the provisions of the Texas Constitution on which I seek your opinion. Also, recognizing that your office does not express opinions on the interpretation of local charters or ordinances, I am including herewith the relevant sections of both the current Garland City Charter and the proposed amendments to the charter to assist your analysis.

### Texas Constitution (current language)

#### **Article XI § 11. Term of office exceeding two years in home rule and general law cities; vacancies**

Sec. 11. (a) 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, that such officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies.

(b) A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.

#### **Article XVI § 65. Persons holding certain public offices; candidacy for election to constitute resignation of office**

Sec. 65. (a) This section applies to the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.

(b) If any of the officers named herein 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 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

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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.

Texas Constitution  
(Former language of Article XI, Section 11, before 2001 amendment)

**Article XI § 11. Term of office exceeding two years in home rule and general law cities; vacancies**

Sec. 11. 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 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.

A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.

Current City of Garland Charter (as amended May 2000)

**Article III Sec. 1. Number, terms, Council districts, etc.**

The Council shall consist of nine (9) members consisting of a Mayor and eight (8) Councilmembers. The Mayor and the eight Councilmembers shall be elected for terms of three (3) years each. The term lengths provided by this paragraph shall become effective upon and after May 1, 2001.

The Mayor shall be nominated and elected by the qualified voters of the entire City and may reside anywhere within the City. The eight Councilmembers shall be elected from eight (8) districts

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established by ordinance and shall be nominated and elected by the qualified voters of the respective Council district of such member.

One (1) Councilmember shall be elected from each of the eight districts established by ordinance. The districts shall be designated as District 1, 2, 3, 4, 5, 6, 7 and 8. A candidate for Councilmember must reside at the time of his or her nomination, at the date of his or her election, and during his or her tenure of office, within the Council district that the candidate desires or has been elected to represent. Failure to continuously reside within the district from which a Councilmember is elected, other than due to a change resulting from realignment of Council district boundaries, shall constitute immediate termination of office.

A person who has served as a member of the Council other than Mayor for two (2) consecutive three-year terms shall not again be eligible to become a candidate for, or to serve in, any district on the Council except Mayor until at least one (1) complete three-year term has elapsed. A person who has served two (2) consecutive three-year terms as Mayor shall not again be eligible to become a candidate for Mayor until at least one (1) complete three-year term has elapsed. A "term," as used in this paragraph, shall include any period of service during a term when that period is in excess of one (1) year.

Within one year after a decennial federal census as mandated by Article I § 2 of the United States Constitution has been performed and finalized, and each five years thereafter, prior to the calling of the regular City election, the Council shall redivide and readjust by ordinance the boundaries of the eight Council districts of the City for the purpose of keeping such districts as nearly equal in population as is practical.

In order to implement the three-year terms made effective by this Section, Councilmembers for Districts 1, 2, 4 and 5 shall be elected in 2001, and the Mayor and Councilmembers for Districts 3, 6, 7 and 8 shall be elected in 2002. (Ord. No. 4184, 2-16-88; Ord. No. 4208, 5-10-88; Ord. No. 5443, 2-15-00; Ord. No. 5463, 5-9-00)

#### **Article III Sec. 5. Vacancies.**

When a vacancy on the Council occurs, a special election shall be held to elect a successor to fill the unexpired term; provided, however, if such vacancy occurs within ninety (90) days prior to a general City election, then no special election shall be held. (Ord. No. 4184, 2-16-88; Ord. No. 4208, 5-10-88)

#### **Article III Sec. 11. Resign for candidacy.**

If, at any time, any member of the Council, or an appointive officer, boardmember or commissioner, files to become a candidate in any general, special or primary election for any office of profit or trust under the laws of this state or the United States other than the office then held,

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such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to this Charter in the same manner as other vacancies for such office are filled; provided, however, that a member of the Council who is not also a candidate for another position on the Council, including the office then held, may be a candidate for Mayor and such candidacy shall not constitute an automatic resignation. (Ord. No. 4184, 2-16-88; Ord. No. 4208, 5-10-88; Ord. No. 5443, 2-15-00; Ord. No. 5463, 5-9-00)

Proposed City of Garland Charter Amendments (set for election May 15, 2004)

Amending Section 1, "Number, terms, Council districts, etc." of Article III, AThe Council" of the Charter to provide for two year terms of office for the mayor and other members of the City Council beginning with elections held in 2004; to provide a term limitation of three two-year terms; and to provide a minimum separation of service of six years so that the same shall read as follows:

(A) The Council shall consist of nine (9) members consisting of a Mayor and eight (8) Councilmembers. The Mayor and the eight Councilmembers shall be elected for terms of two (2) years each. The term lengths provided by this paragraph shall become effective upon and after May 15, 2004.

(B) The Mayor shall be nominated and elected by the qualified voters of the entire City and may reside anywhere within the City. The eight Councilmembers shall be elected from eight (8) districts established by ordinance and shall be nominated and elected by the qualified voters of the respective Council district of such member.

(C) One (1) Councilmember shall be elected from each of the eight districts established by ordinance. The districts shall be designated as District 1, 2, 3, 4, 5, 6, 7 and 8. A candidate for Councilmember must reside at the time of his or her nomination, at the date of his or her election, and during his or her tenure of office, within the Council district that the candidate desires or has been elected to represent. Failure to continuously reside within the district from which a Councilmember is elected, other than due to a change resulting from realignment of Council district boundaries, shall constitute immediate termination of office.

(D) A person who has served as a member of the Council other than Mayor for three (3) consecutive two (2) year terms shall not again be eligible to become a candidate for, or to serve in, any district on the Council except Mayor until at least one complete two (2) year term has elapsed. A person who has served three (3) consecutive two (2) year terms as Mayor shall not again be eligible to become a candidate for Mayor until at least one complete two (2) year term has elapsed. Provided further that no member of the City Council shall serve more than six (6) years consecutively in any district, or as Mayor, or any combination thereof, until two (2) years has elapsed from the end of six (6) years of

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consecutive service. A "term", as used in this paragraph, shall include any period of service during a term of office when that period is in excess of one (1) year.

(E) Within one year after a decennial federal census as mandated by Article I ' 2 of the United States Constitution has been performed and finalized, and each five years thereafter, prior to the calling of the regular City election, the Council shall redivide and readjust by ordinance the boundaries of the eight Council districts of the City for the purpose of keeping such districts as nearly equal in population as is practical."

Amending Section 5, "Vacancies", of Article III, "The Council" of the Charter to provide for the holding of a special election in the event of a vacancy on the Council occurring more than 120 days prior to a general City election so that the same shall read as follows:

"When a vacancy on the Council occurs, a special election shall be held to elect a successor to fill the unexpired term; provided, however, if such vacancy occurs within one hundred twenty (120) days prior to a general City election, then no special election shall be held, except as otherwise provided by state law."

Amending Section 11, "Resign for candidacy", of Article III, "The Council" of the Charter to provide for the automatic resignation from office upon filing for candidacy (as defined by State law) for another office so that the same shall read as follows:

"If, at any time, any member of the Council, or any officer, boardmember or commissioner appointed by the Council, files to become a candidate (as defined by State law) in any general, special or primary election for any office of profit or trust under the laws of this State or the United States other than the office then held, such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to this Charter in the same manner as other vacancies for such office are filled."

### **Comment**

Attorney General Opinion No. JC-0318 (the "Georgetown opinion") dealt with issues similar to those presented here. In that situation, the City of Georgetown had extended the terms of its mayor and city council members from two to three years. A council member filed to run for mayor with more than a year remaining in his council term. As with Mr. Holden, that council member was not elected mayor and continued to serve on the council. The opinion was rendered that the council member had resigned automatically under the provisions of Article XI, Section 11. The opinion further stated that while the law was clear that the council member remained in office until a successor was qualified, he could not continue do so until the next general election; a special election was required to fill the seat.

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The situation before you in this request is distinguishable, primarily because Article XI, Section 11, of the Texas Constitution has been amended since the Georgetown opinion was issued. In addition to inserting subsection designations, the amendment significantly altered the “automatic resignation” provisions relied upon in that opinion. Where Article XI, Section 11, now states (in subsection (a)), “provided, however, that such officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies,”<sup>5</sup> the section formerly stated:

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 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.<sup>6</sup>

At issue in the Georgetown opinion was whether the office of Mayor for the City of Georgetown was “an office of profit or trust” as contemplated by the former language of Article XI, Section 11. The current language of that section, however, no longer includes the “office of profit or trust” language. Instead, it provides for automatic resignation “in certain circumstances” as articulated in Article XVI, Section 65(b). That subsection (b) does include the “office of profit or trust” language, but it also clearly states that it applies only to the “officers named herein,” referring to the listing of certain specific offices in subsection (a). No municipal officers are included in that list. There is confusion about whether the amended language of Article XI, Section 11, and Article XVI, Section 65(b), operate together in the same fashion as the former language of Article XI, Section 11, especially given the apparent conflict in the language of 65(b) limiting its application to those officers enumerated in 65(a). It is unclear, in other words, whether the “certain circumstances” delineated in the new Section 65 are the same as those clarified in the Georgetown opinion.

Adding to this confusion is the body of case law indicating that the courts look with disfavor on any constitutional or statutory interpretation which would shorten the term of a sitting official. The Supreme Court of Texas has stated that “[a]ny constitutional or statutory provision which restricts the right to hold public office should be strictly construed against ineligibility.”<sup>7</sup>

The amended Article XI, Section 11, went into effect on November 6, 2001 – after Mr. Holden was elected to office as a Council member, but before he filed and ran as a candidate for Mayor. The City

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<sup>5</sup> Texas Constitution Art. XI § 11 (adopted Nov. 4, 1958; amended Nov. 6, 2001).

<sup>6</sup> Texas Constitution Art. XI § 11 (adopted Nov. 4, 1958).

<sup>7</sup> *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964). See also *In re Saenz*, 990 S.W.2d 461, 464 (Tex. App. – Corpus Christi 1999, no writ) (“We will strictly construe any language tending to shorten a term of office against such a construction, and will require clear and convincing language to accomplish that end.”) and *Manry v. McCall*, 22 S.W.2d 348 (Tex. App. – Beaumont 1929, no writ).

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is seeking guidance as to the applicability of Article XI, Section 11, both in its previous form as interpreted by the Georgetown opinion, and as amended, in conjunction with Article XVI, Section 65(b).

As to the third question raised, whether Article XI, Section 11, requires a special election filling the unexpired term of a council member who has automatically resigned to be conducted at large, in 1984, then-Attorney General Jim Maddox issued Opinion No. JM-0179 (the “Maddox opinion”), in which he opined that “[a] home rule city is authorized by Article XI, Section 11, of the Texas Constitution to adopt four-year terms for municipal officials elected from single-member districts.”<sup>8</sup> In so holding, the opinion stated:

When Section 11 of Article XI was approved by the voters in November 1958, single-member districts for city council members were not common. Thus, it was clearly not within the contemplation of the voters, in approving the amendment, to rule out the possibility of four-year terms for persons elected from single-member districts. The purpose of the underscored language of amendment was only to ensure that a majority vote, rather than a plurality vote, of the qualified voters so voting is necessary in an election for members of the governing body of a home rule city; the amendment was not intended to address whether such members were to be elected at large or by district.<sup>9</sup>

However, the Georgetown opinion, issued in December 2000, includes language that puts in doubt whether the holding of the Maddox opinion applies to special elections to fill vacancies created by automatic resignations. That opinion states that “in a municipality with terms exceeding two years, a vacancy in the municipal governing body arising from an automatic resignation must be filled by majority vote of the qualified voters of the city at a special election.”<sup>10</sup>

That possible conflict and the circumstances of the facts recited above give rise to the third issue – especially because, as noted previously, Article XI, Section 11, was amended on November 6, 2001, and it is clearly no longer the case that “single-member districts for city council members [are] not common,” which was the foundational assumption of the Maddox opinion. And, if a special election is required to fill the unexpired term of Mr. Holden, continued strict construction of Article XI, Section 11, as expressed in the Georgetown opinion would seem to require that his replacement be elected “by majority vote of the qualified voters in such municipality,” that is, at large, despite his having been elected solely by (and to represent) the voters of a single district. This is a matter which has not been raised in or addressed by the courts. Your guidance in this area will be appreciated.

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<sup>8</sup> Attorney General Opinion No. JM-0197, at 2.

<sup>9</sup> *Id.* at 1. The “underscored language” from Article XI Section 11 referenced in the opinion is as follows: “A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality....”

<sup>10</sup> Attorney General Opinion No. JC-0318, p. 5

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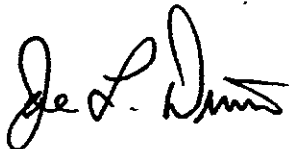
## Summary

In May 2000, the citizens of the City of Garland adopted charter provisions providing that a Council member may be a candidate for Mayor without resigning his current office. Garland City Council member Michael Holden was elected to a three-year term in May 2001. In the May 2002 general election, Mr. Holden filed as a candidate for the office of Mayor, but his bid for that office was unsuccessful. Mr. Holden continued to serve as a Garland Council member pursuant to that Charter provision. The questions presented in this request are of the application of the Texas Constitution; specifically whether Mr. Holden had effectively resigned his position on the Garland City Council under the amended language of Article XI, Section 11; if so, whether the City is required to hold a special election in advance of the May 15, 2004, general election to fill his unexpired term; and whether Article XI, Section 11, as amended, would require such a special election to include all qualified voters of the City, at large, rather than solely the voters of the district represented.

Thank you in advance for your time and attention to this matter. Should you have any questions concerning this request, please do not hesitate to contact me or the City Attorney for the City of Garland, Charles M. Hinton, Jr. You may contact Mr. Hinton at:

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Sincerely,



Rep. Joe Driver  
Chairman, House Committee on Law Enforcement

JD/bh

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