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OPINION COMMITTEE



The Office of Vince Ryan
County Attorney

FILE # ML-46669-11
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February 14, 2011

Certified Mail, Return Receipt Requested

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0945-GA

Attention: Opinion Committee

Re: Whether the County Judge is authorized to order a recall election pursuant to a city charter; *C. A. File No. 11GEN0241*

Dear General Abbott:

We request your opinion as to whether the Harris County Judge is authorized to order a recall election pursuant to a provision in the charter of Jacinto City, Texas, or other law. Our memorandum brief is attached. Because the recall election would be held in mid-May 2011, we ask for your expedited review and response.

Sincerely,

VINCE RYAN
County Attorney

By: 
MARVA GAY
Assistant County Attorney

Approved:


TERENCE O'ROURKE
First Assistant Harris County Attorney

MEMORANDUM BRIEF

Jacinto City, Texas, is a home rule municipality located within Harris County. It is our understanding that the City of Jacinto City received a petition for the recall of a member of the City Council, the petition was certified by the City Secretary, and the City Council by a vote of 3 to 2 refused to order the recall election for the second Saturday in May. The charter of Jacinto City, Texas, contains the following provisions:

Section 8. Power of Recall

The qualified voters shall have the power to recall any elected official of the City on grounds of incompetency, noncompliance with this charter, misconduct or malfeasance in office. Such power shall be exercised by filing with the City Secretary a petition, signed by currently qualified voters of the City equal in number to at least ten percent (10%) of the total number of qualified voters registered to vote at the last regular City election, demanding the removal of such elected official. The petition shall be signed and verified in the manner required for an initiative petition.

Section 9. Recall Election

The provisions regulating initiation, certification, amendment and withdrawal of initiative petitions shall apply to recall petitions. If the petition is certified by the City Secretary to be sufficient, the City Council shall order an election forthwith to determine whether such officer shall be recalled.

* * * * *

Section 13. Failure of City Council to Call an Election

In case all of the requirements of this charter shall have been met and the City Council shall fail or refuse to receive the recall petition, or order such recall election, or discharge other duties imposed upon said City Council by the provisions of this charter with reference to such recall, then the County Judge of Harris County, Texas, shall discharge any such duties herein provided to be discharged by the City Secretary or by the City Council. In addition, any qualified voter in the City may seek judicial relief in the District Court of Harris County, Texas, to have any of the provisions of this charter pertaining to recall carried out by the proper official.

Jacinto City Charter [*emphasis added*]. A copy of the charter is attached hereto. The charter says the "County Judge of Harris County, Texas, shall discharge" the recall election duties should the City Secretary or the City Council fail or refuse to do so. Assuming that the requirements set of in the charter for ordering a recall election have been met and that the City Council and City Secretary have refused to order the election, under the terms of the charter, the County Judge shall order the recall election. Additionally, the city charter says any qualified voter in the City may seek judicial relief in the District Court of Harris County, Texas, to have any of the provisions of the city charter pertaining to recall carried out by the proper official.

County commissioners and officials can exercise only such powers as the Constitution itself or the statutes have specifically conferred upon them. *See Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). *See also City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003); *La.-Pac. Corp. v. Newton County*, 149 S.W.3d 262, 263 (Tex. App.—Eastland 2004, no pet.). Although we find no provision in the Constitution or statutes expressly granting

the County Judge authority to order a city recall election, we note that a constitutional county court as presided over by the County Judge has certain powers pursuant to section 21.002, and sections 26.042 through 26.051 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 21.002 (Vernon 2004) (contempt of court). *See also* TEX. GOV'T CODE ANN. §§ 26.042 (civil jurisdiction; juvenile jurisdiction); 26.043 (civil matters in which county court is without jurisdiction); 26.044 (certiorari jurisdiction); 26.045 (original criminal jurisdiction); 26.046 (appellate criminal jurisdiction); 26.047 (habeas corpus); 26.048 (motions against court officers); 26.049 (appointment of counsel); and 26.050 (reading that “[s]ubject to the limitations stated in this chapter and in the constitution, a county court may hear and determine any cause in law or equity that a court of law or equity recognizes and may grant any relief that may be granted by a court of law or equity.”) (Vernon 2004 and Vernon Supp. 2010). We also note that the charter of Jacinto City expressly delegates authority to the County Judge to order a recall election. *See Duffy v. Branch*, 828 S.W.2d 211 (Tex.App.—Dallas 1992, no pet.) and *Blanchard v. Fullbright*, 633 S.W.2d 617 (Tex.App.—Houston [14th Dist.] 1982, orig. proceeding) (per curiam). *See also* Tex. Const. art. V, §§ 135, 16, and 17.

We request your expedited opinion as to whether the Harris County Judge is authorized to order a recall election pursuant to a provision in the charter of Jacinto City or other law.

ARTICLE 9. Initiative, Referendum and Recall

Section 1. General Authority

(A) Initiative: The qualified voters of the City shall have the power to propose ordinances to the City Council and, if the City Council fails to adopt an ordinance so proposed without any change in substance, to adopt or reject it at a City election, provided that such power shall not extend to the budget, or capital program or any ordinance relating to appropriation of money, levy of taxes or salaries of City officers or employees.

Such initiative power may be used to enact a new ordinance, or to repeal or amend sections of an existing ordinance.

(B) Referendum: The qualified voters of the City shall have the power to require reconsideration by the City Council of any adopted ordinance and, if the City Council fails to repeal any ordinance so reconsidered, to approve or reject it at a City election, provided that such power shall not extend to the budget or capital program or any properly enacted emergency ordinance, ordinance relating to appropriation of money or levying of taxes or ordinance relating to the control of armed or violent insurrection, revolt, rebellion or riot.

Section 2. Initiation of Proceedings; Petitioners' Committee; Affidavit

Any ten (10) qualified voters may begin initiative or referendum proceedings by filing with the City Secretary an affidavit stating they constitute the petitioner's committee and will be responsible for circulating the petition and filing it in proper form stating their names and addresses and specifying the address to which all notices to the committee are to be sent, and setting out in full the proposed initiative ordinance or the ordinance sought to be reconsidered.

Immediately after the affidavit of the petitioners' committee is filed the City Secretary shall issue the appropriate petition blanks to the petitioner's committee.

After the affidavit of the petitioners' committee has been filed, the ordinance sought to be amended or repealed shall not be repealed, or amended or re-enacted by the City Council unless:

- (A) The action taken by City Council is that which the petition requests, or
- (B) The petition has not been filed within the prescribed time limit, or
- (C) There is a final determination of the insufficiency of the petition, or
- (D) The petition is withdrawn by the petitioners' committee, or
- (E) One year has elapsed since City Council or voter action has been taken on the petition, or
- (F) The ordinance sought to be amended or repealed relates to the control of insurrection or riot.

Section 3. Petitions

(A) Number of signatures: Initiative and referendum petitions must be signed by currently qualified voters of the City equal in number to at least ten percent (10%) of the total number of qualified voters registered to vote at the last regular City election.

(B) Form and Content: All papers of a petition shall be uniform in size and style and shall be assembled as one instrument for filing. To be certified, each signature shall be the same as the name of a voter appearing on the current certified list of voter registrations, shall have been personally signed by such voter in ink, and shall be followed by the address of the person signing. Petitions shall contain or have attached thereto throughout their circulation the full text of the ordinance proposed or sought to be reconsidered.

(C) Affidavit of Circulator: When filed, each paper of a petition shall have attached to it an affidavit executed by the circulator thereof stating that he or she personally circulated the paper, the number of signatures thereon, that all the signatures were affixed in his or her presence, that he or she believes them to be the genuine signatures of the persons whose names they purport to be and that each signer had an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered.

(D) Time for Filing Petitions: Referendum petitions must be filed within thirty (30) days after adoption by the City Council of the ordinance sought to be reconsidered. Initiative petitions must be filed within thirty (30) days after issuance of the appropriate petition blanks to the petitioners' committee. Additional time as specified in Section 5 E., shall be allowed for amending petitions.

Section 4. Determination of Sufficiency

(A) Certificate of City Secretary: Within thirty (30) days after the petition is filed, the City Secretary shall complete a certificate as to its sufficiency, specifying, if it is insufficient, the particulars wherein it is defective and shall immediately upon completion of certification send a copy of the certificate to the petitioners' committee by registered mail.

(B) Sufficient Petition, Final Determination: If the petition is certified sufficient, the City Secretary shall present the certificate to the City Council by the next City Council meeting and the certificate shall then be a final determination as to the sufficiency of the petition.

(C) Insufficient Petition, Final Determination: If a petition is certified insufficient, and the petitioners' committee does not elect to amend or request City Council review under sub-sections D. and E. of this section within the time required, the City Secretary shall present a certificate to the City Council by the next City Council meeting which shall be a final determination of the sufficiency of the petition.

(D) Insufficient Petition, Appeal: If a petition has been certified insufficient and the petitioners' committee does not file notice of intention to amend it as in Section 5 E., the committee may, within two working days after receiving the copy of such certificate, file a request that it be reviewed by the City Council. The City Council shall review the certificate at its next meeting following the filing of such request and approve or disapprove it, and the City Council's determination shall then be a final determination as to the sufficiency of the petition.

(E) Insufficient Petition, Amending: A petition certified insufficient for lack of required number of valid signatures may be amended once if the petitioners' committee files a notice of intention to amend it with the City Secretary within two (2) working days after receiving the copy of his or her certificate, and files a supplementary petition with additional names within two (2) weeks after receiving the copy of such certificate. Such supplementary petition shall comply with the requirements of Sections 3 B. and C.

Within five (5) days after an amended petition is filed, the City Secretary shall complete a certificate as to the sufficiency of the petition as amended and shall within forty-eight (48) hours send a copy of such certificate to the petitioners' committee by registered mail as in the case of an original petition. The final determination as to the sufficiency of an

amended petition shall be determined in the same manner as prescribed for original petitions in Sections 4 B., C., and D., except that no petition, once amended, may be amended again.

(F) Court Review; New Petition: A final determination as to the sufficiency of a petition shall be subject to review in a county court of record and higher. A final determination of insufficiency, even if sustained upon court review, shall not prejudice the filing of a new petition for the same purpose.

Section 5. Referendum Petitions; Suspension of Effect of Ordinance

When a referendum petition is filed with the City Secretary, the ordinance sought to be reconsidered shall be suspended from taking effect. Such suspension shall terminate when:

- (A) there is a final determination of insufficiency of the petition, or
- (B) the petitioner's committee withdraws the petition, or
- (C) the City Council repeals the ordinance, or
- (D) the vote of the people in a referendum election determines whether the ordinance sought to be repealed is repealed or is sustained and the election results are certified by the election officials.

All action previously taken under such ordinance or resolution shall be suspended and its legality or validity determined by the final disposition of the referendum petition.

Section 6. Action on Petitions

(A) Action by City Council: City Council shall promptly consider the proposed initiative ordinance in the manner prescribed for enacting ordinances or reconsider the referred ordinance by voting its repeal. Within sixty (60) days after the date the initiative or referendum petition has been finally determined sufficient City Council shall either (1) adopt a proposed initiative ordinance without any change in substance, or (2) repeal a referred ordinance, or (3) call an election on the proposed or referred ordinance, said election to be held not later than forty-five (45) days from date called.

(B) Submission to Voters: The vote of the City on a proposed or referred ordinance shall be held not later than forty-five (45) days from the date called by City Council, except that when a regular City election is to be held within one hundred twenty (120) days, but not less than forty-five (45) days, after the final City Council vote, the vote on the ordinance shall be held at the same time as the regular City election.

Copies of the proposed or referred ordinance shall be made available at the polls and shall also be made available at the City Office for fifteen (15) days immediately preceding the election and shall be posted at the regular posting places for fifteen (15) days immediately preceding the election.

(C) Withdrawal of Petitions: An initiative or referendum petition may be withdrawn at any time prior to the 20th day preceding the day scheduled for a vote of the City by filing with the City Secretary a request for withdrawal signed by at least nine (9) members of the petitioners' committee. Upon filing of such request the petition shall have no further force or effect and all proceedings thereon shall be terminated.

Section 7. Results of Election

(A) Initiative: If a majority of the qualified electors voting on a proposed initiative ordinance vote in its favor, it shall be considered adopted upon certification of the election results and shall be treated in all respects in the same manner as ordinances of the same kind adopted by City Council. If conflicting ordinances are approved at the same election, the one receiving the greatest number of affirmative votes shall prevail to the extent of such conflict.

(B) Limitation of City Council Repeal: The City Council may not repeal or amend the initiated ordinance for one year after the effective date and then only by the affirmative vote of four (4) members of the City Council.

(C) Referendum: If a majority of the qualified electors voting on a referred ordinance vote against it, it shall be considered repealed upon certification of the election results.

Section 8. Power of Recall

The qualified voters shall have the power to recall any elected official of the City on grounds of incompetency, noncompliance with this charter, misconduct or malfeasance in office. Such power shall be exercised by filing with the City Secretary a petition, signed by currently qualified voters of the City equal in number to at least ten percent (10%) of the total number of qualified voters registered to vote at the last regular City election, demanding the removal of such elected official. The petition shall be signed and verified in the manner required for an initiative petition.

Section 9. Recall Election

The provisions regulating initiation, certification, amendment and withdrawal of initiative petitions shall apply to recall petitions. If the petition is certified by the City Secretary to be sufficient, the City Council shall order an election forthwith to determine whether such officer shall be recalled.

Section 10. Results of Recall Election

If a majority of the votes cast a recall election shall be against removal of the elected official named on the ballot, he or she shall continue in office. If the majority of the votes cast at the election be for the removal of the elected official named on the ballot, the City Council shall immediately declare his or her office vacant and such vacancy shall be filled in accordance with the provisions of this charter for the filling of vacancies. An elected official thus removed shall not be a candidate to succeed himself.

Section 11. Limitation on Recall

No recall petition shall be filed against an elected official within six months after he or she takes office, and no elected official shall be subjected to more than one recall election during a term of office.

Section 12. Public Hearing

The elected official whose removal is sought may, within five (5) days after such recall petition has been presented to the City Council, request that a public hearing be held to permit him or her to present facts pertinent to the charges specified in the recall petition. In this event, the City

Council shall order such public hearing to be held, not less than five (5) days nor more than fifteen days after receiving such request for a public hearing.

Section 13. Failure of City Council to Call an Election

In case all of the requirements of this charter shall have been met and the City Council shall fail or refuse to receive the recall petition, or order such recall election, or discharge other duties imposed upon said City Council by the provisions of this charter with reference to such recall, then the County Judge of Harris County, Texas, shall discharge any such duties herein provided to be discharged by the City Secretary or by the City Council. In addition, any qualified voter in the City may seek judicial relief in the District Court of Harris County, Texas, to have any of the provisions of this charter pertaining to recall carried out by the proper official.