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OPINION COMMITTEE

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Via electronic correspondence Opinion.Committee@texasattorneygeneral.gov
or certified mail, return receipt requested

The Honorable Greg Abbott
Office of the Attorney General
Attn. Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: If the City has authority and power to tax, can that authority be delegated to the electorate through its Charter? If so, is a home-rule city charter provision preempted by State law?

Dear General Abbott:

Pursuant to Texas Government Code, section 402.042(b) (7), this letter is being submitted to your office to request an Attorney General's opinion regarding a municipality's taxing authority and certain Texas Tax Code provisions. Specifically, we have two questions:

- 1) If the City has authority and power to tax, can the Charter delegate the decision to tax to the electorate?
- 2) Does the Texas Tax Code ("State law") preempt a home rule municipality's charter provision that requires electorate approval to impose ad valorem taxes?

I. BACKGROUND LAW AND FACTS

Gun Barrel City ("GBC" or "City") passed its Charter on August 10, 1996, as declared by Ordinance 497, passed August 13, 1996 in accordance with Article XI, section 5 of the Texas Constitution and the statutes of the State of Texas. Article VII, Section 7.19 (1) "Power to Tax" of the City Charter, states:

The City shall have the power to levy, assess and collect taxes of every character and type for any municipal purpose not prohibited by the Constitution and laws of the State of Texas as now written or hereafter amended. **No ad valorem or additional sales tax or assessments may be imposed after the passing of this Charter without the approval of the electorate.**

(emphasis added)

The City has not levied and collected an ad valorem property tax since 1991. On November 5, 1991 the City electorate voted to adopt an additional one-half of one percent sales tax within the City to be used to reduce the property tax rate. Subsequently on December 3, 1991, the City passed Ordinance # 329, which authorized the add-on sales tax of one-half cent and eliminated the City's ad valorem property tax. Beginning in 1992 through the present, the City, through its City Council, has set the ad valorem property tax rate at zero each year thereby recognizing the category of sales and ad valorem taxes in compliance with Chapter 26 of the Texas Tax Code.

II. LEGAL AUTHORITY TO TAX

If the City has the authority and power to tax can the decision to tax be delegated to the electorate through its Charter?

A. Express Authority For City to Tax under Texas Constitution and Texas Tax Code.

GBC has the power and authority to tax as expressly stated within Article XI, Section 5(a) of the Texas Constitution, which grants the City the authority "to levy, assess and collect such taxes as may be authorized by law or by their charters..." Tex. Const. art. XI, Section 5(a). Also, Section 302.001(c) of the Tax Code provides, "[a] home-rule municipality may levy special or general property taxes for lawful purposes." TEX. TAX CODE § 302.001 (c). Given this Constitutional and statutory authority, the next question is whether the decision to tax can be delegated to the electorate of GBC with its Charter provision Section 7.19 (1). GUN BARREL CITY, TEX. CODE, Charter, art. VII, Section 7.19(1) (2013).

B. Express Method For City to Tax under Texas Tax Code.

Chapter 26 of the Tax Code provides a well-defined statutory method of adopting a property tax rate that a home-rule municipality must utilize, *See* TEX. TAX CODE §§ 26.05-26.07. To summarize, Section 26.05 provides:

(a) **the governing body of each taxing unit...**shall adopt a tax rate for the current tax year and shall notify the assessor for the unit of the rate adopted... (b) [a] taxing unit may not impose property taxes in any year until **the governing body** has adopted a tax rate for that year, and the annual tax rate must be set by ordinance... (c)[i]f **the governing body of a taxing unit** does not adopt a tax rate before the date required... (d) [t]he **governing body of a taxing unit...**may not adopt a tax rate that exceeds the lower of the rollback tax rate or the effective tax rate calculated...

(emphasis added). TEX. TAX CODE § 26.05 (a)-(d). As seen within the plain language of the statute, the governing body is mentioned at least four times within this portion of the statute which prescribes the only method by which a taxing unit must abide by when adopting a tax rate.

In previous opinions from your office, the Attorney General has stated that the Tax Code requires a *taxing unit* to adopt an annual tax rate *citing* Tex. Tax Code Ann. §26.05(b) and providing that a *taxing unit* may not impose property taxes until the governing body has adopted a tax rate for that year, and the annual rate

must be set by ordinance, resolution, or order. Tex. Att'y Gen. Op. No. JC-0360 (2001) at 1 (emphasis added). Also, your office has stated that "Section 26.05 of the Tax Code is the statutory 'truth-in-taxation' law [which] requires each *taxing unit* in the state to adopt a tax rate for the current tax year..." Tex. Att'y Gen. Op. No. JC-0009 (1999) at 2 (emphasis added); *see also Fisher v. County of Williamson*, No. 03-05-00584-CV, 2006 Tex. App. LEXIS 5157, *7 (Tex. App.--Austin June 15, 2006, no pet.) (citing Texas Tax Code § 1.04(12) by defining a "'taxing unit' as a county, city or school district that is authorized to impose and is imposing ad valorem taxes on property"... and holding "[c]ities are authorized to levy property taxes by the Texas Constitution, the tax code and the local government code.").

Section 26.05 of the Tax Code clearly establishes the governing body of the taxing unit (here the City Council), not the electorate, is responsible for adopting the tax rate, prior to the taxing unit setting the rate each year. Chapter 26 of the Tax Code contains the procedures for a taxing unit's governing body to adopt a property tax rate. These provisions are very detailed in the method a taxing unit must follow to adopt and increase the tax rate; and specifically provide for a notice requirement, followed by two public hearings that allow the public to attend and express opinions on the proposed tax rate, and only after the requisite notice and two public hearings can the governing body vote to adopt the proposed tax rate. At no point during this detailed procedure does the Tax Code require or even contemplate that a taxing unit provide the electorate with a vote on whether a property tax rate can be adopted.

The only provision in Chapter 26 of the Tax Code that contains an election option by the "qualified voters" is when the newly-adopted tax rate exceeds the preceding year's "rollback tax rate". Specifically, Section 26.07 of the Tax Code provides:

Election to Repeal Increase.

(a) If the governing body of a taxing unit other than a school district adopts a tax rate that exceeds the rollback tax rate calculated as provided by this chapter, **the qualified voters of the taxing unit by petition may require that an election be held to determine whether or not to reduce the tax rate as adopted for the current year to the rollback tax rate calculated as provided by this chapter.**

(emphasis added). TEX. TAX CODE §26.07.

The Tax Code requires that rollback elections be held if the adopted tax rate exceeds the rollback tax rate. Here, based upon the formula provided in the Tax Code, section 26.04 (c), the rollback tax rate would effectively equal zero; therefore, the City would be subject to a rollback election with the adoption of any tax rate, other than zero.

Under Section 26.07, the voters may petition for an election to vote upon whether or not to reduce the adopted tax rate for the current year to the rollback tax rate calculated as provided by Chapter 26 of the Tax Code. GBC contends that the Legislature intended to only have the public vote in a rollback election because the Legislature only addresses a public voting requirement in Section 26.07 of the Tax Code. *See generally*, Tex. Att'y Gen. Op. No. GA-0798 (2010). GBC further contends that if the Legislature intended to allow the electorate to vote on adopting a property tax rate, the Legislature would have written that requirement into the Tax Code. They did not do so. Therefore applying statutory construction laws to the plain language in Sections 26.04 through 26.07 and 302.001 of the Tax Code, the absence of such a requirement must be construed as

intentional. GBC acknowledges the electorate potentially may require the City to hold a rollback election to determine if the City's adopted tax rate will remain intact or be reduced pursuant to statutory law.

C. GBC Authority to Delegate to the Electorate

According to case law, "the power to tax belongs to the sovereignty. *Tri-City Fresh Water Supply Dist. v. Mann*, 135 Tex. 280 (Tex. 1940). It can only be exercised by a subordinate corporate body when *delegated* to it either by the Constitution or by the legislature, and when so delegated, it must be exercised *for those purposes, only*, which are distinctly included in the constitutional or legislative provision." *Id.* (emphasis added). The Texas Supreme Court also stated such power, when so conferred, "is to be strictly construed and must be closely followed." *Frosh v. City of Galveston*, 73 Tex. 401 (Tex. 1889). *See also Wood v. City of Galveston*, 76 Tex. 126 (Tex. 1890); *City of Tyler v. Coker*, 58 Tex. Civ. App. 605 (Tex. Civ. App. 1910); *Ripley v. Trinity River Canal & Conservancy Dist.*, 88 S.W.2d 752 (Tex. Civ. App. 1935) (writ of error denied). The Texas Supreme Court, in *Tri-City Fresh Water Supply*, held that based upon the Constitution and the statute, a water district (like an electorate) did not have authority to issue bonds and levy taxes to raise money either to purchase and install equipment for fire protection, or to construct equipment, and operate a sewage system. The Court stated that the statutes which described the authority that the water districts possessed never expressly authorized the water district to issue bonds and levy such taxes. They also pointed out that "these distinct corporate functions cannot be implied from the powers specifically named in the statute." *Id.* at 284.

Under *Tri-City Fresh Water Supply* and the above case law, the specific power that was delegated to the City by the Sovereignty is the power to tax, through the Constitution and state statute. While there is no express authority for cities to further delegate this power to tax to the electorate, there also is no express prohibition/limitation found in the Texas Constitution or the Texas Tax Code that prevents home rule cities from delegating the decision to impose a property tax to the electorate once the governing body of the taxing entity (here the City Council) has adopted a property tax rate pursuant to Chapter 26 of the Tax Code. GBC contends its decision to tax can be delegated to the electorate through a Charter provision because the Tax Code only addresses who has the express authority to adopt a property tax rate for a taxing unit, not who ultimately may decide whether to impose the property tax rate once adopted.

D. Preemption.

Does State law preempt GBC's Charter provision that requires electorate approval to impose ad valorem taxes?

Article XI, Section 5(a) provides that "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. ..." *See* TEX. CONST. ART. XI, §5. Moreover, Section 1.02 of the Tax Code expressly preempts a city charter or ordinance relating to property taxation when an irreconcilable conflict exists between the two. Specifically, Section 1.02 provides, "[the Property Tax Code] supersedes any provision of a municipal charter or ordinance relating to property taxation..." *See* TEX. TAX CODE § 1.02. Finally, the City Charter in Article XV, Section 15.02 "State Preemption" provides, "[i]n the event this Charter is in conflict with State Law or the Texas Constitution, State Law and the Texas Constitution prevail." *See* City Charter, § 15.02. It is GBC's contention that based upon the above-cited constitutional and statutory authority, the *governing body* (here the City Council) is the only authorized entity to set the tax rate; and therefore, the charter provision in

Section 7.19 (1) is preempted.

Various Texas cases have found a municipal ordinance is preempted by statute; and the extent of a home rule municipality's authority has been the subject of several Texas Supreme Court decisions. Most notably, in *Dallas Merchants & Concessionaires Ass'n v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993), the Court held:

Home-rule cities possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their power...[I]f the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity.

Id. at 490-91 (holding a Dallas ordinance regulating the location of businesses selling alcoholic beverages was preempted by clear provisions in the Texas Alcoholic Beverage Code §109.57). Similarly, the Texas Supreme Court, in *Tyra v. City of Houston*, 822 S.W.2d 626 (Tex. 1991), held a Civil Service statute clearly preempted a city's authority by stating that the statute provided the "exclusive procedure for determining whether a fire fighter or police officer is sufficiently physically or mentally fit to continue the person's duties or assignment." *Id.* at 628. The Court held that, by using this language, the Legislature had "withdrawn the [c]ity's authority to create its own procedures for that purpose." *Id.*

Conversely, in *In re Sanchez*, 81 S.W.3d 794 (Tex. 2002), the Supreme Court decided the Election Code provisions establishing general requirements for applications filed by candidates for office, including "the application must be timely filed with the appropriate authority", but making no mention of an exact timeframe and further stating, "except as otherwise provided by this Code," which provides for an exception to the filing deadlines, did not preempt a home-rule city charter that prescribed its own application requirements. *Id.* at 796-97. However, the facts in *In re Sanchez* are distinguishable from GBC's Charter provision because, here, Chapter 26 of the Tax Code is unmistakably clear in establishing the method for a taxing unit to adopt a tax rate. See Tex. Att'y Gen. Op. No. GA-0798 (2010) at 4. In this 2010 opinion, the Attorney General's office recognized that Texas courts have held, "[s]tatutes imposing a tax must be strictly construed against the taxing authority. See *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 606 (Tex. App.—Austin 2000, pet. denied); see also Tex. Att'y Gen. Op. No. GA-0798 (2010) at 4.

In light of the *Dallas Merchants* and *Tyra* decisions, the presence of a clear preemption provision as contained within the Tax Code would act as a limit on the City's power to superfluously require that the City hold an election for the electorate to approve an adopted property tax rate.

E. Statutory Interpretation Does Not Allow For 'Absurd Results'.

Texas courts do not interpret a statute in a manner that will lead to a foolish or absurd result when another alternative is available. See *City of W. Tawakoni v. Williams*, 742 S.W.2d 489, 491 (Tex. App. —Dallas 1987, writ denied); see also *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App. —Dallas 1985, writ ref'd n.r.e.). Under the laws of statutory construction, it is presumed that one of the intentions in the enactment of the statute is so that a just and reasonable result will occur. TEX. GOV'T CODE § 311.021 (3). The results under the Tax Code must also reflect the same. In this instance, adhering to the City's Charter provision in Section 7.19, coupled with the strict interpretation of Chapter 26 of the Tax Code would require the City to potentially hold two elections just to adopt a City ad valorem tax rate above zero, which GBC contends

produces an absurd result.

Alternatively, to avoid this absurd result and assuming arguendo that GBC's charter provision is not preempted by State law, GBC asserts that Section 7.19 of its Charter could be interpreted consistently with Chapter 26 of the Tax Code because Section 26.07 of the Tax Code (i.e., the rollback provision) provides the electorate with the option to hold an election before the final imposition of an ad valorem tax rate for the current year. GBC contends that once the City's governing body (here the City Council) adopts the proposed tax rate in compliance with Tax Code Chapter 26 procedures, then the rollback election procedures prescribed under Tax Code Section 26.07 can be instituted by the electorate, which aligns the City Charter's electoral approval requirement for imposition of ad valorem taxes with the Chapter 26 Tax Code provisions leading to a just and reasonable result.

III. CONCLUSION

Based upon the express authority granted to the governing body of a taxing unit to levy, assess and collect taxes as clearly reflected in Article XI, section 5(a) of the Texas Constitution, Chapter 26 and Section 302.001(c) of the Tax Code, and Section 7.19 of the City's Charter, no basis exists to require a public vote on the initial adoption of a property tax rate. Further, GBC asserts that it can delegate the decision to tax to the electorate because the Tax Code only addresses who has the express authority to adopt a property tax rate for a taxing unit, not who ultimately may decide whether to impose the property tax rate once adopted. Additionally, GBC believes the absence of a public voting requirement to adopt a property tax rate within the Tax Code, which thoroughly establishes the procedures for doing so, evidences the Legislature's intent not to require such a vote. Finally, GBC contends the preemption provisions contained within Article XI, section 5(a) Texas Constitution, Section 1.02 of the Tax Code and Section 15.02 of the City Charter preempt the Charter requirement in Section 7.19 (1) that requires the approval of the electorate for the imposition of ad valorem taxes as being inconsistent with statutory law.

GBC respectfully requests that your office provide an opinion on whether Gun Barrel City can delegate the decision to tax to the electorate through its Charter; and whether the Gun Barrel City Charter provision Section 7.19 (1) conflicts with Constitutional and/or State law requirements and; therefore, is preempted by State law.

Respectfully submitted,



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