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OPINION COMMITTEE

The State of Texas
House of Representatives
Austin

ELLIOTT NAISHTAT
STATE REPRESENTATIVE
DISTRICT 49

P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
512-463-0668

August 22, 2002

RQ-0591-JC

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

FILE # ML-42756-02
I.D # 42756

Dear General Cornyn:

Pursuant to Tex. Government Code 402.042(b)(7), I am writing to request an Attorney General's opinion regarding the amount of deference due home-rule cities on municipal election laws. In particular, I have two questions:

- (1) what is the proper legal standard for determining whether a home-rule city's law is preempted by state election law;
- (2) whether state election law preempts home-rule cities from enacting instant runoff voting (IRV).

Background

In 2001, Austin citizens and city officials were considering placing IRV on the municipal ballot for voters to consider. In the Spring of 2001, the Austin City Attorney's Office requested a formal legal opinion from the Secretary of State's Election Division as to the legality of IRV. In late July 2001, the Secretary of State (SOS) issued a written advisory opinion, HC-1 (July 23, 2001), stating that home-rule cities are preempted from enacting IRV because it is in conflict with the Texas Election Code, Section 275.003. (See www.sos.state.tx.us/elections/elo/hc1.html). Following the SOS's opinion, the City of Austin and citizen groups dropped the issue based on the belief that IRV was illegal.

IRV is a method of voting used in Ireland, Australia, London, and San Francisco as well as for the Federal Reserve Board, the Academy Awards, and the Heisman Trophy. (See The Center for Voting and Democracy, "Why IRV" (<http://www.fairvote.org/irv/index.html>)). It allows voters to go to the polls only once, but still elect candidates by a majority of the voters. It works as follows: when voters go to the polls, they rank candidates as to their first choice, second choice, third, fourth and so on.



The Honorable John Cornyn
August 22, 2002
Page Two

If a candidate does not receive a clear majority of votes on the first count, a series of simulated runoff counts are then conducted until one candidate receives a majority. After the first count, the candidate who received the fewest first place ballots is eliminated and his or her second place votes re-allocated to the remaining candidates. All ballots are then tabulated, with each ballot counting as one vote for each voter's favorite candidate who is still in contention. Voters who chose the now-eliminated candidate have to support their second choice candidate -- just as if they were voting in a traditional two-round runoff election -- but all other voters get to continue supporting their top candidate. This process continues until a candidate receives a majority.

Proponents, therefore, contend that "instant runoff voting is a winner-take-all system that ensures that a winning candidate will receive a majority of votes rather than a simple plurality." (See The Center for Voting and Democracy, "Why IRV"). Because it requires a majority of votes, IRV is also known as "majority preferential voting." As a single-winner election system, IRV is a place-based system in which the winning candidate wins a particular place.

What is the Proper Legal Standard for Deciding the Preemption of Home-Rule Cities' Election Laws?

Proponents of IRV maintain that the Secretary of State used the wrong legal standard and analysis for home-rule city preemption in its July 2001 opinion. The opinion stated as to the home-rule preemption standard only that "a Texas home-rule city has broad authority; however, the city charter cannot be inconsistent with state law. Tex. Const. art. II, § 5. Over the years, state law control over election procedures has increased, and the city charter's powers over elections have been somewhat narrowed." (HC-1, p. 1). The opinion, IRV proponents note, did not analyze state law to see if it preempted IRV with unmistakable clarity, or whether there was any reasonable construction that could harmonize the city's home-rule power and state law. The Secretary of State simply gave its construction of the statute, without deference to the city's home-rule power.

Texas courts, according to IRV supporters, have held that home-rule cities' powers are entitled to more deference regarding their election laws than expressed by the Secretary of State's opinion. Courts generally have held that the legal standard of review, for determining whether a home-rule city's law is constitutionally preempted by state law, is whether the state statute has preempted city law with "unmistakable clarity." Quick v. City of Austin, 7 SW3d 109, 122 (Tex. 1998); Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas, 852 SW2d 489, 491 (Tex. 1993). The courts also have stated that the fact that the Legislature has enacted a law addressing a subject matter does not mean that the entire subject matter is completely preempted and that the cities have no room to exercise their power. City of Richardson v. Responsible Dog Owners of Texas, 794 SW2d 17, 19 (Tex. 1990). The courts have held that a general statute and city ordinance will not be found to be in conflict if a reasonable construction leaving both in effect is possible. City of Richardson, 794 SW2d at 19; Dallas Merchants, 852 SW2d at 491.

The questions then are: Did the Secretary of State in its July 2001 advisory opinion use the proper legal analysis for determining whether IRV is preempted by state election law? Is the legal standard for state preemption of home-rule city powers different in the state election law area than in other areas of the law?

Is IRV Allowed under State Law?

The provisions in question are in Chapter 275 of the Election Code, which was enacted in 1985. Chapter 275 requires that cities of 200,000 or greater, such as Austin, elect candidates by majority vote. Tex. Election Code 275.001, 275.002. In addition, Section 275.003 provides:

(a) When a city attains a population of 200,000 or more, the city shall establish a system of electing its governing body in accordance with this section if in the city's general elections more than one member of its governing body is elected from the same set of candidates.

(b) Not later than the 60th day before the date of the first general election held in accordance with this section, the city's governing body shall assign a place number to each position on the governing body that is to be elected from the same territory as another position, identifying it by the name of the incumbent at the time the assignment is made.

(c) One person shall be elected to fill each position for which a place number appears on the ballot.

(d) The city shall use the place system required by this section until the city establishes another system of election that is consistent with an election by majority vote.
(emphasis added)

Proponents of IRV argue that Election Code Section 275.003 is not unmistakably clear that cities are precluded from enacting IRV. They contend that Section 275.003 provides for a traditional majority, placed-based system for cities over 200,000, unless the city chooses another system "consistent with an election by majority vote." IRV, they maintain, fits the expressed exception: it is a majority voting system. The Secretary of State maintains that a change from the prior law, Section 7.16, indicates that preferential voting is not allowed. Section 7.16 had two exceptions for cities over 200,000, one like current law allowing for majority systems and one for systems with preferential types of ballots. The Secretary of State says the removal in Section 275.003 of the preferential exemption precludes IRV, which is a majority, preferential voting system. Proponents contend that the fact that Section 275.003 does not have a preferential voting exception does not mean that the Legislature with unmistakably clarity meant to preclude all preferential systems, majority or otherwise. It is reasonable, proponents argue, that the Legislature's intent in 275.003 was simply to prevent preferential, non-majority systems, and not majority, preferential systems like IRV. The legislative history is sparse.

The Honorable John Cornyn
August 22, 2002
Page Four

Thank you for your attention to these important issues regarding home-rule cities' powers to enact innovative election laws as well as to the issue of the legality of IRV.

Sincerely,

A handwritten signature in black ink, appearing to read "Elliott Naishtat". The signature is written in a cursive, flowing style with a large initial "E".

Elliott Naishtat
State Representative

EN/db