MICHAEL S. WEN
Criminal District Attorney
Hays County Justice Center
110 E. Martin Luther King
San Marcos, Texas 78666
(512) 393-7600 FAX (512) 393-7619

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Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for Attorney General Opinion

Dear Mr. Abbott:

I am writing to request your opinion on the following question:

> If the date for a home rule city's general elections is set in the city's charter, can the citizens of the city change the date for the city's general elections to another authorized uniform election date through an amendment to the city's charter, or does TEX. ELEC. CODE ANN. §41.0052(a) preempt such a change?

Background

The background facts are as follows. A city's general elections can be held either on "the first Saturday in May," or on "the first Tuesday after the first Monday in November" under subsections (a) and (d) of TEX. ELEC. CODE ANN. §41.001.

TEX. ELEC. CODE ANN. §41.0052(a) states as follows:

> (a) The governing body of a political subdivision other than a county may, not later than December 31, 2004, change the date on which it holds its general election for officers to another authorized uniform election date.

San Marcos is a home rule municipality, and the date for regular City elections is set in the following section of the San Marcos City Charter:

> **Sec. 5.01. Elections.**
> The regular city election shall be held annually on the second uniform election date of the calendar year as provided by state law.

Under TEX. ELEC. CODE ANN. §41.001(a) (version effective January 1, 2005), the second uniform election date of the calendar year is the first Saturday in May, which is one of the two authorized dates for city general elections.

The San Marcos City Council recently adopted an ordinance under authority of TEX. ELEC. CODE ANN. §41.0052(a) changing the date for general elections in San Marcos to the first Tuesday after the first Monday in November. A certified copy of the ordinance is enclosed. In connection with the Council's decision to change the election date, discussion occurred over whether the change could later be reconsidered by the citizens of San Marcos through a proposed amendment to the Charter.

Amendments to a city charter can occur as a result of an election called by the city's governing body either on its own motion or in response to a petition by a city's voters (TEX. LOC. GOV'T CODE ANN. §9.004(a)). In the case of San Marcos, the city council regularly calls charter amendment elections in response to recommendations from a charter review commission appointed by the council in each odd-numbered year.[1]

The question posed above involves the breadth of the self governing authority of home rule municipalities in Texas. This authority derives from Article XI, Section 5 of the State Constitution, which reads as follows:

> **Section 5 - CITIES OF MORE THAN 5,000 POPULATION; ADOPTION OR AMENDMENT OF CHARTERS; TAXES; DEBT RESTRICTIONS**
>
> Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of

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1 The San Marcos Charter includes the following provision requiring periodic review of the Charter:

> **Sec. 12.12. Charter review commission.**
>
> The city council shall appoint at its first regular meeting in July of each odd-numbered year, a charter review commission of seven citizens of the City of San Marcos.
>
> (a) Duties of the commission:
>
> (1) Inquire into the operation of the city government under the charter provisions and determine whether any such provisions require revision. To this end public hearings may be held; and the commission shall have the power to compel the attendance of any officer or employee of the city and to require the submission of any of the city records which it may deem necessary to the conduct of such hearing.
>
> (2) Propose any recommendations it may deem desirable to ensure compliance with the provisions of the charter by the several departments of the city government.
>
> (3) Propose, if it deems desirable, amendments to this Charter to improve the effective application of said charter to current conditions.
>
> (4) Report its finding and present its proposed amendments, if any, to the city council.
>
> (b) The city council may take action to amend the charter in the manner provided by state law.
>
> (c) Term of office: The term of office of such charter review commission shall be six months, and, if during such term no report is presented to the city council, then all records of the proceedings of such commission shall be filed with the person performing the duties of the city clerk and shall become a public record.

> inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and 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. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon. Furthermore, no city charter shall be altered, amended or repealed oftener than every two years.

Interpretation of Home Rule Authority

The breadth of home rule authority has been the subject of several decisions of the Texas Supreme Court. In *Dallas Merchants & Concessionaires Ass'n v. City of Dallas,* 852 S.W.2d 489 (Tex. 1993), the Court stated:

> 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 490-491. The Court went on to hold that a Dallas ordinance regulating the location of businesses selling alcoholic beverages was preempted by the following provisions of TEX ALC. BEV CODE ANN. §109.57:

> (a) Except as expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state may not impose stricter standards on premises or businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.
>
> (b) It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code.

In *Tyra v. City of Houston*, 822 S.W.2d 626 (Tex. 1991), the Supreme Court encountered statutory language similarly clear in its preemptive character, a Civil Service statute which stated that it 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 the legislature, with this language, had "withdrawn the [c]ity's authority to create its own procedures for that purpose". *Id.*

On the other hand, in *In re Sanchez*, 81 S.W.3d 794 (Tex. 2002), the Supreme Court held that an election code provision prescribing a filing deadline for candidates for office "unless otherwise provided by this Code" did not control over a statutory provision allowing a home rule city to "prescribe requirements in connection with a candidate's application for a place on the ballot" in its

charter. *Id.* at 796. The Court stated that "courts will not hold a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect". *Id.*

Similarly, in *City of Richardson v. Responsible Dogs Owners of Texas*, 794 S.W.2d 17 (Tex. 1990), the Supreme Court upheld an ordinance related to vicious animals even though there was "a small area of overlap" between the ordinance and a state law regarding vicious dogs. *Id.* at 19. The Court stated "the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted. When there is no conflict between a state law and a city ordinance, the ordinance is not void." *Id.*

In *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975), the Supreme Court held that a statute authorizing a river authority board to fix rates for electrical service did not preempt a home rule city's power to regulate the authority's rates. The Court found that there was "no essential conflict or inconsistency" between the statute and municipal rate regulation. *Id.* at 646.

In *City of Sweetwater v. Geron*, 380 S.W.2d 550 (Tex. 1964), the Supreme Court held that the provisions in the Civil Service Act defining the bases for disciplinary action against fire and police employees did not preclude a home rule city from enacting an ordinance requiring employees to retire when they reached age 65. The Court stated as follows:

> The matter of maximum age limits for classified employees is not specifically covered in the Act. The Civil Service Commission is given no authority in this field, *nor is the City specifically prohibited from exercising its authority in this field.* While the State has pre-empted the field for removal of firemen and policemen for disciplinary reasons, it has not by this Act preempted the field of maximum age limits for classified employees.

Id. at 552 (emphasis added).

In *City of Weslaco v. Melton,* 158 Tex. 61, 308 S.W.2d 18 (1957), the Supreme Court held that a city ordinance requiring pasteurization of all milk sold and offered for sale within city was not preempted by a state law creating certain grades and labels for milk.

In *Glass v. Smith*, 244 S.W.2d 645 (Tex. 1952), it was held that a proposed initiative ordinance classifying policemen and firemen, fixing their pay, and designating certain holidays was not preempted by provisions of the Civil Service Act dealing with these subjects.

The Courts of Appeals have also dealt with the issue of home rule authority and statutory preemption. In *City of Santa Fe v. Young*, 949 S.W.2d 559 (Tex.App.-Houston [14 Dist.] 1997), the Court of Appeals held that state quarry and sand pit safety statutes preempted local regulations only within the geographic boundaries covered by the statutes, leaving cities free to enact safety regulations to apply outside those boundaries.

In *Hollingsworth v. City of Dallas*, 931 S.W.2d 699 Tex.App.-Dallas,1996, writ denied), the Court of Appeals held that the state statute regulating pawnshops did not preempt city regulation of the location of pawnshops. The court, in analyzing the statute, stated "[n]othing in [the statute] states

with unmistakable clarity that the legislature intended the Commissioner to have exclusive authority over the location of pawnshops." *Id.* at 704.

Attorney General opinions are also illustrative:

- Tex. Atty. Gen. Op. GA-110 (2003) concluded that the State Legislature's preemption of local regulation of alcoholic beverage sales prevented the adoption of an ordinance banning the possession of alcohol in glass containers, but did not preclude a city from enacting a ban on possession of glass containers for all beverages in the city.
- Tex. Atty. Gen. Op. GA-82 (2003) concluded that a statute prescribing the fees and expenses to be borne by a transit authority in establishing transit stops preempted a city from requiring the payment of additional fees to the city to establish the stops.
- Tex. Atty. Gen. Op. GA-25 (2003) determined that state election code provisions preempted a home-rule city's use of "instant runoff voting" since that voting system was "irreconcilably inconsistent with statutes requiring a municipality, in the event no candidate receives a majority of the votes cast, to conduct a runoff election at a later date".
- Tex. Atty. Gen. Op. DM-182 (1992) determined that a statute stating that "[p]ermits for engaging in [tobacco sales] shall be governed exclusively by the provisions of this code" preempted a home rule city from adopting local permit requirements for sellers of tobacco products.

Analysis

To quote TEX. ELEC. CODE ANN. §41.0052(a) once again:

> The governing body of a political subdivision other than a county may, not later than December 31, 2004, change the date on which it holds its general election for officers to another authorized uniform election date.

Two conclusions are obvious from a plain reading of this statute:

1. The statute provides for *governing bodies* of local governmental entities to change the date of their general elections during a specific period of time.
2. The statute is silent as to whether the *citizens of a home rule municipality* can change their general election date by voting to approve an amendment to their city charter.

It also seems clear that, for a home rule city such as San Marcos in which the date for general elections is set in the charter, the statute, by authorizing the *governing body* of a city to change the city's regular election date, preempts the usual requirement for voter approval of a charter amendment to change the election date.

It does not appear clear, however, that in giving temporary authority to the governing body of a home rule city to change the election date, the legislature intended to preempt the power of the citizens of home rule cities to change their election date through charter amendment. Had the legislature included wording such as "a political subdivision other than a county may not otherwise change the

date on which it holds its general election for officers," or "this is intended to constitute the exclusive process by which a political subdivision other than a county may change the date on which it holds its general election for officers," the intent to preempt would have been expressed with "unmistakable clarity". But this wording is not included.

Similarly, had the legislature amended TEX. ELEC. CODE ANN. §41.001 to require all municipal general elections to be held on one particular uniform election date, the legislature's intent to preempt home rule city authority to otherwise set the date would have been clear. The legislature has not done so, and under subsections (a) and (d) of TEX. ELEC. CODE ANN. §41.001, a city's general elections can be held either on "the first Saturday in May," or on "the first Tuesday after the first Monday in November". The statute appears to fail the standard for preemption of "unmistakable clarity" set out in the relevant case law and attorney general opinions.

Please provide me with your opinion on whether the citizens of a home rule city, the general election date for which is set in the city's charter, can change the city's date for general elections to another authorized uniform election date through an amendment to the city's charter, or whether TEX. ELEC. CODE ANN. §41.0052(a) preempts such a change.

Thank you for your assistance in this matter.

Sincerely,

Michael S. Wenk
Criminal District Attorney

cc: Mark B. Taylor, San Marcos City Attorney