

KEITH G. ALLEN
First Assistant

TERRI TIPTON HOLDER
Chief - Criminal Division



JIM WIGINTON
Chief - Civil Division

JOHN BLANKENSHIP
Chief Investigator

JERI YENNE

**CRIMINAL DISTRICT ATTORNEY
BRAZORIA COUNTY**

RECEIVED

MAR 21 2005

OPINION COMMITTEE

RECEIVED

MAR 16 2005

OPEN RECORDS DIVISION

March 15, 2005

FILE # ML-44163-05

I.D. # 044163

Honorable Greg Abbott
Attorney General
300 W. 15th Street
Austin, Texas 78701

VIA UPS # 1Z 69E 08V 01 9758 4935

Re: REQUEST FOR AN OPINION
Regarding term limit provisions of the
City of Alvin, Texas

RQ-0327-GA

Dear Mr. Abbott:

This request for an opinion is submitted regarding the enclosed copy of a letter dated February 21, 2005 from the City Attorney for the City of Alvin, Texas (see Exhibit A) on the subject of the term limit provisions of the City Charter of the City of Alvin (see Exhibit B for current term limit provisions of the City's Charter).

The City Attorney has presented several questions concerning the term limit provisions, including the applicability of the provisions to the status of Mayor Andy Reyes. This office concurs with the conclusions reached in the City Attorney's letter, as discussed herein below.

I.

FACTUAL BACKGROUND

On December 6, 2004 this office received a letter dated December 3, 2004 from a citizen of Alvin, Texas requesting an opinion regarding the application of the City of Alvin's term limit provision to the current Mayor of Alvin, Andy Reyes (see letter of John Ralph enclosed as Exhibit C). A copy of this letter was forwarded to the City Attorney for Alvin, Bobbi J. Kacz.

Subsequently, the City Attorney reviewed records regarding the past revisions to the City Charter. This review included the 2001 Charter Review Commission Report that considered the term limit provision that was later approved and is currently in effect. Additionally, the City

Attorney interviewed the 2001 Commission members, the Commission's chairperson, council members from that time period and the City Manager who attended Commission Meetings. The City Attorney concluded on the basis of this review and her interviews that the Council "intended that the term limit of an individual running for the elected office of Mayor was separate and exclusive of any time served on the Council." (See City Attorney's letter dated February 21, 2005 enclosed as Exhibit A and Chairperson Laurie McSwain's letter dated February 16, 2005 enclosed as Exhibit D).

On February 23, 2005, this office received a letter (Exhibit A) from the City Attorney requesting this office to ask for an Attorney General Opinion on three different questions regarding the applicability of Alvin's term limit. This letter included as enclosures copies of former Charter review Chairperson Laurie McSwain's letter of February 16, 2005 (Exhibit D), Mayor Andy Reye's letter of February 17, 2005 (Exhibit E), Article II from the current City Charter including the term limit provision (Exhibit B), and Minutes of the regular City Council meeting of February 21, 2002 (Exhibit F, containing the proposed Charter amendments that were eventually approved).

II.

DISCUSSION/ANALYSIS OF QUESTIONS PRESENTED

A. Questions Presented

The City Attorney has noted in her letter three (3) questions to be resolved regarding the term limit provision of the Alvin City Charter:

1. Do term limits apply to combined terms of councilmember and mayoral service?
2. Are council District and At-Large positions considered separate offices for term limit considerations?
3. What is the retroactive application of the term limit provision? Does the 8 year term limit that became effective May 2002 upon adoption of the charter revisions apply to **future service only**?

This office's conclusions on these questions are discussed herein below.

B. Applicable Rules of Statutory Interpretation

1. Primary Rule

The cardinal rule of statutory interpretation is to discern and give effect to the intent of the enacting body. *Rosenblatt v. City of Houston*, 31 S.W.3d 399, 403 (Tex. App. – Corpus Christi 2000, pet. denied), citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). In determining this intent, a court first seeks to discern the intent from the plain language of the statute or ordinance. *Id.* The rules that apply to the construction of statutes apply as well to the construction of municipal ordinances. *Id.*

2. Other Rules

In addition to the intent as discerned from the language of the statute itself, courts may consider matters such as the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, the common law or former statutory provisions and laws on the same or similar subject. *Id.*; TEX. GOV'T CODE ANN. § 311.023.

In construing unclear or ambiguous statutes that delineate the duration of terms of office, some authorities support following an interpretation that limits the office to the shortest term. Op. Tex. Att'y Gen. No. JM-592 (1986), citing to *Dobkins v. Reece*, 17 S.W. 2d 81 (Tex. Civ. App. – Fort Worth 1929, writ ref'd) (appointment to fill vacancy); *Wright v. Adams*, 45 Tex. 134 (1876). Courts favor an interpretation that will return the elective or appointive power to those exercising it at the earliest opportunity. *Id.*; Op. Tex. Att'y Gen. No. JM-592 (1986), citing to Attorney General Opinions MW-355 (1981); M-338 (1969) and M-296 (1968).

C. Do The City's Term Limit Provisions Apply to the Combined Terms of Councilmember and Mayoral Service?

As noted above the cardinal rule of statutory interpretation is to discern the intent of the enacting body. The plain language of the Charter term limit provision supports applying the term restriction to a specific office of either mayor or councilmember, and significantly, there is no expressed intent that the time of service in different offices be combined for purposes of determining term limits. In addition, the Chairperson of the 2001 Charter Review Commission (which considered the proposed/revised term limit provision ultimately, enacted) has stated in her letter (Exhibit D) that the intent of the Charter Review Commission was to create "independent term limits" for the mayor and council and "...to consider the term limit of 8 years for each position separately not jointly." Accordingly, given the wording of the provision together with the indicated intent of the Charter Review Commission, it is our conclusion that the term limit provision does not apply to the combined years of service of an individual (Andy Reyes) both as councilmember and mayor.

D. Question of Prospective or Retroactive Application of the Term Limit Provision

The City's term limit provision limits service of a council member or mayor to "no ... more than four (4) terms of office (inclusive of unexpired terms) nor shall the tenure of office exceed eight (8) years; ..." The City Attorney has noted the question of whether or not the term limit provision should be applied retroactively, or whether it should only apply prospectively. This question is currently pertinent to Mayor Reyes only if it is assumed (contrary to the above conclusion in C.) that his prior service as council member and his service as mayor are to be combined in determining application of the term limit provision.

No Texas authorities have considered specifically the question of whether term limits can apply retroactively, or whether they should only apply prospectively.¹ Authorities from other jurisdictions have reached varied and conflicting findings on the question of prospective or retroactive application of term limits. *League of Women Voters v. Secretary of State*, 683 A.2d 769, 773 (Me. 1996) (finding that previous terms served are to be counted towards the term limit, rejecting plaintiff's argument of prospective application); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 360-61 (Ark. 1994) (finding State constitutional amendment regarding State officeholder's terms to be vague on the point of when to begin counting terms, held that only prospective service should be counted); *State ex Rel. Mirlisena v. Hamilton County Board of Elections*, 622 N.E. 2d 329, 331-32 (Ohio 1993) (holding municipal term limit to be a retroactive law in violation of the Ohio Constitution); *Kuryak v. Adamczyk*, 705 N.Y.S.2d 739 (App. Div.), 1999 N.Y. Slip. Op. 08031 (holding term limit amendment to city charter to be prospective only). *Cf., Stockstill v. Rousselle*, 641 So.2d 724, 727-28 (La. App. 4th Cir. 1994) (holding that term limits charter amendment established that incumbent members of parish council were disqualified as candidates for reelection, even if members filed candidate qualification papers before charter amendment allegedly became effective).

As a general rule of law in Texas, statutes are presumed to operate prospectively unless expressly made retrospective. TEX. GOV'T CODE ANN. § 311.022; *Reames v. Police Officers Pension Bd. Of City of Houston*, 928 S.W.2d 628, 631 (Tex. App. – Hous. (14 Dist.) 1996, no writ). Texas courts apply statutes retroactively only if "it appears by fair implication from language used that it was the intention of the Legislature to make it applicable to both past and future transactions." *Id.* citing *State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W. 2d 707, 708-09 (1943). The language of the City of Alvin's term limit provision indicates an

¹ However, one Texas holding does conclude with respect to an act lengthening the term of county school superintendent that the Legislature has the power "to either shorten or lengthen" the term of statutorily created offices "... and make the act doing so apply to those in office at the time the act becomes effective." *Popham v. Patterson*, 51 S.W.2d 680, 683 (Tex. 1932).

intention to include previous year's service in determining the application of the provision. This intention is shown in the express inclusion of "unexpired terms" in reference to the limitation of "no...more than four (4) terms of office...", together with the fact that council members and the mayor served three (3) year terms prior to the Charter amendments that became effective in May, 2002. (See Exhibit F, Minutes of the regular City Council meeting of February 21, 2002 containing the proposed Charter amendments that were subsequently approved and became effective in May 2002). The phrase "inclusive of unexpired terms" was inserted to clarify that an officeholder could not serve more than four (4) terms nor have a tenure exceeding eight (8) years regardless of whether the terms are fully completed and regardless of whether the eight year limit occurred in the middle of an unexpired term. The only way a tenure of office could exceed eight (8) years (while at the same time not exceeding 4 terms inclusive of unexpired terms) is if a past 3 year term, prior to the term limit amendment of May, 2002, is combined with 2 year terms to result in a period in excess of eight years occurring in the middle of the fourth term. Otherwise, if only prospective service is counted, the 8 year tenure restriction does not have any meaning because an officeholder serving two year terms will always reach 4 terms (inclusive of unexpired terms) prior to exceeding 8 years. Additionally, the phrase was inserted to clarify that a then-serving or future officeholder could serve no more than four (4) terms including both past service and the remaining years of any unexpired term. There is no indication that "unexpired terms" refers only to future unexpired terms.

In addition, it is noted that the Charter amendment reflects a change in term limits from three (3) "consecutive full terms" or ten (10) "consecutive years" to "four (4) terms (inclusive of unexpired terms)" and tenure of no more than eight (8) years. This revision reflects an intention to include the aggregate sum of past years/terms of service rather than consecutive years of service in determining term limits.

By reason of all the above, it is concluded that the City's term limit provision does apply to past years/terms of service prior to the amendment's passage.

E. Should Council-District and Council-At-Large Positions Be Considered Separate Offices For Purposes of the Term Limit Provision?

The intent of a term limit provision is to limit an individual's term of service in a particular "office". There does not appear to be any language in the charter provision indicating that council-district or council-at-large positions should be treated separately for term limit purposes, and given that both have the same functions and duties, service in both positions should be added together to determine the applicability of the term limit provision.

**III
CONCLUSIONS**

The term limit provisions of the City of Alvin Charter should be applied separately to service in the offices of councilmember and mayor as that is the apparent intention of the provision indicated by the wording of the provision and its legislative history. Service in those separate offices should not be combined for purposes of determining application of the term limit provision.

The term limit provision was intended to count previous years of service prior to the amendment's enactment in determining application of the term limit provisions, as indicated by the wording of the amendment to include "unexpired terms" in its calculation and the elimination of the "consecutive" years requirement from the prior term limit provision.

The terms of council-at-large and council district positions should be combined for purposes of determining years of service for term limits as both positions are essentially the same "office" with the same functions and duties.

Please issue an opinion on the above referenced questions.

Thank you for your attention to this matter.

Sincerely yours,


JERI YENNE

HWP/las
Enclosures

xc: Henry W. Prejean
Bobbi J. Kacz