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Montgomery County

RQ-0249-KP

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September 7, 2018

via email to [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)

FILE # ML-48424-18  
I.D. # 48424

Honorable Ken Paxton  
Attorney General, State of Texas  
Attention: Opinion Committee

Re: *Request for Opinion regarding whether the City Attorney and/or the City Administrator of the City of Conroe, a home rule city, are "local public officials" subject to Tex. Local Government Code Chapter 171*

Dear Attorney General Paxton:

The County Attorney of Montgomery County, Texas on behalf of and at the request of the City of Conroe, Texas, a home rule city under the laws of the State of Texas, respectfully requests an opinion regarding whether the City Attorney and/or the City Administrator are "local public officials" subject to Chapter 171 of the Texas Local Government Code.

Toby Powell, Mayor of Conroe, Texas requested our office seek an opinion from your office. A copy of Mayor Powell's written request is attached to this letter.

*Background Facts:*

The issue arises due to a proposed agreement between the City of Conroe ("City") and the landowner of a defunct golf course ("Donor") whereby the Donor will donate a portion of the defunct golf course property to the City for park and open space purposes. The Donor will reserve the balance of the defunct golf course for future redevelopment. Under the proposed agreement, the Donor would receive an exception to the City's tree preservation ordinance for any portion of the remaining property to be redeveloped for single family homes and the City agrees to consent to the inclusion of the Donor's remaining land in a municipal utility district to aid in the redevelopment of the property.

The City Administrator and the City Attorney each own homes adjacent to the now defunct golf course. The City Administrator's home is adjacent to a portion of the golf course that would be donated to the City under the proposed agreement. The City Attorney's home is



adjacent to a portion of the former golf course that is retained by the Donor for redevelopment. The City Administrator and City Attorney negotiated the proposed agreement on behalf of the City. The proposed agreement has not been voted on by the City Council though the City Attorney presented the proposed agreement to the City Council in a public workshop. There has been no decision made on the proposed agreement.

There have been public comments or suggestions that the terms of the proposed agreement, if approved by the City, may have a special economic effect on the value of the properties owned by the City Administrator and/or the City Attorney, respectively. If a special economic benefit would result then the City Administrator and/or City Attorney may be required to comply with Section 171.004 of the Texas Local Government Code if they are "local public officials" within the meaning of Chapter 171. The City Administrator and City Attorney contend they are not local public officials subject to the Chapter 171.

*Discussion:*

The City of Conroe is a home rule city. The City charter vests all powers of the City in the City Council. Sec 3.07, City of Conroe Charter. The City charter includes a provision granting the City Council the specific power to remove any officer or employee. Sec. 3.07(a), City of Conroe Charter.

The City Administrator and the City Attorney are not elected officers. The position of City Attorney is created by the City charter. The City Administrator position was created by ordinance.<sup>1</sup> The City Administrator and City Attorney are each appointed by the Mayor with the consent of the City Council and serve for an indefinite period until removed by the City Council. Texas Local Government Code section 171.001(a) defines "local public official" in a way that could include appointed officers of a municipality. An appointed municipal officer is a "local public official" under Chapter 171 only if the officer exercises responsibilities beyond those that are advisory in nature. TEX. LOCAL GOV'T CODE § 171.001(a)(V.A.T.S. 1987).

The City Administrator's duties and responsibilities as described in the city ordinance are supervisory and administrative in nature.<sup>2</sup> The letter from Toby Powell, Mayor, details that the City Administrator does not have the authority to accept the proposed donation agreement,

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<sup>1</sup> The City does not use a city manager form of government.

<sup>2</sup> "The city administrator shall be head of the administrative departments of the city and shall have supervision of all administrative officers and employees, other than elected officials. The city administrator shall perform all other such duties as prescribed by the city Charter, laws of the state and as required by the city council. The city administrator shall be responsible to the city council for the proper administration and operation of all city departments and affairs and shall make frequent reports to the mayor and city council." City of Conroe Code of Ordinances, Sec. 2.205.



commit the City to the creation of a MUD, or grant the exception to the City's tree ordinance as required for the City to perform the proposed agreement. Mayor Powell states in his letter that the authority to approve or reject the proposed agreement lies solely with the City Council. With regard to the proposed donation agreement, the City Administrator's responsibilities are advisory only.

Your office has previously determined that a city employee is not a local public official subject to Chapter 171. *See*, Tex. Att'y Gen. Op. No. GA-0195 (2004) at 2.<sup>3</sup> *See also*, Tex. Att'y Gen. Op. No. KP-0105 (2016) at 2. In construing the predecessor statute to Section 171.001, your office found an investigator appointed and employed by the criminal district attorney to be a "local public official". Tex. Att'y Gen. Op. No. JM-776 (1987).<sup>4</sup> The investigator would not, however, violate Chapter 171 even though the investigator held a community property interest in his spouse's bail bond business. *Id.* A city staff employee working for a city's historic landmark preservation overlay district and planning and zoning commission residing or owning property within the district was determined not to be a local public official under the application of Chapter 171, including when the staff employee made recommendations regarding property within the district. Tex. Att'y Gen. Op. No. KP-0105 (2016). In the same opinion, members of the city's historic landmark commission and the planning a zoning commission residing in the district were local public officials because the respective commissions exercised responsibilities such as reviewing and taking action on construction, alteration, restoration, and demolition on structures issues and for which the commissions' decisions were final subject to appeal to the city council. *Id.*

The position of City Administrator for the City of Conroe has many characteristics of the position of employee. The City Administrator is appointed for an indefinite time, i.e. not a term, and serves until removed by the City Council. The City Administrator serves at the will of the City Council and may be removed with or without cause by the City Council. The City Administrator is required to report to the City Council. The City Administrator's ability to approve expenditures is limited to expenditures under \$50,000; all other expenditures require City Council approval.

Your office has previously determined that the City Attorney for the City of Alpine was an employee and was not holding a public office. As such, the elected county attorney was not precluded from serving as the city attorney by either the bar on dual-office holding pursuant to art. XVI, § 40 of the Constitution or the common law doctrine of incompatibility. Tex. Att'y

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<sup>3</sup> The person at issue in GA-0195 was a local public official with regard to the special utility district as a member of the board; however, his employment with the City of Midlothian did not disqualify him from voting as a board member on contracts or matters between the district and the City. GA-0195 addressed the service of the employee on the board of the district with regard to the issues of dual office holding and Chapter 171.

<sup>4</sup> The investigator was determined to be a local public official due to the investigator's authority to make warrantless arrests as a responsibility of the office beyond that as advisory in nature.

Letter to Hon. Ken Paxton  
September 7, 2018



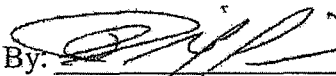
Gen. Op. No. JC-054 (1999). Significant factors in that opinion were that the city attorney served at the will of the city council and that the legal services to be performed by the city attorney were to be directed by the city council. *Ib.* The City Attorney of Conroe serves at the pleasure of the City Council and is subject to its direction and control. The City Attorney may be removed with or without cause by the City Council. The letter from Toby Powell, Mayor, details that the City Attorney does not have the authority to accept the proposed donation agreement, commit the City to the creation of a MUD, or grant the exception to the City's tree ordinance as required for the City to perform the proposed agreement. Mayor Powell states in his letter that the authority to approve or reject the proposed agreement lies solely with the City Council.

Applying the definition of local public official in § 171.001(a), the issue is whether the City Attorney "exercises responsibilities beyond those that are advisory in nature." See, TEX. LOCAL GOV'T CODE § 171.001(a). The City Charter describes the responsibilities of the City Attorney as "the legal advisor of and attorney and counsel for, the City and all officers and departments thereof." Sec. 4.05 City Charter.<sup>5</sup> The City Charter is silent on all other responsibilities other than acting as the legal advisor and attorney for the City. By City ordinance, the City Attorney and other department heads have limited authority for minor purchases (under \$3,000).

Given the foregoing, the County Attorney of Montgomery County, Texas on behalf of and at the request of the City of Conroe, Texas respectfully requests an opinion regarding whether the City Attorney and/or the City Administrator are "local public officials" subject to Chapter 171 of the Texas Local Government Code. On behalf of the City of Conroe, Texas and the citizens it serves, we thank you for your time and attention to this matter and look forward to any guidance you and your office may be able to provide.

Please contact me with any questions.

Sincerely,  
J D LAMBRIGHT, COUNTY ATTORNEY  
OF MONTGOMERY COUNTY, TEXAS

By:   
B. D. Griffin, 1<sup>st</sup> Assistant County Attorney

<sup>5</sup> "The City Council by a majority vote of its total membership shall appoint a competent attorney licensed to practice law in the State of Texas, who shall be the City Attorney. He shall receive for his services such compensation as may be fixed by the City Council and shall hold his office until removed by the majority vote of the total membership of the City Council. The City Attorney, or such other Attorneys selected by him with the approval of the City Council, shall represent the City in all litigation. He shall be the legal advisor of and attorney and counsel for, the City and all officers and departments thereof." Sec. 4.05, City charter.



# CITY OF CONROE

Est. 1904

August 27, 2018

Hon. J. D. Lambright  
Montgomery County Attorney  
501 N. Thompson, Suite 300  
Conroe, Texas 77301

Re: Whether or not the City Administrator and City Attorney of the City of Conroe are "local public officials" subject to Texas Local Government Code Chapter 171

Dear County Attorney Lambright:

On behalf of the City of Conroe I request your assistance in seeking an Attorney General opinion on the question of whether or not the City Administrator and City Attorney of the City of Conroe are "local public officials" subject to Tex. Local Gov. Code Chapter 171.

## Background

This question is presented in connection with a proposed agreement for the donation of a portion of a defunct golf course to the City to be used for park and open space purposes. The donor would reserve the balance of the golf course property for future redevelopment. Under the proposed agreement the donor would receive an exception to the City's tree preservation ordinance for portions of the property redeveloped for single family homes and the City would consent to the inclusion of the remainder property in a municipal utility district to aid in the redevelopment of the property.

The City Administrator owns a home adjacent to a portion of the golf course property that is proposed for donation to the City. The City Attorney owns a home adjacent to a portion of the golf course property that would be retained by the donor and subject to possible redevelopment. The City Administrator and City Attorney negotiated the proposed agreement on behalf of the City. The proposed agreement was presented by the City Attorney to the City Council in a public workshop but the Council has not voted on the agreement and no decision has been made on the agreement.

It has been suggested that the proposed agreement may result in a special economic effect on the value of the property owned by the City Administrator and/or City Attorney thus

requiring them to comply with Section 171.004 of the Code if they are “local public officials” within the meaning of Chapter 171. The definition of “local public official” includes appointed officers of a municipality who exercise responsibilities beyond those that are advisory in nature.”

Powers and duties of City Council, City Administrator and City Attorney

The City of Conroe is a home rule municipality. Under Sec. 3.07 of the City charter “all powers of the City and the determination of all matters of policy shall be vested in the City Council.” Without limiting the general grant of authority the charter enumerates certain specific powers of the City Council. Sec. 3.07(a) provides that the City Council may “Remove from any office or position of employment in the City Government any officer or employee or member of any board or commission.”

The City Attorney is appointed by the Mayor with the consent of the City Council and serves for an indefinite period until removed by the City Council. The City Attorney may be removed with or without cause at the pleasure of the Council. Sec. 4.05 of the City charter provides as follows:

“The City Council by a majority vote of its total membership shall appoint a competent attorney licensed to practice law in the State of Texas, who shall be the City Attorney. He shall receive for his services such compensation as may be fixed by the City Council and shall hold his office until removed by the majority vote of the total membership of the City Council. The City Attorney, or such other Attorneys selected by him with the approval of the City Council, shall represent the City in all litigation. He shall be the legal advisor of and attorney and counsel for, the City and all officers and departments thereof.”

The City of Conroe is not a city manager form of government but has by ordinance created the position of City Administrator. The City Administrator is appointed by the Mayor with the consent of the City Council and serves for an indefinite period until removed from the position by the City Council. The City Administrator may be removed with or without cause at the pleasure of the Council. Sec. 2-205 of the Code of Ordinances prescribes the duties and responsibilities of the City Administrator as follows:

“The city administrator shall be head of the administrative departments of the city and shall have supervision of all administrative officers and employees, other than elected officials. The city administrator shall perform all other such duties as prescribed by the city Charter, laws of the state and as required by the city council. The city administrator shall be responsible to the city council for the proper administration and operation of all city departments and affairs and shall make frequent reports to the mayor and city council.”

By ordinance the City Attorney, in common with other city department heads has been authorized to make minor contracts for purchases required for municipal purposes providing that any contract for an expenditure of more than \$3,000 must be approved by

the City Administrator. The City Administrator's approval authority is limited to expenditures below \$50,000 and all expenditures of \$50,000 or more must be approved by the City Council.

Neither the City Administrator or the City Attorney have authority to make the proposed donation agreement on behalf of the City or to commit the City to the creation of a municipal utility district or to grant the exceptions to the City's tree ordinance which are conditions of the proposed donation. Although the City Administrator and City Attorney have been the primary City negotiators, the authority to approve or reject the proposed agreement lies solely with the City Council.

#### Relevant Attorney General Opinions

KP-0105 (2016) found that a Beaumont city employee providing staff support to the Beaumont Planning and Zoning Commission is not subject to chapter 171. KP-105 cited Opinion GA-0195 (2004) which found a City of Midlothian employee described as a front line supervisor with limited authority for the purchase of supplies was not a public official in his capacity as a Midlothian city employee.

GA-0195 quoted *Aldine Independent School District v. Standley*, 280 SW 2d 578 (Tex. 1955) saying "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others."

JC-0054 (1999) found that the position of attorney for the City of Alpine is not a public office. The factual setting described in that opinion noted that the attorney was appointed by and served at the will of the city council and performed all services incident to the position as directed by the Alpine City Council and concluded, "*Given that you serve at the will and under the direction of the city council, you do not exercise a sovereign function of the city largely independent of the control of others.*"

If you agree to submit this question to the Attorney General please include this letter as a statement of the applicable facts.

Thank you for your cooperation with this request.

Sincerely,



Toby Powell  
Mayor of Conroe, Texas