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March 12, 1991

Ms. Ranette Boyd, CMC/AAE  
City Secretary  
City of Lubbock  
P.O. Box 2000  
Lubbock, Texas 79457

Election Law Opinion JH-1

Re: Whether cities may require write-in candidates to file  
declarations of write-in candidacy.

Dear Ms. Boyd:

Thank you for your letter of January 17, 1991, in which you requested my opinion, as chief election officer of the State of Texas, and asked if the Texas Election Code (the "Code") authorizes cities, by charter amendment or ordinance, to require write-in candidates to file declarations of write-in candidacy as a condition precedent to having write-in votes cast for them counted.

Section 146.001 of the Code provides as follows:

Except as otherwise provided by law, if the name of the person for whom a voter desires to vote does not appear on the ballot, the voter may write in the name of that person.

Tex. Elec. Code Ann. § 146.001 (Vernon 1986) (emphasis added). The term "law" is defined in section 1.005(10) of the Code to mean "a constitution, statute, city charter, or city ordinance." Id. § 1.005(10) (emphasis added).

In the general election for state and county officers, all write-in candidates must file declarations of write-in candidacy before votes cast for them may be counted. Id. §§ 146.021-.032 (Vernon 1986 & Supp. 1991). Additionally, write-in candidates for the office of trustee in independent school districts must file a declaration of write-in candidacy. Tex. Educ. Code Ann. § 23.081 (Vernon Supp. 1991).

You asked if the "[e]xcept as otherwise provided by law" terminology in section 146.001, read in conjunction with the definition of "law" in section 1.005(10) which includes city ordinances, permits cities to require write-in candidates to file declarations of write-in candidacy. It is my opinion that that terminology is not independent authority that allows a city to enact a declaration of write-in candidacy ordinance.

Pursuant to sections 141.003 and 143.005 of the Election Code, as well as section 26.041 of the Texas Local Government Code, home rule cities have express authority to set certain qualifications for candidates if the home rule city so desires. Clearly, home rule cities may adopt such a requirement for write-in candidacy either by charter amendment or ordinance. Home rule cities are given broad authority under article XI, section 5, of the Texas Constitution to adopt a charter and enact ordinances pursuant to that charter. The only limitation under the constitution is that the charter or ordinances be consistent with the constitution or the general laws of the state. Lower Colo. River Auth. v. City of San Marcos, 523 S.W.2d 641, 644-45 (Tex. 1975).

Conversely, general law cities have only those powers granted by state law or by necessary implication therefrom. Payne v. Massey, 145 Tex. 237, \_\_\_, 196 S.W.2d 493, 495 (1946); Ex parte Ernest, 138 Tex. Crim. 441, \_\_\_, 136 S.W.2d 595, 597-98 (1940); Messengale v. City of Copperas Cove, 520 S.W.2d 824, 828 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.). The Election Code does not expressly grant general law cities authority to require declarations of write-in candidacy.

[E]ven though the Election Code allows a municipal charter or ordinance to govern an election matter, a municipality may not adopt a provision relating to that matter unless it is authorized to do so by other state law. . . .

. . . .

Consequently, whenever the Election Code allows another law to control over the code, it appears that only home-rule municipalities, by their charters or ordinances, have actually done this. For this reason, any provision in this handbook referring to a municipality acting by charter

or ordinance with regard to an election matter should be read as applying only to home-rule municipalities.

G. Shuffler, Texas Municipal Election Laws § 1.03, at 5 (1990-91 rev. ed.) (emphasis in original).

Section 146.001 of the Code is not intended as a grant of authority whereby a city may require declarations of write-in candidacy. Rather, it simply allows another law to control over the general rule stated in the Code. A city may not adopt a declaration of write-in candidacy scheme unless authorized to do so by other state law.

As noted above, a home rule city has such authority, by either charter amendment or ordinance. Section 146.001 does not, however, either expressly or by necessary implication, grant authority to a general law city to enact an ordinance providing write-in procedures. I am not aware of any state law that grants such ordinance-making authority to a general law city.

Accordingly, you are advised that home rule cities, by charter amendment or ordinance enacted under the charter, are empowered to require write-in candidates for city office to file declarations of write-in candidacy. You are further advised that general law cities are not empowered to require, by ordinance, write-in candidates for city office to file declarations of write-in candidacy.

#### SUMMARY

Home rule cities may require, by charter amendment or ordinance enacted under the charter, that write-in candidates file a declaration of write-in candidacy in order for such candidates to have votes cast for them counted. General law cities are not empowered to require that write-in candidates file declarations of write-in candidacy.

Sincerely,

  
John Hannah, Jr.  
Secretary of State

Audrey Selden  
Assistant Secretary of State

Prepared by Austin C. Bray, Jr.  
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