

M E M O R A N D U M

TO: Honorable Mayor and Town Council Members

FROM: Terrence S. Welch, Town Attorney

DATE: September 29, 2016

RE: Proposed Town Charter Amendments

The Charter Review Commission (“Commission”) has concluded its deliberations and is submitting ten (10) proposed amendments to the Town Charter. The purpose of this memorandum is to present the Commission’s proposed amendments and describe the legal issues associated with each proposed amendment. This memorandum should be read in conjunction with the redlined version of the Charter that Town Secretary Robyn Battle will be providing to you.

Proposition No. 1

Shall the Town Charter be amended throughout to correct non-substantive errors such as misspellings, punctuation, grammar and sentence structure; provide non-substantive clarifications and include better descriptive language of the matters addressed in the Charter; conform notice, publication and election requirements to state law; and revise references to repealed or obsolete provisions of the Town Charter, state or federal law?

This is the standard “clean-up” charter amendment that virtually every municipality adds to its listing of charter amendment propositions; nonetheless, this proposition covers the majority of proposed changes.

A. Misspellings, Punctuation, Grammar and Sentence Structure

Throughout the Charter, the Commission has noted various misspellings, punctuation errors, grammatical errors and revisions to sentence structure. None of these are substantive and these items are included to provide proper language and correct grammatical usage.

B. Non-substantive Clarifications/Better Descriptive Language

Non-substantive clarifications are those minor wording changes that do not change the substance of prior versions of the Charter. For example, current Section 5.05 refers to new councilmembers being “inducted” into office rather than being “sworn” into office, so “inducted” has been replaced with “sworn.”

C. Conform Notice, Publication and Election Requirements to State Law

Throughout the Charter there are references to various provisions of Texas election law. Due to recent legislative amendments to election requirements, several of those current Charter provisions have become obsolete. For example, current Article V of the Charter is entitled “Nominations and Elections.” Section 5.01(1) provides that all elections shall be conducted in accordance with the Election Code, and further provides that Town elections shall be held on the second Saturday in May; however, the current municipal election date is now the first Saturday in May. Rather than change each election requirement to conform with current law, it was determined that it is better to require conformity with the Texas Election Code generally rather than specifically address each individual Election Code requirement. As a result, the Charter will not need to be amended every time the Legislature changes specific provisions in the Election Code.

D. Revise references to repealed or obsolete provisions of the Town Charter, State or Federal Law

Several provisions of the current Charter are obsolete and no longer are necessary. For example, in current Section 3.06 there is reference to a 12-month period beginning on June 1, 2012, a date that has long since passed. Further, Article XIII is entitled “Transitional Provisions” and refers back to the original adoption of the Charter in 2006, clearly an obsolete provision.

Two provisions of the current Charter are unconstitutional and have been removed from the Charter. First, for candidates filing for Town Council seats, current Section 5.02(2)(D) provides that at the time of filing, the candidate cannot “be in arrears in payment of taxes or other liabilities due the Town after notice of any delinquency.” A second similar provision is found in current Section 14.07 which provides that no Town employee or appointee of the Town (e.g., board and commission members) “after notice of delinquency, shall be in arrears in the payment of taxes or any other liabilities due the Town. . . .”

There are two Texas federal court cases that directly address these “in arrears” issues. The first is *Gonzales v. City of Sinton*, 319 F.Supp. 189 (S.D. Tex. 1970). In this case, two individuals were seeking places on the ballot for the Sinton City Council. One of the two individuals was not permitted to file for office because he had “been adjudged delinquent in the payment of property taxes for the year preceding the election.” *Id.*, 319 F.Supp. at 189. Citing the United States Supreme Court case of *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970), which held that the state may not restrict the right to vote to real property taxpayers, the United States District Court for the Southern District of Texas wrote as follows:

All residents of Sinton who are qualified voters under the laws of Texas have a significant interest in representation at the local level. Assessment of property taxes is only one function of the City Council of Sinton. Every other potential act of the Council will bear as much upon the resident who owns no real estate or pays no property taxes as upon him whose tax payments fill the public coffers. Furthermore, even if some overriding interest could be found to justify the linkage of taxation to representation, the claim is erroneous that non-property owners do not contribute to the general revenues. . . . It is equally certain that, to be guaranteed the full extent of the rights acknowledged by these franchise cases, plaintiffs must be granted the concomitant right to stand for office. . . . The court believes that the Equal Protection Clause of the Fourteenth Amendment requires an extension to candidacy of those guidelines which the Supreme Court has already formulated with respect to voting.

Id., 319 F.Supp. at 190. Thus, the federal district court held that the non-payment of property taxes is not and should not disqualify candidates from running for elective office and that any such charter or ordinance provision to the contrary is violative of the Fourteenth Amendment's Equal Protection Clause.

The second case is *Hunt v. City of Longview*, 932 F.Supp. 828 (E.D. Tex. 1995). The holding of this case, originating in the Eastern District of Texas (federal district court), is highly important since both Collin County and Denton County are located in the Eastern District of Texas and this holding would be viewed as strong, binding precedent.

In *Hunt*, an issue arose regarding qualification for holding office in Longview. The Longview City Charter provided that "[t]he Mayor and each member of the City Council . . . must not be in arrears in payment of taxes or other liabilities due the City of Longview." As you will note, this is almost the same language as in our Town Charter. Further, the Longview Charter also provided that when a candidate ran for office, he or she was required to sign an unsworn statement that "he or she is not in arrears to the City of Longview." *Id.*, 932 F.Supp. at 832. As a result of the foregoing charter provisions, two city councilmembers were in jeopardy of losing their seats on the council and a lawsuit was initiated in federal court by those two city councilmembers to seek a declaration from the court whether those charter provisions were unconstitutional.

The court addressed the constitutionality of the Longview charter provisions.

Plaintiffs [the two city councilmembers who were in danger of being removed from their council seats] assert that a qualification for holding office based upon a person's ability to pay taxes and liabilities to the city is not rationally related to any legitimate governmental interest. The Supreme Court has condemned restrictions on candidates based on wealth and land ownership. . . . Although a candidate does not have a fundamental right to placement on a ballot, the impact of eligibility requirements upon voters implicates basic constitutional rights. A qualification that officeholders not be in arrears to the city in which they are elected to serve raises similar concerns. However, the United States Supreme Court and the Fifth Circuit have yet to rule on the precise issue before the court today.

Id., 932 F.Supp. at 838-39 (citations omitted). After addressing several cases from around the country, the court described its concerns about such a provision:

Today we consider the restriction of tax delinquency as an additional threshold qualification for an elected official. Tomorrow's restriction may concern failure to pay federal or state taxes. Thereafter, candidacy may be conditioned on municipal obligations such as sewer assessments, parking fines, dog law violations, jaywalking and other minor infractions. None of these potential qualifications bears on a candidate's maturity, intelligence, knowledge of the community, ability to recognize and solve community problems. Each new qualification decreases a voter's choice and consequently harms democratic government. Analysis of equal protection and our understanding of the legitimate interests of society counsel that candidacy conditioned on the payment of taxes is inimical to democratic government.

Id., 932 F.Supp. at 840. The court also questioned the "good citizenship" aspect of being current on all property taxes owed the city.

Keeping current with one's tax liabilities is not necessarily a mark of good citizenship. Good citizenship can also entail speaking out against unfair or excessive taxes. In this case Plaintiffs [two councilmembers] dispute that any money is owed to the City. Moreover, the court cannot agree with an argument that those who either fall on hard times or are too poor to pay taxes are bad citizens. The value of the citizenry is not dependent upon the size of its pocketbook. This case has been the subject of many local newspaper articles and television news reports. The electorate has been informed. If the voters of Longview decide they do not wish to be represented by those who are delinquent in paying city taxes, they can do

so at the ballot box. . . . Removing one from office for failure to pay taxes and fees . . . is irrational.

Id., 932 F.Supp. at 841. Based upon the court cases referenced above, I believe that foregoing current sections of our Charter do not pass federal constitutional muster.

A minor inconsistency in the current Charter exists between Section 4.02(1), which provides that the Town Manager is responsible for the hiring and terminating of the Town Secretary, and Section 4.06(2)(E), which provides that the Town Council performs an annual evaluation of the Town Secretary, among others. Since the Town Council has never provided a performance review of the Town Secretary, and the Town Manager is specifically charged with hiring and terminating the Town Secretary, Section 4.06(2)(E) is both obsolete and inoperative, and consequently, any reference to the Town Secretary would be removed from Section 4.06(2)(E).

Last, current Section 5.02(2)(F) provides that any Town employee who files to become a candidate for Town Council forfeits his or her employment with the Town. A recent change in state law prohibits such a provision. See Tex. Local Gov't Code § 150.041(c) ("A municipality may not take disciplinary action against a municipal employee, including terminating the employment of the employee, solely because the employee becomes a candidate for public office").

Proposition No. 2

Shall Section 3.02 of the Town Charter, entitled "Limitations on Terms," be repealed?

The Commission voted to repeal the term limits provisions found current Section 3.02 of the Charter.

Proposition No. 3

Shall Section 3.04 of the Town Charter, entitled "Compensation," be amended to provide that Town Councilmembers shall be entitled to reimbursement for actual reasonable expenses incurred in the performance of official duties for the Town?

The Commission voted that Town Councilmembers should be reimbursed their actual reasonable expenses that are incurred in the performance of their duties, and believed that such reimbursement should be in accordance with the Town's travel and reimbursement policies.

Proposition No. 4

Shall Section 3.06 of the Town Charter, entitled “Vacancies, Forfeiture and Filling of Vacancies,” be amended to provide that vacancies on the Town Council shall be filled by election; however, if there is a vacancy on Town Council for a position with twelve (12) or fewer months remaining in the term, the Town Council may fill the vacancy by appointment?

Prior to November 2013, Section 11(b) of article XI of the Texas Constitution provided that in the event of a vacancy on a city council with terms of office of either 3 or 4 years (such as in Prosper with 3-year terms of office), any vacancy on the Town Council was required to be filled by a special election within 120 days after such vacancy occurred. In the November 2013 general election, Texas voters approved an amendment to Section 11(b) that would allow a home rule municipality with 3 or 4 year terms, if the charter so provides, to fill a vacancy by appointment if the unexpired term is 12 months or less. The Commission voted to approve the filling of vacancies on the Town Council by appointment if the unexpired council term is 12 months or less. By doing so, the Town is not required to call a special election and incur the costs associated with a special election.

Proposition No. 5

Shall Section 3.12 of the Town Charter, entitled “Abstention,” and Section 9.03 of the Town Charter, entitled “Procedure,” be amended to provide that any abstention from voting by a Town Councilmember or Planning and Zoning Commissioner, respectively, should be recorded in the official minutes of the meeting as an abstention?

These two sections of the Charter provide that when a Town Councilmember or a Planning and Zoning Commissioner abstains from voting on a matter, the minutes are required to reflect that they voted in the negative on an issue. While the effect of an abstention is generally the same as a “no” vote, the current Charter provision does not address the effect of an abstention but instead requires that the minutes reflect a “no” vote that did not occur and indeed was not cast by the councilmember or commissioner. The Commission desired that an abstention from voting by a councilmember or commissioner should be accurately reflected in the minutes of the meeting.

Proposition No. 6

Shall Section 5.02 of the Town Charter, entitled “Filing for Office,” be amended to provide that (A) only registered voters for at least twelve (12) months immediately preceding the filing date may file to become a

candidate for Town Council; (B) only Town residents who have resided within the Town for at least twelve (12) months immediately preceding the filing date may file to become a candidate for Town Council; and (C) if any board or commission member appointed by the Town Council becomes a candidate for election to the Town Council, he immediately shall forfeit the board or commission position with the Town?

This proposed Charter amendment changes the “Filing for Office” provisions of the current Charter in three significant respects (other than the “in arrears” provision addressed above). First, a candidate for Town Council must be a registered voter in the Town for the twelve (12) months preceding the date of filing (currently there is no amount of time required to be a registered voter prior to filing); second, a candidate must reside in the Town for twelve (12) months prior to filing (currently a candidate can live in territory annexed by the Town at any time prior to the filing date); and third, if a member of a Town board or commission announces his or her candidacy or becomes a candidate for Town Council, that board or commission member forfeits the board or commission position.

Proposition No. 7

Shall Section 5.05 of the Town Charter, entitled “Taking of Office,” be amended to provide that new Town Councilmembers shall be sworn into office at the next meeting following the declaration of the results of the election?

Current Section 5.05 of the Charter provides that newly elected councilmembers take office at the first regular Council meeting following the election. Since the amount of time required to canvass an election has increased due to both state and federal legislation, it is rarely feasible to swear in new councilmembers at the “first regular Town Council meeting following the election.” The proposed Charter amendment allows for the swearing in of new councilmembers following canvassing, *i.e.*, “the declaration of the results of the election.”

Proposition No. 8

Shall Section 7.06 of the Town Charter, entitled “Proceeding on Adoption of Budget,” be amended to provide that the Town budget shall be adopted prior to the beginning of the next fiscal year?

The current Charter, in Section 7.06, has an unusual provision that the Town’s budget must be adopted ten (10) days before the start of the new fiscal year and if the Town Council does not do so, the then-current budget remains in place until the new

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fiscal year budget is adopted. For example, if the FY 2016-2017 budget is not adopted by September 20, 2016, then the FY 2015-2016 budget remains in place until the FY 2016-2017 budget is adopted in late September. Since the new annual budget is always adopted on or prior to September 30, the current Charter language is of no practical effect.

Proposition No. 9

Shall Section 8.01 of the Town Charter, entitled "Authority, Composition and Procedures," be amended to provide that (A) board and commission members may be reimbursed for actual reasonable expenses incurred in the performance of official duties; and (B) all board and commission meeting minutes shall be kept by the Town and that written reports are not required to be submitted to the Town Council within three (3) weeks?

This proposed Charter amendment conforms board and commission member reimbursements with those reimbursement procedures for councilmembers, as reflected in Proposition 3. This amendment also provides that the Town shall retain all minutes of its meetings and eliminates the requirement that the Town Council receive copies of minutes within three (3) weeks since copies of minutes are provided to councilmembers routinely by the Town Manager.

Proposition No. 10

Shall Section 9.05 of the Town Charter, entitled "Board of Adjustment," be repealed?

Since the Town's Zoning Ordinance, in Section 8.6 of Chapter 1 thereof, provides a detailed ordinance regarding the duties and authority of the Zoning Board of Adjustment, there is no need for a Charter provision to do so. Additionally, the current Charter provision about the Zoning Board of Adjustment is inexplicably located in an article entitled "Planning & Zoning Commission." This Charter amendment simply deletes the current Charter provision since it is superfluous.

I hope the foregoing is of assistance to you in reviewing the proposed Charter amendments. If you have any questions or concerns, please feel free to give me a call at the office at 214/747-6104. Thanks.

c: Harlan Jefferson, Town Manager