The Attorney General of Texas

December 20, 1978

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An Equal Opportunity/
Affirmative Action Employer

Honorable Craig A. Washington
Chairman
House Committee on Social Services
P. O. Box 2910
Austin, Texas 78769

Letter Advisory No. 155

Re: Whether a statute may constitutionally require approval of both a majority of voters of the entire county and of the voters in the unincorporated areas to grant county ordinance-making power.

Dear Representative Washington:

You inquire about the constitutionality of a proposed statute which would authorize a local option election to grant a county either general or limited ordinance-making powers. The proposed statute would direct that the votes of persons residing outside of incorporated cities and towns be counted separately and would require that the proposition be approved by a majority of voters residing outside of incorporated areas as well as a majority of all voters in the county. It would thus give the nonurban voters a veto over the assumption of ordinance-making authority by the county. The residents of incorporated cities and towns do not have a comparable veto, since their votes only go toward determining whether there is a county-wide majority. You ask whether this voting procedure would be constitutional under the "one person, one vote" principle.

The Equal Protection Clause of the Fourteenth Amendment requires that the votes of citizens be given equal weight in elections for representatives. Reynolds v. Sims, 377 U.S. 533 (1964) (state legislators); see, e.g., Hadley v. Junior College Dist., 397 U.S. 50 (1970) (trustees of junior college district); Avery v. Midland County, Texas, 390 U.S. 474 (1968) (county commissioners); Westberry v. Sanders, 376 U.S. 1 (1964) (congressional elections). The "one person, one vote" rule embodies the principle of "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." Reynolds v. Sims, supra at 560-61; see Lockport v. Citizens for Community Action, 430 U.S. 259 (1977). Apportionment structures that contain a built-in bias favoring particular geographic areas or less populous districts over more highly populated districts are generally disapproved. Abate v. Mundt, 403 U.S. 182, 186 (1971); Hadley v. Junior College Dist., supra at 57-58.

The "one person, one vote" rule has been applied to invalidate property qualifications in certain nonrepresentational elections which significantly affected all voters. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bonds); Cipriano v. Houma, 395 U.S. 701 (1969) (municipal utility bonds). But see Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) (franchise in limited purpose water district may be restricted to landowners and weighted according to holdings). However, in upholding a statute requiring the approval of 60 percent of the voters in bond and tax rate elections, the Supreme Court has said that the Constitution does not require "that a majority always prevail on every issue." Gordon v. Lance, 403 U.S. 1, 6 (1971).

In Lockport v. Citizens for Community Action, 430 U.S. 259 (1977), the Court considered the application of the "one person, one vote" principle to a special purpose election to restructure county government. A New York law provided that a new county charter would go into effect only if approved in a referendum election by separate majorities of the voters who live in cities within the county, and of those who live outside of cities. 430 U.S. at 260. A proposed new county charter was defeated because it failed to receive a majority of the rural votes, even though a county-wide majority approved it. The Court stated that the equal protection principles applicable to the election of representatives were less relevant to the "single-shot" referendum, where distinctive voter interests might in some cases be recognized by the state. 430 U.S. 266. Compare Salyer Land Co. v. Tulare Water Dist., supra with Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court articulated a two part inquiry for determining whether voter classifications in single purpose referendum elections violated the Equal Protection Clause: whether there is a genuine difference in the relevant interests of the groups created by the state electoral classification, and if so, whether any resulting enhancement of minority voting strength nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause. 430 U.S. at 268.

Applying this test, the Court determined that the voter classifications rested on the state's identification of the distinctive interests of urban and nonurban residents within the county. 430 U.S. at 268. If all residents of the county had identical interests in the adoption of a new county charter, the separate majority requirements would be unconstitutional. In fact, the new charter would significantly enhance the county's capacity to deliver services. It could shift the preexisting balance of power between city and county government toward county predominance. Thus, city and noncity dwellers would be affected in different ways by the adoption of the new charter. The Court determined that the differing interests of the two groups of voters were sufficient under the Equal Protection Clause to justify the voter classifications made by the New York law. It compared the charter referendum to annexation proceedings and school district consolidation, stating as follows:

> In each case, separate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite

> differently by the different county constituent units that in a sense compete to provide similar governmental services.

430 U.S. 271–272. It concluded that the New York law merely recognized the realities of substantially differing electoral interests, and found that it was not unconstitutional.

The proposed statute you inquire about resembles the New York statute in some respects. The assumption of ordinance-making authority by a county would affect residents of unincorporated areas and residents of incorporated areas in different ways. County governments may now exercise only those powers granted by the Constitution and statutes. Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1948). After a successful election under the proposed statute, the commissioners court could "enact any ordinance not inconsistent with the constitution and laws of the state and not outside the scope of the authority as described in the proposition." Thus the county could expand its ability to provide services to its residents and its power to regulate their activities. Residents of unincorporated areas would be affected by the change differently than residents of incorporated areas, already subject to powers of municipal government which can be very broad in the case of home rule cities. See Tex. Const. art. 11, § 5. We believe the ordinance would be held by our courts to satisfy the first branch of the test stated in Lockport, in that there is a difference in the interests of urban and rural dwellers within the county.

If the proposed statute required concurrent majority votes of city voters and noncity voters, we believe it would be constitutional within the principles outlined in Lockport. However, the absence of a requirement for a majority vote by city voters differentiates your statute from the one at issue in Lockport. Whether incorporated areas would also have to have veto power would depend on how the statute would affect their interests. In the absence of a more detailed statute we cannot say what effect, if any, it might have. Cf. City of Galveston v. Galveston County, 159 S.W.2d 976 (Tex. Civ. App. — Galveston 1942, writ ref'd) (jurisdiction of city over portion of seawall within city must yield to jurisdiction of county); Lockport, supra, 430 U.S. at 272, n. 18 (statute gave equal recognition to the interests of city and noncity voters); Hawn v. County of Ventura, 141 Cal. Rptr. 111 (1977), cert. denied, 46 U.S.L.W. 3722 (U.S. May 22, 1978) (No. 77–1273) (finding unconstitutional ordinance giving city voters, but not rural voters, right to vote on location of county airport in their area). Thus, it is difficult to predict how a court will evaluate the voting procedure you describe. We believe, however, that the courts would uphold the proposed statute on the authority of Lockport if it were revised to require a separate majority vote by dwellers in incorporated areas.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

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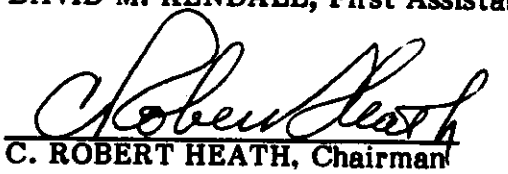

C. ROBERT HEATH, Chairman
Opinion Committee

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