

October 2004 Legal Q&A
By TML Legal Staff

Q: May a city council call for a senior/disabled property tax freeze election on its own motion, that is without the receipt of a citizen petition?

A: Until recently, the answer appeared to be “no.” According to the 2003 constitutional amendment, freezes could be enacted in one of two ways: (1) either enacting the freeze directly by official action of the council (resolution or ordinance); or (2) “[a]s an alternative, on receipt of a petition signed by five percent (5%) of the registered voters of the...city,...the...city...shall call an election to determine by majority vote whether to establish a tax limitation provided by this subsection.” (Please see the March 2004 Legal Q&A column for a more detailed discussion of the senior/disabled tax freeze). In other words, the plain language of the amendment appeared to allow elections only after receipt of a proper petition.

A recent attorney general opinion, GA-222, concluded that a home rule city council may, in fact, call for a freeze election on its own motion. The opinion is troubling on two grounds. First, it cites as authority a provision of the Election Code that most city attorneys believe merely delineates who, as between the mayor and council, has authority to call certain elections. That provision does not appear to independently authorize councils to call referendum elections on measures, but the attorney general seems to have concluded that it does.

The opinion is also troubling for another reason. While it concludes that home rule cities may call freeze elections, there is nothing about the reasoning of the opinion that wouldn't make it equally applicable to general law cities. The Election Code provision cited in the opinion is equally applicable to all types of cities. In other words, if a city attorney feels the reasoning of the opinion is sound, there is no reason it would not apply to a general law city.

In summary, TML legal staff believes that the reasoning of the GA-222 is questionable. While the opinion expands the authority of city councils, something TML generally supports, it does so by questionable legal authority. No city, especially a general law city, should act on the opinion without first consulting with its own legal counsel.

Q: What are the current uniform building codes for Texas cities?

A: Prior to 2001, Texas had no statewide standards for any residential or commercial buildings constructed within a city. Each city chose what, if any, building code(s) to adopt for construction in the city limits, and each city amended its code to meet local concerns. The most common codes were the Uniform Building Codes and the Southern Standard Building Code. The following is a brief synopsis of the evolution of uniform building codes in Texas:

- In 2001, at the behest of homebuilders, the Texas Legislature adopted S.B. 365, now codified at § 214.211 et seq. of the Texas Local Government Code. S.B. 365 adopted the International Residential Code (IRC) and the National Electrical Code (NEC) as the standard building codes for residential construction in Texas cities starting January 1,

2002. Under the statute, cities are authorized to make amendments to these codes to meet local concerns.

- In 2001, the legislature also adopted S.B. 5, which is now codified at § 388.003 of the Texas Health and Safety Code. S.B. 5 adopted the Energy Efficiency Chapter of the IRC for single-family residential construction and the International Energy Conservation Code (IECC) for all other residential, commercial, and industrial construction. The bill became effective on September 1, 2001, and cities were required to establish procedures for the administration and enforcement of the codes by September 1, 2001. Under this law as well, cities are authorized to make amendments to the codes to meet local concerns.
- No standard building code exists for commercial construction other than the IECC. Many cities have adopted the Uniform Building Code or the International Building Code to apply to commercial construction.
- In 2003, S.B. 283 was passed and requires any city that adopts a building code, other than the IRC, to adopt and enforce either prescriptive provisions for the rehabilitation of buildings or the rehabilitation code that accompanies the city's building code. The bill is codified at § 214.215 et seq. of the Texas Local Government Code.
- In 2003, H.B. 730 was passed and creates the Texas Residential Construction Commission. The purpose of the bill is to create standards for home buyer complaints against builders. The bill uses the IRC as the standard for those complaints. However, the bill does not affect city authority in any way or impose any additional requirements on cities.

Currently, cities that choose to adopt and enforce building codes should be operating under: (1) the IRC and NEC for residential construction; (2) the IECC for all construction other than single-family residential; and (3) if the city adopts a building code other than the IRC, either prescriptive provisions for the rehabilitation of buildings or the rehabilitation code that accompanies the city's building code.

Q: What is the Age Discrimination in Employment Act?

A: The Age Discrimination in Employment Act of 1967 (ADEA) is a federal statute that protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. ADEA protections include:

- **Job Notices and Advertisements**

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business.

- **Pre-Employment Inquiries**

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

- **Benefits**

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Q: What happens if a city fails to adopt its property tax rate by September 30th?

A: Cities that do not meet the September 30th deadline are nevertheless entitled to a "default" tax rate, which is equal to the lower of the following: (1) the effective tax rate for the upcoming budget year, or 2) last year's actual tax rate. Tex. Tax Code § 26.05(c). The city council must pass an ordinance ratifying the default tax rate before the fifth day after the default rate is established. It is important to note that the September 30th deadline does not apply if the appraiser was late in delivering the certified roll to the city. In that case, the city would have 60 days following receipt of the certified roll to adopt its own tax rate. Tex. Tax Code § 26.05(a).