

THE GOOD LAW FIRM
www.TheGoodLawFirm.net

ATTORNEYS AND COUNSELORS
Bullard Square, Suite 200
5604 Old Bullard Road
Tyler, Texas 75703

(903) 579-7507
(866) 381-0455 Fax

KEN W. GOOD
LAW OFFICE OF KEN W. GOOD, PLLC
keng@tyler.net

April 15, 2020

Jane Hughson- Mayor
630 E. Hopkins
San Marcos, Texas 78666

Via Email
jhughson@sanmarcostx.gov

Re: Proposed City Ordinance- To Take Discretion Away From City Police

Dear Mayor Hughson:

I am writing to you regarding the proposed city ordinance that is currently under consideration. As you are aware, the city ordinance seeks to give a mandatory obligation onto the city police to issue "cite and release" tickets inside the city limits of San Marcos. I am writing to raise several issues with you on this matter. Several issues are procedural and others are substantive.

At the outset, I am requesting additional information about the current status of Joca Marquez as a member of the San Marcos city council. According to news reports, Ms. Marques resigned her seat on the council on March 9th. Her letter of resignation is quoted as saying, "I am resigning at this time because my employment plans will require me to move my residence to a location outside the city of San Marcos." Further, it is my understanding that Ms. Marquez is no longer a resident of San Marcos, but has relocated to Florida.

Since Ms. Marquez has resigned, she is no longer eligible to vote as a city council member on matters appearing before the board. The qualification for each member of the city council is set out in Article III of the San Marcos City Charter. Section 3.02 of the charter states that in addition to other qualification prescribed by law, each member of the city council has have the additional qualifications of the following:

- (1) Shall be a qualified voter of the city;
- (2) Shall have had his or her principal physical residence for at least one year preceding the election within the corporate limits of San Marcos and shall maintain his or her principal physical residence within the corporate limits of San Marcos throughout his or her term of office; for purposes of this subsection, a person must meet all of the following to meet the requirement for a "principal physical residence" in the city:
 - (A) The person must use the residence address for voter registration,

- current driver's license or Texas identification card;
- (B) The person must use the residence address as the person's home address on documents such as employment records, resumes, business cards, government forms and loan applications;
 - (C) The person must not claim a homestead exemption on any property other than the residence;
- (3) Shall not hold any other office or employment under the city government while a member of the council, except a member of the city council may be appointed by the city council to represent the 8 council on any board, commission, committee, organization or entity in the council's sole discretion so long as that person's service does not extend beyond the person's council term;
 - (4) Shall not be an officer or director of any public service company within the city, or outside the city but serving inhabitants of the city, nor be the owner or proprietor of any public service company in the city. "Public service company" is defined as any company, individual, partnership, corporation or other entity recognized by law that uses any of the city's streets, alleys, highways or other public property to carry out its principal purposes, including but not limited to water, wastewater, gas, electricity and, telecommunications utilities, commercial railway or street railway services, public transit services, solid waste collection, and vehicles for hire.
 - (5) Shall not have a financial interest in the sale to the city of any land, materials, supplies or service, outside of the person's position with the city.
 - (6) Shall remain current on all financial obligations to the city relating to the duties of the council member.

I question whether Ms. Marquez continues to meet the requirements of the city charter to continue to be able to attend meetings and vote on matters as a member of the city council. As further support for this position, the city council has declared a vacancy and scheduled an election. However, because of the current pandemic, the date of the election has been put off. Section 3.06 of the city charter states that a special election to fill a vacancy shall be called in accordance state law and the city charter. Since the council has previously scheduled a special election, this is a recognition of the fact that the seat for Ms. Marquez has been vacated. Setting aside the date of the election because of a pandemic does not revive Ms. Marquez status as a member of the council.

Pursuant to section 3.02 (b) of the city charter, the city council *shall* determine that the qualifications of its own members are continually met. If the council determines that any member of the council has ceased to possess any of these qualifications, they member *shall* immediately forfeit office. The council has no discretion in this matter. If Ms. Marquez no longer meets the requirements to sit a member of the city council she cannot do so even during a pandemic. If Ms. Marquez continues to sit on the council and she is not eligible to do so, then the actions taken by the council may well be VOID.

Substantively, I do not believe that the city council has the authority to change state law by enacting a city ordinance. This is an issue that has been litigated multiple times in the past. For example, a state board may decide that it would like to change a licensing requirement set out by statute. However, the case law in this area of the law is very consistent that a board does not have the authority to change state law. In the present matter, the Texas Legislature has enacted a statute that allows an arresting officer to issue a ticket and release a defendant in 7 different categories. This statute is referred to as “cite and release” generally. The statute leaves the determination to the arresting officer over whether to arrest a defendant or to issue a citation. Therefore, the statute has delegated to the officer discretion by statute to make the determination. The policy reason behind this is that certain situations may require a level of diffusion by taking a defendant into custody. Further, if the statute were to take away all discretion, then the matter could create situations where the matter escalates because the defendant knows he cannot be taken into custody.

The proposed city ordinance seeks to change state law by taking an existing statute and changing it so that the officer has no discretion and must cite and release the defendant; even though state law says the opposite.

I do not believe that such action on the part of the city council would be proper. The city ordinance would be subject to being set aside just as other administrative groups have enacted rules seeking to change existing law have been set aside by courts. Further, from a policy perspective, I question whether this proposed change has been sufficiently debated. There is a reason that “cite and release” is not used more in other counties in Texas because it has at least a 40% failure to appear rate. This means that at least 40% of the people given citations will not appear. For this group of people the Municipal Court must decide whether to issue a warrant for the failure to appear. This would cause additional costs and expenses for the defendants who fail to appear. Therefore, other jurisdictions have not begun to use this approach before because it is unreasonable to use something that sets up at least 40% of those cited for failure and additional costs.

The people who would be asked to defend the actions of the board are the same people who are currently telling you that you should not go down this road. Therefore, it appears that the calculation may be that no one will question the action of the city council. However, that is not true. I believe that the actions of the council would be clearly improper and would be subject to being set aside by a court of law.

By way of summary, I believe that the actions of the board would be void because an illegal member of the council voted in the meeting. Further, I believe that the council does not have the authority to alter Texas law. In fact, I have not checked, but I believe that there is a provision in your city ordinances which states that if an ordinance conflicts with state law, then state law governs. You are taking actions that are improper. Please reconsider what you are doing.

Ms. Jane Hughson- Mayor
April 16, 2020
Page 4

If you have any questions, please do not hesitate to contact me.

Sincerely,
THE GOOD LAW FIRM

Ken W. Good

cc: Maxfield Baker- City Council Member, Place 1
630 E. Hopkins
San Marsos, TX 78666
Via Email
mbaker@sanmarcostx.gov

Saul Gonzales- City Council Member, Place 2
630 E. Hopkins
San Marsos, TX 78666
Via Email
sgonzales2@sanmarcostx.gov

Ed Mihalkanin- City Council Member, Place 3
630 E. Hopkins
San Marsos, TX 78666
Via Email
emihalkanin@sanmarcostx.gov

Mark Rockeymoore- City Council Member, Place 4
630 E. Hopkins
San Marsos, TX 78666
Via Email
mrockeymoore@sanmarcostx.gov

Jacabed "Joca" Marquez- City Council Member, Place 5
630 E. Hopkins
San Marsos, TX 78666
Via Email
jmarquez@sanmarcostx.gov

Melissa Derrick- City Council Member, Place 6
630 E. Hopkins
San Marsos, TX 78666
Via Email
mderrick@sanmarcostx.gov

Michael Cosentino- City Attorney
630 E. Hopkins
San Marcos, TX. 78666
Via Email
legalinfo@sanmarcostx.gov