HOUSE
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focus report

Texas House of Representatives

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CONSTITUTIONAL

Amendments Proposed

for November 2005 Ballot

Page

Amending the Constitution

Texas voters have approved 432 amendments to the state Constitution since its adoption in 1876. Nine more amendments will be submitted for voter approval at the general election on Tuesday, November 8, 2005.

Joint resolutions

The Legislature proposes constitutional amendments in joint resolutions that originate in either the House or the Senate. For example, Proposition 2 on the November 2005 ballot was proposed by House Joint Resolution (HJR) 6, introduced by Rep. Warren Chisum and sponsored in the Senate by Sen. Todd Staples. Art. 17, sec. 1 of the Constitution requires that a joint resolution be adopted by at least a two-thirds vote of the membership of each house of the Legislature (100 votes in the House of Representatives, 21 votes in the Senate) to be presented to voters. The governor cannot veto a joint resolution.

Amendments may be proposed in either regular or special sessions. A joint resolution includes the text of the proposed constitutional amendment and specifies an election date. A joint resolution may include more than one proposed amendment. For example, HJR 68, adopted in 2003, included a proposition allowing the Veterans' Land Board to use excess assets for veterans' homes and a separate proposition adopting a total-return investment strategy for the Permanent School Fund. The secretary of state conducts a random drawing to assign each proposition a ballot number if more than one proposition is being considered.

If voters reject an amendment proposal, the Legislature may resubmit it. For example, the voters rejected a proposition authorizing $300 million in general obligation bonds for college student loans at an August 10, 1991, election, then approved an identical proposition at the November 5, 1991, election after the Legislature readopted the proposal and resubmitted it in essentially the same form.

Ballot wording

The ballot wording of a proposition is specified in the joint resolution adopted by the Legislature, which has broad discretion concerning the wording. In rejecting challenges to the ballot language for proposed amendments, the courts generally have ruled that ballot language is sufficient if it describes the proposed amendment with such definiteness and certainty that voters will not be misled. The courts have assumed that voters become familiar with the proposed amendments before reaching the polls and that they do not decide how to vote solely on the basis of the ballot language.

Election date

The Legislature may call an election for voter consideration of proposed constitutional amendments on any date, as long as election authorities have enough time to provide notice to the voters and print the ballots. In recent years, most proposals have been submitted at the November general elections held in odd-numbered years. However, all joint resolutions proposing constitutional amendments that the 78th Legislature adopted during its 2003 regular session set Saturday, September 13, 2003, as the election date.

Publication

Texas Constitution, Art. 17, sec. 1 requires that a brief explanatory statement of the nature of each proposed amendment, along with the ballot wording for each, be published twice in each newspaper in the state that prints official notices. The first notice must be published 50 to 60 days before the election. The second notice must be published on the same day of the subsequent week. Also, the secretary of state must send a complete copy of each amendment to each county clerk, who must post it in the courthouse at least 30 days prior to the election.

The secretary of state prepares the explanatory statement, which must be approved by the attorney general, and arranges for the required newspaper publication. The estimated total cost of publication twice in newspapers across the state is $66,497, according to the Legislative Budget Board.

Enabling legislation

Some constitutional amendments are self-enacting and require no additional legislation to implement their provisions. Other amendments grant general authority to the Legislature to enact legislation in a particular area or within certain guidelines. These amendments require "enabling" legislation to fill in the details of how the amendment will operate. The Legislature often adopts enabling legislation in advance, making the effective date of the legislation contingent on voter approval of a particular amendment. If voters reject the amendment, the legislation dependent on the constitutional change does not take effect.

Effective date

Constitutional amendments take effect when the official vote canvass confirms statewide majority approval, unless a later date is specified. Statewide election results are tabulated by the secretary of state and must be canvassed by the governor 15 to 30 days following the election.

Previous Election Results

Analyses of the 22 proposals on the September 2003 ballot appear in House Research Organization Focus Report No. 78-10, *Constitutional Amendments Proposed for the September 2003 Ballot*, July 28, 2003. (*Source for 2003 election results: Secretary of State's Office.*)

Proposition 1: Allowing Veteran's Land Board to use excess assets for veterans' homes

FOR	1,127,888	81.5%
AGAINST	256,735	18.5%

Proposition 2: Two-year redemption period for mineral interests sold at tax sale

FOR	830,009	62.4%
AGAINST	499,696	37.6%

Proposition 3: Tax exemption for property owned by religious organization for expansion

FOR	730,127	52.9%
AGAINST	650,563	47.1%

Proposition 4: Allowing municipal utility districts to develop parks and recreational facilities

FOR	746,523	56.4%
AGAINST	576,164	43.6%

Proposition 5: Revising the property-tax exemption for travel trailers

FOR	846,005	62.3%
AGAINST	511,507	37.7%

Proposition 6: Allowing use of reverse mortgage to refinance a home equity loan

FOR	958,293	70.9%
AGAINST	393,239	29.1%

Proposition 7: Requiring six-person juries in district court misdemeanor trials

FOR	1,033,199	74.7%
AGAINST	350,491	25.3%

Proposition 8: Canceling election for any office if candidate is unopposed

FOR	781,330	56.4%
AGAINST	604,385	43.6%

Proposition 9: Adopting a total-return investment strategy for Permanent School Fund

FOR	655,983	50.3%
AGAINST	648,167	49.7%

Proposition 10: Allowing cities to donate used equipment to rural volunteer fire departments

FOR	1,284,004	91.7%
AGAINST	116,677	8.3%

Proposition 11: Allowing wineries to sell wine for consumption on or off premises

FOR	851,809	62.4%
AGAINST	513,053	37.6%

Proposition 12: Capping noneconomic damages in medical and other liability cases

FOR	751,896	51.1%
AGAINST	718,547	48.9%

Proposition 13: Freezing elderly and disabled homeowners' property taxes

FOR	1,125,947	81.0%
AGAINST	264,069	19.0%

Proposition 14: Allowing borrowing by the Texas Transportation Commission

FOR	810,855	61.0%
AGAINST	517,606	39.0%

Proposition 15: Guaranteeing benefits earned in local public retirement systems

FOR	964,515	71.5%
AGAINST	383,710	28.5%

Proposition 16: Authorizing home equity lines of credit

FOR	862,009	65.4%
AGAINST	455,707	34.6%

Proposition 17: Freezing school taxes on residential homesteads owned by the disabled

FOR	1,063,917	77.7%
AGAINST	304,860	22.3%

Proposition 18: Canceling election for unopposed candidates in political subdivisions

FOR	720,479	53.1%
AGAINST	636,863	46.9%

Proposition 19: Abolishing authority to create rural fire prevention districts

FOR	759,336	58.7%
AGAINST	533,264	41.2%

Proposition 20: Authorizing general obligation bonds for military enhancement projects

FOR	743,048	56.8%
AGAINST	563,848	43.1%

Proposition 21: Allowing college professors to be paid for serving on water district boards

FOR	692,937	52.3%
AGAINST	631,328	47.7%

Proposition 22: Filling temporary vacancies caused by military service of public officers

FOR	1,069,328	78.5%
AGAINST	293,083	21.5%

1 Proposition

Creating the Texas Rail Relocation and Improvement Fund

(HJR 54 by McClendon/Staples)

Background

The Texas Constitution, Art. 3, sec. 49 prohibits state debt, generally requiring that voters authorize bonded indebtedness before the state may incur it. Sec. 49-j limits annual state debt payable from state general revenue to 5 percent of the annual average amount of non-dedicated general revenue for the three preceding fiscal years.

Digest

Proposition 1 would amend the Constitution to authorize the creation of the Texas Rail Relocation and Improvement Fund in the state treasury. The Texas Transportation Commission (TTC) would administer this revolving fund to finance or partially fund the relocation and improvement of privately and publicly owned passenger and freight rail facilities. Funds would be used in the interest of improving mobility and public safety around the state for projects such as:

- relieving congestion on public highways;
- enhancing public safety;
- improving air quality; or
- expanding economic opportunity.

The fund also could be used to provide a method of financing the construction of railroad underpasses and overpasses, if the construction was part of the relocation of a rail facility.

The TTC could issue bonds pledged against the fund to be repaid from the fund balance.

The Legislature could dedicate to the fund one or more specific revenue sources or portions of other state revenues, as long as the sources were not otherwise dedicated by the Constitution.

The dedication of a specific source or portion of revenue, taxes, or other money could not be reduced, rescinded, or repealed unless two conditions were satisfied. First, the Legislature by law would have to dedicate a substitute or different source that the comptroller projected to be of an amount equal to or greater than the dedicated source. Second, the Legislature would have to authorize TTC to guarantee payment of any bonds, notes, other obligations, or credit agreements by pledging the state's full faith and credit if dedicated revenue were insufficient to cover the payment.

The fund's obligations and credit agreements would not be included in computing the constitutional limit on state debt under Art. 3, sec.49-j, except to the extent that the comptroller projected that general revenue would be needed to pay the amounts due should TTC exercise its authority to pledge the state's full faith and credit, or if money had been dedicated to the fund from an unspecified source.

The ballot proposal reads: "The constitutional amendment creating the Texas rail relocation and improvement fund and authorizing grants of money and issuance of obligations for financing the relocation, rehabilitation, and expansion of rail facilities."

Supporters say

Proposition 1 would help enhance public safety, alleviate traffic congestion, improve air quality, and boost economic opportunity by facilitating the relocation and construction of rail lines in Texas. If approved by the voters and funded by the Legislature, it would create a mechanism for financing the relocation of dangerous freight rail lines in densely populated areas. Relocating railroads outside of cities would improve public safety by reducing the number of inner city rail accidents and preventing the shipment of hazardous materials through densely populated areas. Last year, a toxic waste spill in San Antonio killed five people and injured 50.

The current congestion crisis on Texas highways stems in part from the inability of railroads to keep up with increasing demands for the transport of freight through the state. According to the Texas Department of Transportation (TxDOT), the number of vehicles on Texas roads increased by more than 60 percent — from 11.7 million to 18.9 million — between 1980 and 2003. Allowing for the shipment of more goods by train would reduce the number

of trucks traveling on highways, which would decrease congestion and increase safety by eliminating potentially dangerous truck traffic. Freight rail is more fuel-efficient than trucks and would help Texas comply with federal air quality standards.

Right-of-way obtained by relocating railroads out of urban areas could be used for the placement of commuter rail lines or new highways, both of which would decrease traffic congestion and provide economic development opportunities along these corridors. The Union Pacific track between Georgetown and San Antonio that straddles MoPac Expressway (Loop 1) in Austin would be one location for a possible commuter rail line if the heavy freight traffic could be relocated to an area outside of the urban centers. The fund could be used to help finance both the relocation of existing rail lines and the development, improvement, and maintenance of new lines, such as commuter or high-speed rail.

The state needs outside assistance to fund large-scale railroad improvement and relocation projects, and Texas should continue to forge public-private partnerships to finance such projects. In the construction of the Trans-Texas Corridor, for example, a Spanish company has agreed to finance the project in exchange for toll revenues collected over the next 50 years. Similarly, in a public-private partnership for rail relocation, a private company could finance the construction and maintenance of the rail lines in exchange for the opportunity to profit from future economic activity along the railways.

Relocating rail lines would boost the state's economy by encouraging investment, improving efficiency, and preventing existing businesses from moving out of the state. Rail carriers are not shipping as much freight as is needed for a vital economy because of clogged or inadequate rail lines. With a revamped rail system, investors would look to Texas as a prime location through which to ship their goods, which would be delivered much faster if freight rail lines did not pass through congested cities. Texas already has begun to lose important businesses as a result of inadequate rail lines. Any costs related to rail improvements would be offset by the income from increased shipments.

Opponents say

Railroad relocation should be left entirely to the private sector. It is not the responsibility of the state to finance construction of additional freight rail lines. The state debt commitment would be open-ended, with no limit on the amount of state bonds that could be issued from this new fund. By amending the Constitution to authorize the creation of this fund, the state could commit itself to such debt for a long time to come.

TxDOT deals primarily with state highways and has very little authority over railroad matters. TxDOT should use its resources to carry out its primary functions that relate to the planning, construction, and maintenance of the state's highways. The railroad industry no longer is state-regulated, and state government should not involve itself in that industry's investment decisions.

Notes

If voters approve Proposition 1, provisions of HB 1546 by McClendon, would take effect creating the statutory framework for the establishment of the Texas Rail Relocation and Improvement Fund. The TTC would administer this revolving fund to finance the relocation, construction, reconstruction, acquisition, improvement, and expansion of rail facilities. The bill would enable TTC to issue bonds, which could be issued to finance projects for state-owned rail facilities or to partially fund projects for privately owned rail facilities.

A rail facility would include real or personal property needed to provide freight or passenger rail service, including commuter rail, intercity rail, and high-speed rail, and would include equipment, rights of way, track work, train controls, stations, and maintenance facilities. TxDOT could acquire property for the authorized purposes of the rail fund. The department could use the property acquired for any transportation purpose and could sell or lease such property no longer needed for a transportation purpose, with the revenue to be deposited in the rail fund. Local transportation planning organizations and a majority of the counties and municipalities where the relocated rail line would be located would have to approve the relocation.

The 79th Legislature has not appropriated money nor dedicated a revenue source for the fund contingent on voter approval of Proposition 1.

2 Proposition

Defining marriage as a union of one man and one woman

(HJR 6 by Chisum/Staples)

Background

In 2003, the 78th Legislature approved SB 7 by Wentworth, the Defense of Marriage Act (DOMA), which declares that same sex marriages or civil unions are contrary to Texas' public policy and are void. It prohibits the state and any agency or political subdivision from recognizing a same-sex marriage or civil union granted in Texas or in any other jurisdiction or any legal rights asserted as a result of such a marriage or union. It defines a civil union as any relationship status other than marriage intended as an alternative to marriage or applying primarily to cohabitants that grants the parties legal protections, benefits, or responsibilities granted to spouses in a marriage. Family Code, sec. 2.001(b) prohibits issuance of a marriage license for the marriage of people of the same sex.

One of the first constitutional challenges to a state's marriage law was *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999), in which the plaintiffs alleged that Hawaii's marriage laws were unconstitutional under the equal protection clause of the state constitution. In 1997, before the case was decided, the Hawaii Legislature met and adopted a constitutional amendment, which voters ratified in 1998, reserving marriage for opposite-sex couples.

In 1999, the Vermont Supreme Court ordered the state legislature to establish a system by which same-sex couples could obtain traditional marriage benefits and protections. The case, *Baker v. State*, 744 A.2d 864 (Vt. 1999) hinged on the common benefits clause of the Vermont Constitution. The court decided that the plaintiffs – three same-sex couples who had been denied marriage licenses – could not be "deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry." The Vermont Supreme Court gave its legislature an opportunity to choose a remedy — either through a change in the marriage laws or creation of a parallel system of domestic partnership. In response, the Vermont Legislature created civil unions, which became effective in July 2000. Acting without a court order, Connecticut this year enacted a law, effective October 1, 2005, allowing same-sex civil unions while also defining marriage as between a man and a woman. In September 2005, the California Legislature, also without a court order, passed a bill defining marriage as a union between two people, but Gov. Arnold Schwarzenegger announced he would veto the measure.

In 2003, the Massachusetts Supreme Judicial Court ruled, in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), that the state could not use its regulatory authority to deny civil marriage to same-sex couples under the equal protection and due process clauses of the state constitution. The Massachusetts Legislature, convened as a Constitutional Convention in February 2004, initially approved a constitutional amendment that would have defined marriage as a union between opposite-sex couples and also would have established a parallel system of civil unions for same-sex couples, but rejected the proposed amendment when it met again in September 2005. An initiative petition is circulating to submit a same-sex marriage ban to Massachusetts voters in 2008.

Digest

Proposition 2 would amend the Texas Constitution by adding Art. 1, sec. 32 stating that marriage in Texas consists only of the union of one man and one woman. It also would prohibit the state or a political subdivision of the state from creating or recognizing any legal status that is identical or similar to marriage.

The ballot proposal reads: "The constitutional amendment providing that marriage in this state consists only of the union of one man and one woman and prohibiting this state or a political subdivision of this state from creating or recognizing any legal status identical or similar to marriage."

Supporters say

The citizens of Texas, not the courts, should decide what constitutes marriage in this state. A constitutional amendment would prevent a possible challenge to the state's marriage statutes. Even though Texas courts may be unlikely to interpret the state Constitution to allow same-sex

marriage today, it could happen in the future. Texas' equal protection clause is not so different from those of other states that it could not be interpreted to permit same-sex marriage. Preserving marriage for unions between a man and a woman should be defined beyond doubt, and not left to the whims of future judges.

Since the recent state court decisions involving same-sex marriage or civil unions, voters in 18 states have responded by approving amendments to their constitutions to protect the traditional definition of marriage. Proposition 2 would give Texas voters a similar opportunity. A proposed amendment to the U.S. Constitution that would prohibit same-sex marriage and similar arrangements may take years to be ratified by the states if approved by Congress, so the state Constitution should be changed now to ensure that the traditional concept of marriage is protected in Texas.

Ensuring that Texas cannot be forced to recognize same-sex marriages or unions is important for several reasons. The state has an interest in giving the solidity that accompanies legal recognition only to relationships that could result in procreation. Heterosexual marriage is the basis for a healthy and productive society, and any erosion of this foundation would jeopardize the future of Texas' children and families. It also is important to define marriage precisely in the Constitution in order to establish the parameters of who may form a union. Otherwise, the right to marry eventually could be expanded beyond two adult persons of the opposite sex to include a wide variety of other nontraditional unions, possibly including even polygamy or partnerships among close relatives.

The proposed amendment would not discriminate against individuals based on their sexual preference but merely would permit the voters of Texas to decide the scope of marriage in the state. Same-sex couples would not be prohibited from pursuing their lifestyle if this amendment were approved by voters – it simply would not be sanctioned by the state. Also, a constitutional provision is not written in stone, and future lawmakers and voters could amend the provision if values and mores change significantly in the future.

This constitutional provision also would protect the definition of marriage by ensuring that civil unions were not permitted in the future. Civil unions are a way for same-sex couples to circumvent laws protecting marriage by creating a legal arrangement that is substantially the same as marriage in all but the name.

The prohibition against recognition of any legal status that is identical or similar to marriage would not infringe on the ability of individuals to enter into contracts or change the way common law marriage is treated today. The amendment would not apply to contracts because they would not be considered the same or similar to marriage, and common-law marriage would not be affected because it is viewed as marriage today.

The joint resolution proposing the constitutional amendment contains a statement of legislative intent plainly stating that the state of Texas recognizes the use of contracts, designation of guardians, and appointment of agents for rights concerning hospital visitation, property, and entitlement to life insurance proceeds in the absence of a legal status that is identical or similar to marriage. Proposition 2 would not affect these rights and arrangements between individuals.

Opponents say

Asking Texas voters to approve an unnecessary and needlessly redundant constitutional prohibition against what already is prohibited by law is a divisive distraction from real issues that the state should be addressing, such as school finance and children's health insurance. Amending the Texas Constitution to ban same-sex marriage is entirely unnecessary because, in practical terms, no case would get far enough in state court to challenge current law that prohibits it. Texas courts are considered so unlikely to be sympathetic to arguments favoring same-sex marriage that no one has even filed a suit to start the process. Other challenges have been a part of a national campaign with national funding and resources to seek the recognition of same-sex marriage in certain states considered more sympathetic to such unions. Texas is not one of them, so the state should not change its Constitution unnecessarily.

Defining marriage in the Texas Constitution would have no positive effect on Texas' children or families. Crime, poverty, poor education, drug abuse, and many other issues are a real and grave threat to the foundation of Texas' society, but attempts to link social problems to same-sex marriage have no basis in reality. Rather than more narrowly defining marriage, the state should pursue policies that support families of all types so that all Texas children have the opportunity to grow up in a stable household.

The proposed amendment would take the issue of same-sex marriage out of the hands of citizens even though the institution of marriage has proven dynamic. It is noteworthy that anti-miscegenation laws banning interracial marriage were struck down less than 40 years ago. Although same-sex marriage is not contemplated in Texas today, future generations may see value in creating alternatives to traditional marriage. Already, many Texas families exist that look different from the traditional model, either because of divorce and remarriage, single parenthood, or other circumstances. A constitutional amendment would limit the ability of future lawmakers to respond to constituents' changing needs.

Fears that recognition of a right by two consenting adults to seek legal sanction for their personal commitment to one another somehow would lead to broader attempts to undermine the criminal prohibitions against polygamy, incest, or even bestiality are specious and totally unfounded. For example, the past expansion of rights to new groups of individuals, such as the right to vote for women and minorities, has not led to overly broad application to additional groups such as children and non-citizens.

As the state's fundamental law, the Texas Constitution is meant to protect the rights of the people, not take them away. Proposition 2 essentially would determine that the state's equal protection clause would not apply to one group of people. Texas should not discriminate against a group of citizens in the state constitution. Nowhere else in the constitution is one group of people singled out to be denied rights.

Other opponents say

While a constitutional amendment banning same-sex marriage may reflect current state law and tradition, a ban on all types of civil unions or any legal status similar to marriage would go too far. Other states have reacted to the prospect of same-sex marriage by banning it in their state constitutions without also banning civil unions or restricting the rights of individuals to form domestic partnerships. Adopting such a sweeping ban would needlessly inhibit the freedom of unmarried couples to seek legal recognition of their relationship short of marriage.

This proposed amendment could threaten some contracts and other arrangements between individuals, such as common law marriage and certain domestic partner arrangements, for opposite-sex as well as same-sex couples. Although not all contracts are similar to marriage, some relating to medical decision-making authority and other family issues beyond the narrow exceptions identified in the legislative intent language included in the joint resolution could be construed as granting privileges similar to those enjoyed by married people.

The legislative intent language likely would have no effect on judicial interpretation of the proposed amendment because it would not be part of the Constitution nor would it be in any statute. Even if today's legislators did not intend for those rights to be changed, the very plain language that this proposition would add to the Constitution would grant the courts broad authority to invalidate any agreement considered similar to marriage. Common law marriage also could be threatened as it is not explicitly excluded from the prohibition this amendment would add to the Constitution.

Notes

Sec. 2 of HJR 6 affirms that Texas recognizes the use of private contracts, designation of guardians, and appointment of agents by persons who do not hold a legal status identical or similar to marriage to arrange rights of hospital visitation, property, and entitlement to life insurance proceeds. This language appears in the joint resolution, but it would not become part of the Constitution if Proposition 2 were approved.

Authorizing local economic development programs, loans, and debt

(HJR 80 by Krusee/Ogden)

3 Proposition

Background

Texas Constitution, Art. 3, sec. 52 generally prohibits the Legislature from authorizing local governments to lend their credit or grant public funds to any individual, association, or corporation. An exception to this general prohibition, Art. 3, sec. 52-a, adopted in 1987, authorizes the Legislature to allow local governments to create economic development programs funded through loans and grants of public money. Among such economic development projects are municipal sales tax rebates, referred to as "380 agreements" because the statutory authorization appears in Local Government Code, ch. 380. A contract between a business and the municipality specifies the rebate terms and the duration of the agreement.

Texas Constitution, Art. 11, sec. 5 prohibits a municipality from creating a debt, unless the city provides a mechanism to collect and pay the interest on the debt and creates a sinking fund of at least 2 percent of the principal.

On February 18, 2005, Judge Darlene Byrne of the 250th District Court in Travis County ruled in *Save Our Springs Alliance v. Village of Bee Cave* (GN400441) that a 380 agreement between the village of Bee Cave and a private shopping center developer created an unconstitutional debt. Judge Byrne concluded that the agreement, in violation of Texas Constitution, Art. 11, sec. 5, created a debt and failed to create an annual sinking fund. The agreement did not provide for payment by Bee Cave out of sales taxes derived directly from the shopping center project, no fund was established by the collection of those taxes to pay Bee Cave's obligation, payment would be from funds that were neither current year revenues nor funds within the immediate control of Bee Cave, and the village had no right to terminate the agreement at the end of each budget period. The case has been appealed to the Texas Third Court of Appeals.

Digest

Proposition 3 would amend Texas Constitution, Art. 3, sec. 52-a to stipulate that economic development grants and loans made by a local government, except those backed by ad valorem taxes or financed by bonds backed by ad valorem taxes, would not constitute debt prohibited by the constitution.

The ballot proposal reads: "The constitutional amendment clarifying that certain economic development programs do not constitute a debt."

Supporters say

Proposition 3 would affirm the legality of 380 tax incentive packages and similar economic development loans and grants made by local governments. These agreements are responsible for promoting economic development activities and forming public-private partnerships throughout the state. With the constitutional and statutory authority already in place, 380 agreements provide a wide array of economic development programs that have attracted new business, employment, and tax revenue. For example, a 380 agreement helped the city of Round Rock lure Dell Computers, which employs about 10,000 people and provides nearly $16.7 million annually in sales tax revenue for the city.

The ruling by Judge Byrne that the 380 agreement between Bee Cave and a private shopping center developer was unconstitutional threatens to discourage the use of this important economic development tool by other municipalities. Even though the case has been appealed to the Third Court of Appeals, 380 agreements are too valuable for the state's economic development to risk being scuttled by an adverse court ruling.

Proposition 3 would affirm the legal viability of 380 agreements. By explicitly stating that 380 agreements and similar economic development grants and loans do not constitute illegal debt, the amendment would safeguard the future of these needed incentives to attract or retain businesses that boost employment. These agreements have been used extensively by local governments in Texas, and Proposition 3 is necessary to protect the integrity of this important economic development tool. The proposition would amend Art. 3, sec. 52-a to affirm economic development grants and loans by all political subdivisions,

not just municipalities. Also, the amendment would not change the current constitutional requirement that local economic development grants and loans financed by issuing bonds or other obligations backed by ad valorem taxes must be approved by local voters.

These economic development programs between cities and developers usually involve 20-year terms. The benefits of economic development occur over a period of growth and workforce development during which a community incrementally can transition into an improved economic environment. Proposition 3 would protect long-term economic development goals to create jobs and promote business activity.

Opponents say

Proposition 3 is an overreaction to one lower court lawsuit involving a narrow set of circumstances and that may be overturned on appeal. The Travis County district court ruling that a specific 380 agreement was unconstitutional applied only to the village of Bee Cave's agreement with one shopping center developer. The court specifically said that it did not find all 380 agreements unconstitutional. Therefore, amending the Constitution is not needed to protect other local governments from such lawsuits.

The danger in adopting this constitutional amendment is that it would grant blanket approval for economic development programs regardless of their overall implications for local government and public benefit. While economic development certainly is vital to municipal prosperity, some 380 agreements encourage cities to entice development that might not be in the best interests of communities. This type of economic development caters mainly to strip malls and retail centers that actually do not need incentives in the first place. Texas' growing population and economy naturally lure these business without development incentives that obligate local governments for terms of 20 or 30 years. Such long-term agreements bind future city councils and restrict their ability to write future budgets by restricting revenue.

These 380 agreements can amount to local governments giving away valuable tax revenue in return for attracting low-paying jobs, such as in the retail sector. All economic development programs should be subject to review to ensure corporate interests or poor planning policies do not outweigh local benefits.

Allowing bail denial to defendants violating conditions of their release

(SJR 17 by Staples/Gattis)

4 Proposition

Background

A person accused of a crime generally is guaranteed the right to post bail to secure release from jail pending trial. Texas Constitution, Art. 1, sec. 11 states that all prisoners shall be bailable unless accused of a capital offense when proof is evident. However, Texas Constitution, Art. 1, sec. 11a allows courts to deny bail under certain other circumstances. Under this provision, a district judge has the discretion to deny bail if the defendant is accused of:

- a felony and has been convicted of two prior felonies;
- a felony committed while on bail for a prior felony for which the defendant has been indicted;
- a felony involving the use of a deadly weapon after being convicted of a prior felony; and
- a violent or sexual offense committed while on probation or parole.

Bail may be denied in these circumstances only after a hearing and upon presentation of evidence substantially showing the guilt of the accused. Under Texas Constitution Art. 1, sec. 13, excessive bail cannot be required. Absent one of the factors listed above, a defendant whose bond has been revoked still has a constitutional right to new and reasonable bail.

Under Code of Criminal Procedure, art. 17.40, to secure a defendant's attendance at trial a court may impose any reasonable condition on a bond related to the safety of an alleged victim or the safety of the community. A court may revoke a defendant's bond only if at a hearing it finds by a preponderance of the evidence that the defendant has violated a condition of the bond.

Digest

Proposition 4 would add Art. 1, sec. 11b to the Constitution, authorizing a judge to deny bail to a person accused of a felony who already had been released on bail on that same charge. Bail could be denied if the defendant's earlier bond had been revoked or forfeited for violating a condition of that bond and the violation was related to the safety of the victim or the safety of the community. The determination of whether the violation was related to the safety of the victim or the community would be made by a district judge at a hearing.

The ballot proposal reads: "The constitutional amendment authorizing the denial of bail to a criminal defendant who violates a condition of the defendant's release pending trial."

Supporters say

Proposition 4 would give judges discretion to deny bail in limited, justifiable circumstances. The Texas Constitution long has recognized that there are exceptions to the requirement that bail generally should be made available to criminal defendants. The proposed amendment simply would add an additional, narrowly tailored exception that would be in line with current provisions allowing the denial of bail in certain circumstances. Proposition 4 would not be a major change in Texas' constitutional provisions dealing with bail because the circumstances, like those currently outlined in the Constitution, describe serious situations that warrant an exception.

Existing mechanisms that might keep in custody certain defendants who have violated their bond conditions are not effective. Under current law, when an accused felon violates a condition of his or her bond following release, the bond can be revoked and the person taken into custody. However, if the bond violation does not fall under any of the exceptions listed in the Constitution, the judge must set a new bail, and the defendant must be released again if he or she makes bail. While a judge might attempt to keep the defendant in custody by setting an extremely high bail or refusing to set it at all, defendants in such cases routinely are successful in obtaining release or reduced bail amounts through *habeas corpus* appeals. Setting tighter conditions on the first bond or setting different conditions on the second bond also are unlikely to be effective because these defendants already have demonstrated an inability to abide by the conditions of their previous release by threatening the safety of the victim or the community.

Proposition 4 would address this problem by allowing a judge to deny bail in specific, limited situations in which the defendant already had been free on bond once, had failed to comply with the conditions for release, and had presented a threat. The proposed amendment would apply only to accused felons whose first bond had been revoked due to a serious violation related to the safety of the community or the alleged victim. It would not apply to a person accused of a misdemeanor, nor would it apply to an accused felon who committed a technical violation that posed no danger to the victim or the community – for example, a defendant who lost his job while free under a bond that required his employment. The requirement that the revocation of the bond be related to the safety of a victim or the community tracks current language in Code of Criminal Procedure, art. 17.40, which authorizes a judge to impose any reasonable conditions of a bond.

Proposition 4 could prove especially important in protecting victims of domestic violence. In such cases, it is not uncommon for a defendant, while free on bail, to be arrested for violating a restraining order after having threatened or harmed the victim. The proposed amendment could help ensure that, in appropriate cases, perpetrators of family violence could not further harm their victims.

Defendants described by Proposition 4 – like those denied bail currently under the Constitution – would retain all their rights to due process and other protections. For example, the determination to deny the second bail would have to be made at a hearing in which the defendant could make his or her case for another bond. The defendant also could appeal the denial of bond.

The language in the proposed amendment would be placed in a different article of the Constitution than are the current bail denial exceptions because the defendants described by Proposition 4 are different in fundamental ways: they already have been released on previous bond, have failed to abide by the conditions of that bond, have endangered the victim or community, and are being held not necessarily on a new felony or other criminal violation, but for a bond violation. Under these circumstances, it would be appropriate to base the denial of bail on a standard different than that used for other denials of bail.

Judges already routinely make decisions dealing with public safety and the denial of bail. The objection that judges would be biased toward denying bail because they are elected really is an objection to Texas' system of elected judges, not the specifics of the proposed amendment. Judges would continue to exercise their responsibility to evaluate cases and make individual decisions about bonds. Proposition 4 would not require that judges deny bail to anyone but would authorize judges to do so when they deemed necessary.

Proposition 4 would have limited – if any – impact on jail populations. Only a limited number of defendants would fit the proposition's narrow criteria, and not all of them would have to be denied bail.

The proposed amendment would address the population of defendants who under current law must be released on a second bail. It would not apply to probationers or parolees who can be taken into custody for violating the conditions of their release.

Opponents say

Proposition 4 further would erode the state's basic tenet that bail should not be denied to criminal defendants except in the most limited circumstances. The purpose of requiring bail is to ensure a defendant's appearance at a subsequent hearing or trial, not to punish someone for an alleged offense or to deter hypothetical future crimes. Giving judges discretion to deny bail in the broad circumstances described by the proposed amendment could violate the longstanding legal principle that bail cannot be used as an instrument of oppression. The problem that this proposed amendment seeks to solve is a very limited one that does not justify amending the Constitution.

Under the broad language in Proposition 4, a judge could deny bail in virtually any situation in which an individual charged with a felony violated a condition of an initial bond. "Safety of the victim" or "safety of the community" could be interpreted to include almost any circumstance – including technical violations such as failure to keep a job or pay a fee – resulting in the denial of bail in inappropriate cases. The proposed amendment could result in the unfair detainment of persons who were innocent or who were not dangerous.

Because judges must stand for reelection, they could feel pressure to deny bail to most or all accused felons who violate conditions of a previous bond. Judges could use the broad cover provided by Proposition 4 to abdicate their responsibilities to evaluate individual cases, which could

result in the loss of due process rights for defendants. An increase in jail overcrowding could result if judges used the new authority to routinely keep persons in custody who otherwise would have been released.

There are other ways to address the situation contemplated by Proposition 4. Courts can take into account a defendant's assets and set bail accordingly, which would allow judges to set the second bail higher, if warranted. Defendants charged with serious or violent crimes often cannot make bail and so remain in custody. A judge could set different, more restrictive, conditions on the new bond using the concepts of progressive sanctions and supervision strategies to better protect the victim and the community. Persons on probation or parole who fall under the circumstances described by Proposition 4 could be confined while awaiting a revocation hearing.

Proposition 4 should not require a different standard for denying bail than the one used for the current situations in which bail can be denied. By adding a new section to the Constitution, instead of amending the current list of exceptions, the proposed amendment would not require that there be presentation of "evidence substantially showing the guilt of the accused" in order to deny bail. The proposition should continue this standard or set another high standard for the denial of bail.

Proposition 5

Authorizing the Legislature to exempt commercial loans from interest rate caps

(SJR 21 by Averitt/Flynn)

Background

Texas Constitution Art. 16, sec. 11 allows the Legislature to define interest and fix maximum rates of interest. If no maximum rate of interest has been defined, any rate above 10 percent is deemed usurious.

Digest

Proposition 5 would amend the Texas Constitution, Art. 16, sec. 11 to allow the Legislature to create exemptions from the maximum rates of interest for commercial loans. A commercial loan would be considered a loan made primarily for business, commercial, investment, agricultural, or similar purposes and not primarily for personal, family, or household purposes.

The ballot proposal reads: "The constitutional amendment allowing the legislature to define rates of interest for commercial loans."

Supporters say

Proposition 5 would allow the Legislature to exempt certain commercial loans from maximum interest rates. Texas' commercial lending laws place both Texas borrowers and lenders at a competitive disadvantage compared to the laws of 46 other states, which give sophisticated commercial lenders and borrowers greater freedom to structure the unique loan arrangements that commercial parties often require. Texas-chartered banks and other commercial lenders do not share this freedom.

Because of Texas' low interest-rate ceiling, the vast majority of commercial loan transactions are made by out-of-state entities in accordance with the lending laws of other states. According to federal law, 12 U.S.C. § 85, banks domiciled in one state may export interest rates, including most fees in connection with credit extension or availability, to customers in another state. Other commercial lenders also use choice-of-law provisions to close loans in their home states with more favorable interest rate conditions. Texas' existing commercial lending laws increase costs for Texas businesses, limit opportunities for Texas-chartered banks attempting to make commercial loans, and require Texas businesses to obtain loans from lenders whose decision makers are located out-of-state. Proposition 5 would allow the Legislature to level the playing field by permitting Texas' commercial lenders to compete with financial institutions from across the country. This also would provide opportunities for economic development, because it would increase incentives for large banks to locate their headquarters in Texas.

Often, Texas banks and lenders cannot obtain a great enough yield to make high-dollar commercial lending worthwhile because of the greater risk involved in making large loans. Loosening the restrictions on certain commercial lending further would reduce costs because parties to large commercial loans with Texas banks often must obtain elaborate legal opinions to navigate the complex laws governing which fees and charges constitute interest.

Proposition 5 would grant sophisticated borrowers the freedom to structure loan deals with proper incentives to compensate lenders with reasonable rewards for the risk they assumed. It would not remove the protections of rate ceilings for less sophisticated borrowers because the Legislature, as demonstrated in the reasonable criteria set forth in the enabling legislation (HB 955 by Solomons), still could set the eligibility criteria for which commercial loans would be exempted from the interest-rate ceiling. Regardless of whether Texas institutes such exemptions, out-of-state banks and commercial lenders still could contract with small, commercial borrowers using the interest-rate standards set by their home states.

Opponents say

The interest-rate ceilings in the Texas Constitution and statutes create a protection from usurious lending practices. While some commercial borrowers have the sophistication to enter into complex loan agreements, not all commercial loans are obtained by sophisticated borrowers. Certain borrowers may not recognize the implications of all the terms included in a loan contract and often do not possess adequate resources to subject the contract to legal review prior to signing.

The exemption criteria included in HB 955, the enabling legislation, is based upon the loan amount, and the size of a loan is not always an accurate measure of borrower sophistication. Even if HB 955 sets forth exemption criteria to protect less sophisticated borrowers, Proposition 5 would open the door for future legislatures to change these criteria. Texas should not follow the dangerous lead of other states that have exempted all commercial lending from interest-rate ceilings.

Notes

HB 955 by Solomons, the enabling legislation for Proposition 5/SJR 21, would allow parties to an exempt commercial loan to agree to contract for, charge, and receive any agreed-upon interest rate. An exempt commercial loan would be any commercial loan of $7 million or more that was secured primarily by real property or any loan of $500,000 or more that was not secured primarily by real property.

6 Proposition

Increasing the membership of the State Commission on Judicial Conduct

(HJR 87 by Farabee/Lindsay)

Background

Texas Constitution, Art. 5, sec. 1-a establishes the State Commission on Judicial Conduct (SCJC). The commission consists of 11 members, who serve six-year terms. The members of the commission include one appeals court justice, one district judge, one justice of the peace, one municipal court judge, and one county court-at-law judge, all appointed by the Texas Supreme Court, two State Bar members with at least 10 years experience and who are not judges, appointed by the State Bar of Texas governing board, and four citizens who are neither attorneys nor judges, appointed by the governor. All members must be confirmed by the Senate. The justice of the peace, the municipal judge, and the county court-at-law judge are appointed at large. The remaining eight commissioners may not reside or hold a judgeship in the same supreme judicial district as another commissioner. A quorum of the membership consists of six members.

The commission's constitutional mandate is to investigate and to take appropriate action when it finds judicial misconduct or judicial incapacity. Such action may include discipline, education, censure, or the filing of formal procedures that could result in removal from office. About 3,300 judges and judicial officers are under the jurisdiction of the SCJC. Commission members receive no pay but may be compensated for expenses such as travel.

A judge of a constitutional county court is elected countywide and also serves as the presiding officer of the commissioners court, the county's governing body. Most large counties have statutory county courts-at-law that handle the judicial duties of the county judge.

Digest

Proposition 6 would amend Art. 5, sec. 1-a(2) to increase the number of SCJC members from 11 to 13. One new member would be a citizen member, appointed by the governor, and the other would be a judge of a constitutional county court, appointed by the Texas Supreme Court, both with the advise and consent of the Senate.

The number of members appointed at-large would increase from three to seven – the five citizen members, the justice of the peace, and the municipal judge. The appeals court judge, the district judge, the two State Bar attorney members, the county court-at-law judge, and the constitutional county court judge could not reside or hold a judgeship in the same court of appeals district as another commissioner. A quorum would consist of seven members, rather than six. Recommendations on retirement, censure, suspension, or removal of any justice or judge would require a vote of at least seven, not six, members.

The ballot proposal reads: "The constitutional amendment to include one additional public member and a constitutional county court judge in the membership of the State Commission on Judicial Conduct."

Supporters say

Proposition 6 would restructure the SCJC to ensure the fairness of the judicial conduct commission's overview of the judiciary. The commission should be expanded to include a constitutional county court judge and an additional citizen member. Constitutional county judges have unique duties, including civil and criminal jurisdiction. In addition to judicial functions, they also serve as the presiding officer of the commissioners court, the governing body of the county. The inclusion of a constitutional county judge would bring a unique and valuable perspective to the commission as well as give judges with these jurisdictions representation on the commission. This added background and experience would be well worth the small increase in costs that the commission easily could absorb into its existing budget**.** It would recognize the importance of constitutional county judges and the role they play in the judiciary. Also, the addition of a citizen member would result in greater public accountability.

The current geographic area restriction has caused delays in finding qualified individuals to fill the positions. It is not always easy to find qualified people to serve on boards and commissions, and lifting the geographic restriction would help alleviate this problem. Finally, it is very unlikely that a lack of geographic diversity among the membership ever would cause the commission to lack a quorum.

Opponents say

There is no data suggesting a need to add to the membership of the commission, which should remain at 11 members. By increasing membership to 13, Proposition 6 would create a commission larger than similar judicial conduct commissions in other states, which have nine or 11 members. A better alternative would be constitutionally to grant the Supreme Court the latitude to choose a county level judge, which could include a constitutional county judge, as one of existing 11 members. Adding two members would increase travel and other operating expenses. It also likely would result in the commission's meeting less frequently because it would be more difficult to obtain a quorum.

Lifting the geographic restriction could result in a loss of geographic diversity if a substantial portion of the commission members were appointed from one area. When a judge has a case pending before the commission, it is standard practice for a commission member from the same city or county to recuse himself or herself. If the commission contained a number of members from the same area, it could make a quorum impossible if they all recused themselves. The current make-up of the commission better reflects that of the state, is more in keeping with other similar commissions, and should not be changed.

7 Proposition

Allowing line-of-credit advances under a reverse mortgage

(SJR 7 by Carona/Hochberg)

Background

In 1997, Texas voters approved Proposition 8 (HJR 31 by Patterson), amending Texas Constitution, Art. 16, sec. 50 to allow homeowners to obtain loans and other extensions of credit based on the equity of their residence homesteads. Equity is the difference between a home's market value and what is owed on the home.

Home equity loans are paid to the borrower in a lump sum or through home equity lines of credit. Loans made in lump sums are called closed-end loans because they extend for a specified time and require repayments in equal monthly amounts. Interest rates usually are fixed on these loans. If a homeowner fails to make a monthly installment, the lender may foreclose through a judicial process.

Home equity lines of credit were approved through a 2003 constitutional amendment. A home equity line of credit is a form of an open-ended account under which borrowers can debit the account from time to time and credit can be extended from time to time. Borrowers can request advances, repay money, or reborrow money. No single advance can be less than $4,000, and borrowers cannot use a credit card, debit card, check, or similar device to obtain an advance. Lenders can collect fees on lines of credit only at the time they are established and cannot charge or collect fees in connection with a debit or advance.

Reverse mortgages, a type of home equity loan, are restricted to homeowners or their spouses who are at least 62 years old may obtain reverse mortgages. The borrower receives periodic loan advances based on the equity in the homestead, but repayments do not begin until all borrowers cease to occupy the home for more than 12 months, the borrower and spouse have passed away, or the property is sold or transferred to another owner. At that time, the home often is sold, and the proceeds are used to pay off the loan. Any money remaining after the reverse mortgage is paid goes to the borrowers or their heirs. If the home is not sold, but transferred to heirs, the loan balance is due at the time of transfer. If the loan balance exceeds the value of the home, the estate or heirs are responsible only for the value of the home. The Federal Housing Administration insures the lender for any additional amounts.

Lines of credit are not available for reverse mortgages. Under Art. 16, sec. 50(p) of the Constitution, if more than one advance is made on a reverse mortgage, the terms of the advance must be established in the loan documents and it must be either:

- at regular intervals;
- at regular intervals in which the amount advanced may be reduced at the request of the borrower; or
- made by the lender directly to another entity, on behalf of the borrower, to pay taxes, insurance, repair or maintenance costs, assessments and any lien with priority over the lien held by the lender making the reverse mortgage.

Digest

Proposition 7 would amend Art. 16, sec. 50 of the Texas Constitution to revise the methods by which advances could be made on reverse mortgages to allow lines of credit to be used for these loans. Borrowers could receive an initial advance at any time and future advances:

- at regular intervals;
- at regular intervals in which the amounts advanced could be reduced at the request of the borrower;
- at times and in amounts requested by the borrower until the credit limit was reached; or
- in amounts requested by the borrower until the credit limit established was reached, and subsequent advances at times and in amounts requested by the borrower according to the terms established by the loan documents to the extent that the outstanding balance was repaid.

Reverse mortgages could not allow the homeowner to use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance. No transaction fees could be charged after the extension of credit in connection with any debit or advance. The lender or holder of the note could not unilaterally amend the extension of credit.

The ballot proposal would read: "The constitutional amendment authorizing line-of-credit advances under a reverse mortgage."

Supporters say

Many Texas seniors have begun to reap the benefits of using reverse mortgages to tap their home equity without having to sell their home. Proposition 7 would build upon this success by providing more options for seniors taking out these loans. Obtaining a line of credit on a reverse mortgage could help seniors obtain the most economical, appropriate type of loan to live with financial security in the comfort of their own homes. Current provisions do not restrict other home equity borrowers from using lines of credit, and no justification exists for this restriction on consumers obtaining reverse mortgages. Providing the option to access funds as a line of credit would provide Texas seniors who obtain reverse mortgages with a convenient option available in all 49 other states. In other states, about 88 percent of all reverse mortgages are taken as lines of credit.

Currently, borrowers obtaining reverse mortgages can receive the money either in a lump sum or in monthly payments, with the vast majority taking the lump sum. This can result in borrowers taking on more debt than they need at any particular time. Not only does interest begin accruing on the entirety of the loan, but when the loan comes due it can include interest on money that was never even used. If the borrower instead chooses to receive installment payments on a reverse mortgage, the consumer may receive money not needed at a particular time or a payment that is too small to cover emergency expenses or to respond to changing needs.

Proposition 7 would address this lack of flexibility by authorizing the use of lines of credit for reverse mortgages. Borrowers would be able to draw out money from their established line of credit only when it was needed and only in amounts necessary, and interest would accrue only on the money that the consumer borrowed. For example, a senior could obtain money from a reverse mortgage line of credit for an unexpected medical or prescription drug expense. Under reverse mortgage lines-of-credit, seniors also would be able to reduce their interest costs by repaying outstanding balances when they wanted and would have the flexibility to redraw the amounts repaid if desired.

Proposition 7 could result in Texas' seniors obtaining loans more appropriate to their situation. Other types of home equity loans that are not reverse mortgages may allow more flexibility but also can require repayment to begin immediately, charge a higher interest rate, and give the consumer fewer protections against foreclosure than a reverse mortgage. Although consumers can use credit cards for unanticipated expenses, they typically carry a much higher interest rate than reverse mortgages, with the potential for higher fees and a damaging impact on credit scores if the consumer cannot make a payment every month.

Proposition 7 would maintain all of the consumer protections in current law, including limiting recourse to only the homestead, restricting the events constituting default, and requiring that all foreclosures go through a judge. As with all reverse mortgages, seniors would not be required to make payments on a line-of-credit reverse mortgage unless they no longer occupied the property or had transferred it to another. As long as they paid their property taxes and homeowner's insurance, the loan could not be foreclosed. In addition, the numerous consumer protections on lines of credit would apply to those issued on reverse mortgages, including preventing seniors from accessing their line of credit too readily through credit cards, debit cards, or preprinted solicitation checks. These restrictions would help ensure that borrowers could not casually request advances from a home equity line of credit secured by their home. With the protections in Texas law, reverse mortgages are virtually risk-free to the consumer, and this would not change with the addition of a line-of-credit option.

Allowing seniors to control the amount and timing of their borrowing thorough reverse mortgage lines of credit would allow them to stay in their homes and better conserve their estates for themselves and their heirs, especially since interest rates on reverse mortgages are lower than other types of home equity loans. While the use of a line of credit under a reverse mortgage could possibly leave fewer assets for homeowners or their heirs, this is a private decision. Family members often are the ones who introduce the idea of reverse mortgages to seniors because they are involved in elder family members' care and interested in seeing them remain in their homes with financial security. Concerns that seniors may use larger portions of their equity using a reverse mortgage line of credit are outweighed by the numerous and substantial benefits that this option would give seniors. Finally, borrowers are required to receive counseling on reverse mortgages and their financial alternatives, so they would be well informed when making the decision to obtain a line of credit.

Concerns that unscrupulous lenders would take advantage of seniors who want to obtain lines of credit for their reverse mortgages by charging higher interest rates are unfounded. Reverse mortgage lending does not provide an appealing market for lenders who are unscrupulous or out-of-step with the rest of the market. To entice customers to

take out such a loan, independent lenders have to keep their offers in line with those offered by the federal Department of Housing and Urban Development (HUD) or Fannie Mae. An unscrupulous lender would need considerable funds on hand to sink into these loans for the long term. Also, foreclosures of reverse mortgages are restricted and highly regulated and must be done by a judge.

Opponents say

Proposition 7 could stimulate demand for a type of loan product that ultimately could leave fewer assets for the homeowner and his or her heirs. Borrowers who obtain reverse mortgages typically are house-rich and income-poor, so their fixed income may not be sufficient to repay portions of the loan and interest taken out under a line-of-credit. Because reverse mortgages do not have to be repaid until the homeowner no longer occupies the property or the property is transferred to another, the amount owed and the interest that is added to the principal loan balance each month can become significant. If lines of credit entice seniors to finance routine consumption spending through reverse mortgages, they could quickly use up substantial amounts of equity in a home. That would leave fewer assets for the homeowner and his or her heirs.

Although borrowers currently use HUD and Fannie Mae loan products, other lenders could offer lines of credit with reverse mortgages with fees and interest rates higher than the average market rate. Also, unscrupulous lenders could seek to take advantage of seniors, resulting in some seniors draining the equity in their homes at an accelerated rate.

Relinquishing state claim to certain land in Upshur and Smith counties

(SJR 40 by Eltife/Hughes)

8 Proposition

Background

The terms of Texas' annexation by the United States in 1845 provided that the state shall "retain all the vacant and unappropriated lands lying within its limit" (Natural Resources Code, Sec. 11.011). Under law dating to 1836, settlers in Texas had the right to survey land they wanted to claim or purchase, but the state retained all land not specifically claimed in those surveys.

In 1900, all unpatented Texas land that was not held or dedicated for other purposes reverted to the Permanent School Fund, which is overseen by the School Land Board with administrative oversight from the General Land Office (GLO). As such, the GLO has the authority to determine vacancies. A "vacancy" is a piece of unsurveyed land that is property of the Permanent School Fund and not part of any patented survey. A person who locates vacant land may file an application with the GLO. If the GLO verifies the vacancy, the applicant may be eligible for one-sixteenth of the land's mineral royalties.

On January 16, 2004, Land Commissioner Jerry Patterson denied a claim that 4,600 acres of land in Upshur County in Northeast Texas belong to the state as a vacancy because of inaccuracies in the 1838 King Survey. On April 6, 2005, the 115th District Court ruled in favor of the GLO, confirming that no vacancy exists and upholding the ownership rights of the existing landowners.

A vacancy claim involving multiple surveys for 950 acres in Smith County remains pending. The land commissioner denied this vacancy claim on March 23, 2004, after which the claimants filed an appeal in Smith County district court.

Digest

Proposition 8 would add Art. 7, sec. 2C to the Constitution to relinquish any claim of sovereign ownership or title by the state to land or mineral rights in a tract of land in Upshur County and a tract of land in Smith County. The proposition specifies the boundaries of each tract of land. It would not apply to any public right-of-way, road, navigable waterway, park, or public land owned by a governmental entity. The resolution would be self-executing.

The ballot proposal reads: "The constitutional amendment providing for the clearing of land titles by relinquishing and releasing any state claim to sovereign ownership or title to interest in certain land in Upshur County and in Smith County."

Supporters say

By permanently resolving two controversial land disputes involving more than 1,000 surface owners and 2,000 mineral interest owners, Proposition 8 would ensure that the private property rights of several hundred landowners in Upshur County and Smith County were respected. Many of the citizens who reside in the areas targeted by the vacancy applications have lived on their land for decades, unaware that their ownership might be in doubt. These residents legally purchased or inherited their properties without any reason to suspect that trivial discrepancies in an early 19th century survey might rob them of their homes or royalty income from oil and gas development in the tracts. Failure to act in this case by the Legislature could leave the door open to a court-ordered vacancy finding and the unjust seizure of citizens' private land and mineral rights by the state. Such seizures would be particularly burdensome to older and lower income citizens who might not be able to repurchase their homes.

The state has determined that the Upshur County and Smith County vacancy applications have no merit, but many landowners in these areas have had the validity of their titles unnecessarily clouded because of this unfounded challenge. The land commissioner and the district court ruled that there is no vacancy in the King Survey and that the Upshur County challenge has no validity. The Smith County appeal, however, is pending in district court. Property titles in these areas are not clear, and landowners are unable to sell their land, which has caused serious disruptions in the lives of many residents.

If a court overturned the land commissioner's ruling and ordered the transfer of land in Smith County to the state, landowners unfairly would be forced to buy back property they thought they owned. Landowners should not be forced to pay again for property they already have purchased. Equally troubling is that fact that current state law would require that all rights to the substantial privately held mineral resources in the area be forfeited to the state in the event of a vacancy ruling. Such a finding would be tantamount to government expropriation of the mineral rights of individuals and firms who hold interest in those resources.

Because of the unique nature of these disputes and the large number of people suffering because of this unwarranted application of the vacancy law, these cases merit specific remediation through a constitutional amendment. Although Texas voters in 2001 approved Proposition 17 (Art. 7, sec. 2B) to authorize the School Land Board to settle land-title disputes, this constitutional provision cannot be used to settle boundary disputes and does not authorize the release of mineral rights on the part of the state. Thus, under current law, it is up to the Legislature and Texas voters to evaluate the merits of these cases. Constitutional amendments dealing with other specific instances of vacancies have been considered and overwhelmingly approved four times in the last quarter-century, most recently in 2001 involving a tract in Bastrop County. The cases in Upshur and Smith counties are no less compelling and justifiable.

Concerns that this resolution would deprive the Permanent School Fund of revenue are unjustified. A district court already has ruled that the state has no claim to the alleged vacancy in Upshur County. While the Smith County claim remains unsettled, the Legislative Budget Board estimates no fiscal implication to the state from this proposition relinquishing the state's claim.

Opponents say

By denying any claim to vacant land in Smith County, which unlike the Upshur County claim has not yet been adjudicated, the state of Texas would be surrendering claim to what could be hundreds of millions of dollars in potential mineral resource revenue that would benefit the Permanent School Fund. It has been the policy of the state for more than 100 years to pursue vigorously vacant lands and to apply proceeds from state land toward funding public education. With the Legislature searching for additional revenue to finance the state's public school system, it would be irresponsible for the state to relinquish its claim to resources that could greatly benefit the Permanent School Fund.

Concern over the threat to individuals' property rights is overblown. Should a district court find merit in the Smith County vacancy application, current property owners would have the first opportunity to purchase at a marginal rate the land to which they held title. This provision in current law ensures that no residents arbitrarily would lose their land should a court find merit in the vacancy application. In any case, it would be premature for the state to intervene in a case in which an appeal of the land commissioner's decision remains pending.

Other opponents say

Texas voters should not have to settle yet another land-title dispute by amending the Constitution. Such matters are better left to the courts. Instead of regularly amending the Constitution to address land disputes, the Legislature should establish an ongoing mechanism to settle such matters without having to hold expensive constitutional amendment elections and require voters statewide to evaluate local land

Six-year staggered terms for Regional Mobility Authority board members

(HJR 79 by Krusee/Staples)

9
Proposition

Background

Regional mobility authorities (RMAs) were created by SB 342 by Shapiro, enacted in 2001 by the 77th Legislature (Transportation Code, ch. 370). Any county or set of counties may petition the Texas Transportation Commission (TTC) to form an RMA. These authorities finance, build, operate, and maintain toll roads and other transportation projects aimed at improving mobility in a region. RMAs have the power of eminent domain, bonding authority, and the ability to contract with private entities for transportation projects.

The commissioners court of each county initially forming a RMA appoints at least two board members. Counties containing an operating project of the authority appoint an additional member and may by agreement of the counties appoint additional directors to represent political subdivisions affected by a project. The governor appoints one director to serve as presiding officer and may appoint an additional director if necessary to maintain an odd number of directors. Counties that subsequently join a RMA appoint one director.

A provision in HB 3588 by Krusee, enacted in 2003 by the 78th Legislature, amended Transportation Code, sec. 370.251 to extend the terms of RMA board members from two years to six. Board members are permitted to serve staggered six-year terms, with no more than two board members leaving in one year. In 2005, the 79th Legislature enacted HB 2702 by Krusee, again setting RMA terms at two years, unless longer terms were authorized by the Texas Constitution.

Texas Constitution, Art. 16, sec. 30(a) states that the term length for any office not fixed by the Constitution cannot exceed two years. On July 14, 2005, Judge Darlene Byrne of the 353rd District Court in Travis County ruled in *People for Efficient Transportation Inc. v. Central Texas Regional Mobility Authority* (GN500643) that the statute authorizing six-year terms for RMA board members violates the constitutional two-year term requirement.

Digest

Proposition 9 would amend Art. 16, sec. 30 of the Texas Constitution to specify that the Legislature may permit RMA board members to serve staggered six-year terms with no more than one-third of the members to be appointed every two years.

The ballot proposal reads: "The constitutional amendment authorizing the legislature to provide for a six-year term for a board member of a regional mobility authority."

Supporters say

Proposition 9 would provide clear constitutional authority for six-year terms for RMA board members and would allow the tenure of current board members to be extended from two to six years. Six-year term lengths provide consistency and stability for RMA boards of directors. Experienced board members possess specialized knowledge that aids in the development of transportation plans for a particular region. Also, six-year terms provide private investors with more confidence in the board's leadership than two-year terms and would promote public-private partnerships, which expedite the completion of transportation projects and save taxpayer dollars. This proposed amendment would ensure that vital transportation projects underway or in planning were not jeopardized.

Six-year term lengths are not unusual for appointed boards. Most state agency and university governing board members serve six-year terms, and the RMA boards should be no different.

Opponents say

It would be inappropriate to allow unelected, unaccountable board members of RMAs to serve six-year terms. A two-year term of office requires more frequent assessments of the board member's job performance. Six-

year terms are not necessary to carry out the functions of the authority since the staff or employees of an authority would do so regardless of the length of the directors' terms.

The Constitution generally limits terms of office for appointed boards to two years to guard against possible conflicts that can accompany long terms and to ensure sufficient turnover in board membership. Some existing RMA board members have been accused of having conflicts of interest with regard to their positions on the board. RMA boards should be required to abide by the standard provided in the Constitution that limits the terms of members of such boards to two years.

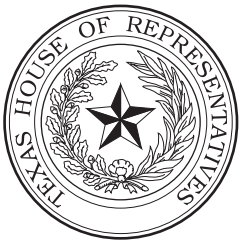
Other opponents say

RMA terms should be four years to coincide with the terms of county commissioners. Making the terms of the RMA board members consistent with the terms of the county commissioners who appoint them would improve the accountability of RMA boards, which are not elected and are not directly accountable to the public.

Notes

HB 2702 by Krusee, effective June 14, 2005, limits RMA board members to staggered two-year terms. If permitted by the Constitution, board members would be authorized to serve staggered six-year terms.

HOUSE RESEARCH ORGANIZATION



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