KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2021

The Honorable Wesley Hoyt
San Augustine County Attorney
108 South Broadway Street
San Augustine, Texas 75972

Opinion No. KP-0384

Re: Enforceability of city action transitioning to staggered elections for city officials (RQ-0399-KP)

Dear Mr. Hoyt:

On behalf of the City of San Augustine (the "City"), you ask several questions about the enforceability of an act transitioning to staggered elections for city officials.[1]

Background

You tell us that the City is a Type B general-law city and that it has six elected officials—five aldermen and a mayor. Request Letter at 1. You explain that prior to the November 2020 city elections, the city council attempted to change the council terms so that they would be staggered after the election.[2] *See id.* The action provided that "after the election the Council (and Mayor) would draw lots to determine which officials would serve a 1-year term to effectively re-stagger the terms." *Id.* Of the six elected officials, "[t]hree would be elected in odd years and three would be elected in even years." *Id.* You describe the circumstances following the election: "when the time arose to draw lots several of the Council members refused to do so and wanted to undo what had already been done or in the alternative wait until the next election cycle to draw lots." *Id.* The council members argued that the public voted them into office for two-year terms and "inferred that the public may not have been aware" of the previous council's actions. *Id.* You add that "the decision to draw lots and return to staggered terms" was taken "at an open meeting and was also published in the local newspaper." *Id.* In this context, you ask several specific questions. *See id.* at 2.

[1] *See* Letter from Honorable Wesley Hoyt, San Augustine Cnty. Att'y, to Office of the Att'y Gen., Op. Comm., at 1–2 (Mar. 4, 2021), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0399KP.pdf ("Request Letter").

[2] You explain that in 2012, the City "unstaggered the terms of its elected officials so that it could save election costs" by having its election at the same time as the county. *Id*. at 1. Thus, the recent action was "to revert back to staggered terms" after the election. *Id.*

Authority to Adopt a Stagger Ordinance

Unlike a home-rule city, which has all power not reserved or restricted by the Legislature, a city incorporated under the general laws of the State has only those powers expressly given to it and those necessarily implied therefrom. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016). Generally, the Local Government Code grants a Type B general-law municipality authority to "adopt an ordinance or bylaw, not inconsistent with state law, that the governing body considers proper for the government of the municipal corporation." TEX. LOC. GOV'T CODE § 51.032(a); *see also id.* § 51.031 (applying subchapter C, chapter 51 of the Local Government Code to Type B general-law municipalities). Subsection 23.026(a) provides that the mayor and aldermen "are elected for a term of one year unless a longer term is established under Subsection [23.026](b) or under Article XI, Section 11, of the Texas Constitution."[3] *Id.* § 23.026(a); *see also id.* § 23.023(a) (providing for annual elections for the mayor and aldermen "except as otherwise provided by law"). The first option for a longer term, subsection 23.026(b), expressly provides for staggered terms: "[T]he governing body may provide by ordinance for two-year staggered terms of office for the mayor and aldermen." *Id.* § 23.026(b).

Action of the City Council

You ask whether the City's action taken to re-stagger the terms of office was lawful. *See* Request Letter at 2. Neither you nor the city attorney provided a copy of the document evidencing the council's 2020 action, but you make multiple references to the document as both an "ordinance" and a "resolution." *Id.* at 1–2. The two are not the same. An ordinance is a legislative act. *See Wilder v. Am. Produce Co.*, 147 S.W.2d 936, 938 (Tex. App.—El Paso 1940), *rev'd on other grounds*, 160 S.W.2d 519, 523 (Tex. 1942); *Joiner v. City of Dallas*, 380 F. Supp. 754, 770 (N.D. Tex. 1974) (distinguishing an ordinance from a resolution). "[U]nlike an ordinance, a resolution is not a law, but an expression of opinion." *City of Carrollton v. Tex. Comm'n on Env't Quality*, 170 S.W.3d 204, 215 (Tex. App.—Austin 2005, no pet.). Section 23.036(b) requires an ordinance to transition to staggered terms. TEX. LOC. GOV'T CODE § 23.026(b). Thus, if the action taken was by resolution, the City's action did not conform to subsection 23.026(b) and is therefore likely void, making your remaining questions moot. *See Masterson v. Town of Hedley*, 265 S.W. 406, 407 (Tex. App.—Amarillo 1924, no writ) (distinguishing municipal action by resolution or ordinance and recognizing that when the law provides that "certain subjects shall be governed only by ordinance, . . . that it is competent for the courts to set aside the vote of a municipal council, upon the ground that it was a resolution when it should have been an ordinance"). To the extent the action taken was by ordinance, we address your other questions.

[3]The second option for a longer term, article XI, section 11, authorizes a general-law city, through an election of qualified voters, to establish terms of between two and four years. TEX. CONST. art. XI, § 11(a).

Drawing Lots

You also ask whether the council members can opt out of drawing lots and whether the city secretary may draw lots for them. Request Letter at 2. In addition to authorizing staggered terms, subsection 23.026 specifies how a city transitions to staggered terms:

> If the governing body adopts the ordinance, the mayor and two aldermen serve for a term of two years. The two aldermen who serve two-year terms are determined by drawing lots at the first meeting of the governing body following the annual municipal election held after the ordinance is adopted. The remaining aldermen hold office for an initial term of one year. Thereafter, all members of the governing body serve for a term of two years.

TEX. LOC. GOV'T CODE § 23.026(b). Subsection 23.026(b) states that the mayor elected at the municipal election following adoption of the ordinance serves two years. *See id.* Under subsection 23.026(b), the mayor does not participate in the drawing of lots. Subsection 23.026(b)'s requirement to draw lots applies to only the five aldermen. *See id*. Thus, once the staggering ordinance is adopted, the aldermen are required to draw lots, if not by the ordinance, then by subsection 23.026(b) itself. *See id.*; *see also Foster v. City of Waco*, 255 S.W. 1104, 1105 (Tex. 1923) (recognizing that "where a power is granted, and the method of its exercise prescribed, the prescribed method excludes all others, and must be followed"). An ordinance providing otherwise would be inconsistent with state law and invalid. *See* TEX. LOC. GOV'T CODE § 51.032(a) (authorizing a city to adopt ordinances "not inconsistent with state law").

Accordingly, a court would likely conclude that the new council members may not opt out of drawing lots. Subsection 23.026(b) similarly does not provide an alternative for the council members drawing lots, and thus a court would likely conclude that the city secretary may not draw lots for the aldermen.

Overturning the Previous Council's Action

You also ask if the new council may overturn the previous council's action and preserve the currently unstaggered election terms. *See* Request Letter at 2. Section 51.001 of the Local Government Code authorizes the governing body of a city to "adopt, publish, amend, or *repeal* an ordinance." TEX. LOC. GOV'T CODE § 51.001 (emphasis added). Texas courts have long recognized that the "governing body of a municipal corporation has, as a general rule, the power, if vested rights are not thereby interfered with, to reconsider and rescind action previously taken." *City of Belton v. Head*, 137 S.W. 417, 418 (Tex. App.—Austin 1911, no writ) (quotation marks omitted); *see also Tarrant Cnty. v. Ashmore*, 635 S.W.2d 417, 421–22 (Tex. 1982) (concluding that though an elected office may be a property interest subject to procedural due process protection, it is not a vested property right). The "power to enact implies power also to repeal ordinances, unless the right is limited or abrogated by a higher law. All ordinances, too, are subject to repeal, except such as are contractual in their character." *City of Belton*, 137 S.W. at 418 (quotation marks omitted). But an "ordinance may be repealed only by another ordinance, not by resolution or order, or motion." *Red Bird Vill. v. State ex rel. City of Duncanville*, 385 S.W.2d

548, 550 (Tex. App.—Dallas 1964, writ ref'd). Therefore, a court would likely conclude that the City may adopt an ordinance repealing its earlier ordinance providing for the election stagger.

Such a conclusion, however, does not address the question in this case whether repealing the ordinance "preserve[s] the currently unstaggered election terms." Request Letter at 2. Repealing the ordinance does not necessarily revive the prior nature of the council. *See generally* Tex. Att'y Gen. Op. No. JM-169 (1984) at 2–3 (providing that once a municipality accepted the benefits and responsibilities of incorporation as a "town," it ceased to exist as a "village," and its attempt to return to "village" status was a nullity without express statutory authority). Rather, to reinstate the unstaggered nature of the city council, it is more likely that a city must affirmatively adopt a new ordinance so providing. *Cf.*, TEX. GOV'T CODE § 311.030 ("The repeal of a repealing statute does not revive the statute originally repealed . . . ."); *Ex parte Dick*, 724 S.W.2d 69, 71 (Tex. Crim. App. 1987) (acknowledging the predecessor statute providing that the repeal of a statute does not revive a law repealed by such statute); *see also Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002) ("Courts use the same rules that are used to construe statutes to construe municipal ordinances.").

Public Notice

Next, we address your question about the required public notice for the ordinance. *See* Request Letter at 2. With respect to the meeting at which the prior ordinance was adopted, chapter 551 of the Government Code governing open meetings requires notice of the "date, hour, place, and subject" of all regular, special, or called meetings of a municipal governing body to be posted at designated places for 72 hours prior to the meeting. *See* TEX. GOV'T CODE §§ 551.041 (imposing notice requirement), 551.002 (requiring open meetings), 551.043(a) (requiring a meeting notice to be posted 72 hours in advance). Failure to comply with the Open Meetings Act notice requirement renders an action taken at that meeting voidable. *See id.* § 551.141.With respect to public notice of the adopted ordinance, chapter 52 of the Local Government Code provides that before an ordinance of a Type B general-law municipality may be enforced, the municipality must post the ordinance "in three public places in the municipality or published in a newspaper that is published in the municipality." TEX. LOC. GOV'T CODE § 52.012(a). Failure to follow this publication requirement would render the ordinance unenforceable. *Id.* § 52.012(a) (stating that "[b]efore an ordinance or a bylaw of a Type B general-law municipality may be enforced").

Lawfulness of Ordinance

While your last question about the lawfulness of the ordinance to re-stagger the elections is a legal question, it is also one that involves issues of fact. This office cannot resolve mixed questions of law and fact in an Attorney General opinion. *See* Tex. Att'y Gen. Op. No. GA-0648 (2008) at 7.

S U M M A R Y

Subsection 23.026(b) of the Local Government Code authorizes a Type B general-law city to provide for two-year staggered terms for the mayor and city aldermen by ordinance. To the extent the municipal action at issue providing for such stagger was taken by resolution, it does not conform to the statute and is likely void.

To the extent the action was taken by ordinance pursuant to subsection 23.026(b), that provision contains no language allowing the aldermen to opt out of drawing lots to determine which aldermen have two-year terms. Similarly, subsection 23.026(b) does not authorize the city secretary to draw lots for the aldermen.

While a Type B general-law city may repeal a prior ordinance, such a repeal does not necessarily revive the prior law. Instead, a city must affirmatively adopt a new ordinance providing for the change in form of government.

A meeting to adopt an ordinance must be posted as required by the Open Meetings Act in chapter 551 of the Government Code. An adopted ordinance must be published in three public places in the municipality or posted in a newspaper published in the municipality as required by chapter 52 of the Local Government Code. Failure to follow these posting and publication requirements would render the ordinance voidable under the Open Meetings Act or unenforceable under chapter 52 of the Local Government Code.

We do not address your last question about the lawfulness of the ordinance to re-stagger the elections because it involves mixed questions of law and fact.

Very truly yours,

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