



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 26, 2021

The Honorable Terry Canales
Chair, House Committee on Transportation
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0351

Re: Whether yard signs and a social media post qualify as an “announcement” for candidacy for another office, thus triggering the automatic resignation provision of article XI, section 11 of the Texas Constitution (RQ-0369-KP)

Dear Representative Canales:

On behalf of the City of Palmview (“City”), a home-rule city, you ask whether the resign-to-run provision of the Texas Constitution applies to a city councilmember who engaged in certain behavior.¹ Specifically, you ask whether the councilmember’s “placing political signs on public property and making public statements on Facebook” qualify as an “announcement” for candidacy for a school district board of trustees that triggers the automatic resignation provision for his current city council office. Request Letter at 2–3. You explain that the councilmember placed “political signs on public properties that state ‘Elect Anthony Uresti for Place 5 of LJISD School board.’” *Id.* at 1. You further detail that the councilmember posted “the same political advertisement” on his personal social media page, alongside a message stating, “After great anticipation ... I look forward in sharing this journey with you!” *Id.* You ask whether the City correctly concluded that the above facts trigger the resign-to-run provision. *Id.* at 3.

Article XVI, section 65 of the Texas Constitution provides that certain district or county officers automatically resign from office upon announcing their candidacy or becoming a candidate for other specific offices:

If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any

¹See Letter from Honorable Terry Canales, Chair, House Comm. on Transp., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 5, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0369KP.pdf> (“Request Letter”).

time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

TEX. CONST. art. XVI, § 65(b). Two separate acts may trigger this provision: (1) when an officer announces candidacy; or (2) when an officer in fact becomes a candidate. *Id.* An officer becomes a candidate in fact under subsection 65(b) by formally applying for a place on the ballot. *See* Tex. Att’y Gen. Op. No. GA-0769 (2010) at 1. Here, you ask whether the councilmember’s actions constitute an “announcement” under this provision, and we address only the first component of subsection 65(b).

Although the list of officers in section 65 does not include city councilmembers, article XI, section 11 provides that officers of a home-rule city that hold a term longer than two years “are subject to Section 65(b), Article XVI, of this Constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies.” TEX. CONST. art. XI, § 11(a). Because the City is a home-rule municipality with four year terms for its councilmembers,² the councilmember you describe is subject to article XVI, section 65(a) when running for any office of profit or trust. TEX. CONST. art. XVI, § 65(a), (b). The councilmember voiced interest in running for a position as trustee of a school board, which is an “office of profit or trust.” *See* Tex. Att’y Gen. Op. No. JC-0403 (2001) at 3 (citing *Ramirez v. Flores*, 505 S.W.2d 406 (Tex. App.—San Antonio 1973, writ ref’d n.r.e.)). Therefore, if the councilmember you describe announced his candidacy under subsection 65(b), he automatically resigned from his position on the city council.

Article XVI, section 65 does not define the term “announce.” *See* TEX. CONST. art. XVI, § 65; *see also* Tex. Att’y Gen. Op. No. KP-0301 (2020) at 2. Prior opinions and court decisions rely on the ordinary meaning of the word: “to make known publicly.” Tex. Att’y Gen. Op. No. GA-0210 (2004) at 2 (citing WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 87 (9th ed. 1990)), *Standley v. Sansom*, 367 S.W.3d 343, 350 (Tex. App.—San Antonio 2012, pet. denied); *see also* Tex. Att’y Gen. Op. No. GA-0769 (2010) at 2. To be sufficiently public, the candidate’s statement must “be made in a public setting or be otherwise available to the public,” and the statement must be definite. Tex. Att’y Gen. Op. Nos. KP-0301 (2020) at 2, GA-0643 (2008) at 6–7. A statement about merely considering running for another office is not an announcement. Tex. Att’y Gen. LO-95-071, at 2. Courts narrowly construe the term announce because “[a]ny constitutional or statutory provision which restricts the right to hold office must be strictly construed against ineligibility.” Tex. Att’y Gen. Op. No. GA-0210 (2004) at 3 (citing *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992)).

We first consider whether the statements and actions you describe satisfy the clear and unequivocal requirement of an announcement. With regard to the social media post, by itself, the caption stating, “After great anticipation...I look forward to sharing this journey with you” would

²PALMVIEW, TEX., CITY CHARTER, § 3.03(C) (providing that councilmembers serve four-year terms), <https://cityofpalmview.com/charter/>.

likely not qualify as an announcement for automatic resignation purposes. Request Letter at 1; *see* Tex. Att’y Gen. Op. No. GA-0643 (2008) at 8–9 (concluding that, among other acts, a flier that an officer handed out stating that he wanted to bring his “leadership, values, and experience . . . to the County Commissioners Court” did not qualify as an announcement for candidacy). However, a court would likely conclude that campaign materials urging the public to “elect” a candidate provide a clear statement that the candidate is running for office.³ Assuming that the councilmember posted the yard signs and social media statement, a court would likely conclude that the statements and actions satisfy the clear and unequivocal prong of an announcement for the resign-to-run provision.

To qualify as an announcement under subsection 65(b), the announcement must also be sufficiently public. One Texas court suggested that “posters, billboards, cards, or ads” for one’s candidacy for another position support application of the automatic resignation provision. *See Standley*, 367 S.W.3d at 353 (upholding application of the resign-to-run provision despite that a candidate did not have these materials). Where those materials are posted and to whom they are given are also relevant to determine whether the materials satisfy the requirement that they be public. You explain that the signs at issue were placed “on public properties,” but do not further describe those properties. Request Letter at 1. To the extent that the candidate posted signs on public rights-of-way, visible to the general electorate, a court would likely find that the signs are “made in a public setting or [are] otherwise available to the public.” Tex. Att’y Gen. Op. No. KP-0301 (2020) at 2.

With regard to the social media post, you explain that the councilmember posted it on his personal social media account. Request Letter at 2. You do not explain who follows his social media page or to what extent it is visible to the public, and a court would consider such factors in determining whether the statements satisfied the requirement that the announcement be sufficiently public to satisfy the resign-to-run provisions.

Assuming an automatic resignation occurred, you also ask whether the vacancy is filled by special election or appointment by the city council. *Id.* at 3. Article XI, section 11 of the Texas Constitution provides that home-rule municipalities shall generally fill vacancies by special election:

Any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur except that the municipality may provide by charter or charter amendment the procedure for filling a vacancy occurring on its governing body for an unexpired term of 12 months or less.

³This office cannot resolve any question of fact as to whether the councilmember himself posted the signs and social media post. *See* Tex. Att’y Gen. Op. No. GA-0867 (2011) at 2 (“Attorney general opinions do not answer fact questions.”); *see also* Tex. Att’y Gen. Op. No. GA-0643 (2008) at 7 (concluding that certain facts fell “short of an unambiguous statement of candidacy shown to have been made by the constable himself” for the purpose of the resign-to-run provision).

TEX. CONST. art. XI, § 11(c). Article XI, section 11 requires that “any vacancy in a municipal governing body with terms exceeding two years must be filled by majority vote of the qualified voters at a special election and that a city may not fill such a vacancy by appointment, even if the vacancy is the result of an automatic resignation.”⁴ Tex. Att’y Gen. Op. No. JC-0318 (2000) at 5. Because the vacancy left by the councilmember exceeds twelve months, to the extent an automatic resignation occurred, the city council position must be filled by a special election. *See id.*

You also ask whether the City of Palmview should hold the special election in conjunction with the general election in November or at a later date. Request Letter at 3. Home-rule municipalities must fill vacancies in a special election within 120 days after the vacancy occurs. TEX. CONST. art. XI, § 11(c). A city may initiate an election to fill a vacancy immediately upon automatic resignation under article XI, section 11, and it must do so to ensure the vacancy is filled within 120 days. Tex. Att’y Gen. Op. No. JC-0403 (2001) at 3. Chapter 201 of the Election Code provides that if a vacancy in office is to be filled by special election, the election shall be ordered as soon as practicable after the vacancy occurs. *See* TEX. ELEC. CODE § 201.051 (a); Tex. Att’y Gen. Op. No. JC-0318 (2000) at 6. “Except as otherwise provided by [the election] code, a special election to fill a vacancy shall be held on the first authorized uniform election date occurring on or after the 46th day after the date the election is ordered.” TEX. ELEC. CODE § 201.052.⁵ For municipalities, uniform election dates occur on the first Saturday of May in each year and the first Tuesday after the first Monday in November. *Id.* § 41.001(a). Under the automatic resignation provision, an officer resigns, and therefore leaves a vacancy, immediately upon announcing candidacy for another office. *See Ramirez*, 505 S.W.2d at 409 ; Tex. Att’y Gen. LO-94-059, at 1. Assuming that the councilmember engaged in behavior that amounted to an automatic resignation within 120 days of the general election in November, the special election to fill the vacancy should have been held, and in fact was held, on November 3, 2020.⁶

You also ask whether the “holdover provision” applies to the councilmember. Request Letter at 3. Article XVI, section 17 of the Texas Constitution provides that “[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.” TEX. CONST. art. XVI, § 17. The purpose of this provision “is to prevent vacancies in office and the consequent cessation of the functions of government.” Tex. Att’y Gen Op. No. DM-0377 (1996) at 2 (citing *Plains Common Consol. Sch. Dist. No. 1 v. Hayhurst*, 122 S.W.2d 322 (Tex. App.—Amarillo 1938, no writ)). This office previously opined that “[a]lthough the cases and prior opinions of this office suggest that article XVI, section 17 generally does not apply to vacancies created by operation of the constitution, we believe that article XVI, section 65 may be distinguished from the authorities cited.” Tex. Att’y Gen. Op. No. DM-0377 (1996) at 4; *see also* Tex. Att’y Gen. Op. No. WW-1253 (1962) at 3. Thus, this office treats the automatic

⁴The City called a special election to fill this vacancy on Aug. 11, 2020. *See* <https://www.progresstimes.net/2020/08/11/palmview-councilman-to-step-down-in-november/>.

⁵You do not present facts that suggest that any exceptions apply in these circumstances, such as the Governor ordering an earlier emergency election on a nonuniform date. TEX. ELEC. CODE § 41.0011(a); *see also id.* § 41.0011(b) (political subdivision must seek permission from Governor), (c) (proclamation for emergency election must identify nature of the emergency).

⁶*See* Notice of Palmview Special City Election, <https://www.progresstimes.net/2020/10/23/notice-of-palmview-special-city-election/>.

resignation provision like other voluntary resignations of office rather than like other constitutional bars on holding an office, and “an officer whose resignation has been effected but whose successor has not been appointed retains the position as a ‘de jure’ officer.” Tex. Att’y Gen. Op. No. DM-0377 (1996) at 4. Therefore, office holders subject to the automatic resignation provision hold over in office until a successor is duly qualified.

In your final question, you ask whether the councilmember may rescind an announcement for candidacy to avoid application of the automatic resignation provision. Request Letter at 3. In previous opinions, this office interpreted automatic resignations under article XVI, section 65 similar to other voluntary resignations of office and found “no authority for the revocation or undoing of a public officer’s resignation once it has taken effect.” See Tex. Att’y Gen. LO-94-059, at 2; see, e.g., Tex. Atty. Gen. Op. No. DM-0406 (1996) at 3, *Sadler v. Jester*, 46 F. Supp. 737, 741 (N.D. Tex. 1942); *Amarillo v. Mendenhall*, 276 S.W.2d 868 (Tex. Civ. App.—Amarillo 1955, writ ref’d n.r.e.). An automatic resignation takes effect on the same day that an announcement for candidacy for another office is made. See *Ramirez*, 505 S.W.2d at 409; Tex. Att’y Gen. LO-94-059 (1994) at 1. Accordingly, an officer may not rescind an automatic resignation.

S U M M A R Y

Article XVI, section 65 of the Texas Constitution provides that certain district or county officers automatically resign from office upon announcing their candidacy for any other office of profit or trust under the laws of this State or the United States. Article XI, section 11 applies this provision to officers of a home-rule city that hold a term longer than two years. To qualify as an announcement under these provisions, the person's statement must be made in a public setting and be clear and unequivocal. Whether any given statement satisfies these requirements will involve questions of fact, but to the extent a person posts campaign signs on public property, visible to the general public, urging his or her election, a court would likely conclude that such acts constitute an announcement for purposes of article XVI, section 65.

Article XI, section 11 of the Texas Constitution requires that any vacancy in a home-rule municipal office with a term exceeding two years be filled by majority vote of the qualified voters at a special election.

If a city councilmember automatically resigned within 120 days of the general election in November, the special election to fill the vacancy should be held on the same day as the general election.

Article XVI, section 17 of the Texas Constitution provides that all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified. Pursuant to this provision, office holders subject to the automatic resignation provision hold over in office until a successor is duly qualified.

A city councilmember may not rescind an announcement for candidacy to avoid application of the automatic resignation provision.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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