KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 13, 2021

The Honorable Dustanna Rabe
Hopkins County Attorney
128 Jefferson Street, Suite B
Sulphur Springs, Texas 75482

Opinion No. KP-0394

Re: Eligibility to hold municipal office under section 22.008 of the Local Government Code and related questions (RQ-0412-KP)

Dear Ms. Rabe:

You ask several questions about the application of subsection 22.008(a) of the Local Government Code to a recently enacted ordinance of the City of Cumby (the "City").[1]

Background

Chapter 22 of the Local Government Code governs Type A general-law municipalities operating under a mayor and alderman form of government.[2] *See generally* TEX. LOC. GOV'T CODE §§ 22.01–.077. Subsection 22.008(a) of that chapter prohibits "[a]n officer who is entrusted with the collection or custody of funds belonging to the municipality and who is in default to the municipality" from "hold[ing] any municipal office until the amount of the default, plus 10 percent interest, is paid to the municipality." *Id.* § 22.008(a). You tell us the City recently enacted an ordinance "establishing the conditions in which an elected official may be disqualified from serving" and attach a copy of the ordinance at issue. Request Letter at 1; *see also* Attachment at 1 (Ordinance No. 2021-03). One of the ordinance provisions prohibits "any official" from holding office if a default is owed, and not just an officer who collects or holds custody of funds as set out in subsection 22.008(a). Attachment at 1.

You first ask whether the City is "interpreting [subsection] 22.008(a) correctly when it states in Ordinance No. 2021-03 that [its] 'elected officials are officers who are entrusted with the collection or custody of funds belonging to the municipality.'" Request Letter at 1. This office generally does not construe municipal ordinances; however, we can address the legal question of

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[1]*See* Letter and Attachment from Honorable Dustanna Rabe, Hopkins Cnty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (June 14, 2021), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0412KP.pdf ("Request Letter" and "Attachment," respectively).

[2]You tell us the City is a Type A general-law municipality. Request Letter at 1.

whether state law permits a municipality to take a specific action. Tex. Att'y Gen. Op. No. GA-1078 (2014) at 1. Here we address whether the City may apply subsection 22.008(a) to any of its elected officials.

Assignment of Duties to Collect or Keep Custody of Funds

Chapter 22 of the Local Government Code sets forth the officers of a Type A general-law municipality by providing that the governing body consists of an elected mayor and a certain number of elected aldermen. *See* TEX. LOC. GOV'T CODE § 22.031(a)–(b). Chapter 22 also lists the other officers of the municipality, including a treasurer. *See id.* § 22.071(a). These additional officers are either elected or appointed, as provided by "the governing body by ordinance." *Id.* § 22.071(b). According to the City's Ordinance No. 72-7, all offices, except those comprising the governing body, are "filled by appointment."[3] Thus, the elected officers of the City are the mayor and the aldermen.

By statute, the only officer of a Type A general-law municipality with the express duty to collect and keep custody of municipal funds is the treasurer. *See id.* § 22.075(b) ("The treasurer shall receive and securely keep all money belonging to the municipality."). Thus, on its face, subsection 22.008(a) applies only to the treasurer.

We consider whether other officers might also acquire the duty of collection and custody of municipal funds alongside the treasurer. Type A general-law municipalities possess authority to prescribe the powers and duties of any of its officers, including additional duties for those whose duties are set by statute, or to "confer on other municipal officers the powers and duties of an officer provided for by . . . section [22.071]," which in theory could include the treasurer. *See id.* §§ 22.071(c), .072(a), (b). But the Texas Supreme Court long ago recognized that the authority to impose duties "does not empower [a city council] to confer upon one officer the powers, duties, or rights expressly conferred by law upon another." *Beard v. City of Decatur*, 64 Tex. 7, 10 (Tex. 1885) (concluding that the predecessor to section 22.072 does not permit a general-law municipality to assign the treasurer's collection and disbursement duties to the mayor); *see also* Tex. Att'y Gen. Op. No. JC-0544 (2002) at 2, 6 (concluding that section 22.072 does not permit a general-law municipality to delegate one officer's statutorily designated powers and duties to another). Thus, a court would likely conclude the City may not assign the treasurer's statutory duty to collect or keep custody of funds to other officers in order to make subsection 22.008(a) applicable to them.

City's Definition of "Default"

You next ask whether the City may define default as either (a) unpaid "[t]axes or other liability due to the City of Cumby or Hopkins County"; or (b) unpaid "[w]ater, sewer, garbage, or any other utility in the candidate's name or associated with the address upon which the candidate establishes residency in the City of Cumby." Request Letter at 1. The Local Government Code does not define "default" for purposes of subsection 22.008(a). *See* TEX. LOC. GOV'T CODE

[3] CITY OF CUMBY, TEX., ORDINANCE NO. 72-7 (Dec. 6, 1972), https://www.cityofcumby.com/city-ordinances.shtml.

§ 22.008(a). The term "default" is commonly defined to mean "failure to fulfill an obligation, esp. to repay a loan." NEW OXFORD AMERICAN DICTIONARY 453 (3d ed. 2010); *see also* BLACK'S LAW DICTIONARY 507 (10th ed. 2014) (defining "default" as the "omission or failure to perform a legal or contractual duty; esp. the failure to pay a debt when due"). Thus, unpaid taxes or utilities can be associated with default. But section 22.008 limits (i) the scope of persons to whom it applies, and (ii) the type of political subdivisions to which it applies.

First, subsection 22.008(a) applies only to an applicable officer "in default *to the municipality*," not the county (or another political subdivision). TEX. LOC. GOV'T CODE § 22.008(a) (emphasis added). Second, subsection 22.008(a) expressly applies to the officer "entrusted with the collection or custody of funds belonging to the municipality," not to others residing at the address used to establish residency and in whose name a utilities account is established. *Id.* § 22.008(a). "General-law municipalities . . . are political subdivisions created by the State and, as such, possess those powers and privileges that the State expressly confers upon them." *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex. 2004).

An officer's financial standing with a county is separate from his or her financial standing with the municipality. Similarly, a default on the part of someone (whether such person is an officer, or living with another officer), other than the officer who collects or has custody of municipal funds is unrelated to the officer's qualification for office. Thus, a court would likely find that applying the prohibition and fee of subsection 22.008(a) to (i) an applicable officer in default to the county, or (ii) an applicable officer residing with another person in whose name a utilities account in default is held, goes beyond the authority the statute provides in both instances.

Disqualification of Candidates and Elected Officers Under Certain Circumstances

Your remaining questions concern qualification for and disqualification from elected office. You ask whether the City may disallow candidates for elected office from having been "in arrears to the city or county for utilities three or more times in the twelve-month period preceding the filing of the application for a place on the ballot" or from "enter[ing] into default to the city or county" during their candidacy in order to qualify for office. Request Letter at 2.

"The Constitution and statutes of this state . . . prescribe the qualifications of candidates." *Brown v. Meeks*, 96 S.W.2d 839, 841–42 (Tex. App.—San Antonio 1936, writ dism'd). Unlike a home-rule municipality, which the Legislature empowered to "prescribe the qualifications . . . of office" for its officers, a Type A general-law municipality possesses no express authority to do the same. TEX. LOC. GOV'T CODE § 26.041(3). Instead, with regard to a Type A general-law municipality, the Legislature provided that "[t]o be eligible for the office of mayor . . . a person must be a registered voter and must have resided within the municipal limits for at least the 12 months preceding the election day" and that "[t]o be eligible for the office of alderman . . . a person

must be a registered voter and must reside on election day in the ward from which the person may be elected."[4] *Id.* § 22.032(a)–(b).

When the Legislature establishes the qualifications for public office, a political subdivision may not prescribe its own. *See Brown*, 96 S.W.2d at 842 (concluding that a commissioners court may not add to or take from the qualifications for constable set by the Legislature even though it may create new justice precincts from which a constable shall be elected); Tex. Att'y Gen. Op. No. KP-0196 (2018) at 2 (explaining that, despite a school board's broad authority to manage a school district, "the authority to regulate who may run for and hold the office of trustee belongs to the Legislature"). Because the Legislature has determined the qualifications for a Type A general-law municipality's governing body, a court would likely conclude that the City has no authority to add to those qualifications in the manner you describe.

Finally, you ask whether the City may "disqualify any elected official holding office that enters into default to the city or county during their term of office." Request Letter at 2. The Legislature articulated the circumstances that disqualify a member of a Type A general-law municipality's governing body from continuing to hold office. *See* TEX. LOC. GOV'T CODE § 22.008(b) (providing that a member "is automatically disqualified" from holding office if the member moves his or her residence to a location outside the municipality's corporate boundaries); *see also id.* § 22.041(a)-(b) (creating a vacancy in office "[i]f an alderman moves from the ward from which the alderman is elected" or if a member of the governing body "is absent for three regular consecutive meetings" unless specified circumstances exist). A Type A general-law municipality has no express authority to disqualify current officers from continuing to hold office. Instead, it has only general authority to "adopt an ordinance, act, law, or regulation, not inconsistent with state law, that is necessary for the government, interest, welfare, or good order of the municipality as a body politic." *Id.* § 51.012.

As previously stated, an officer's financial standing with a county is separate from his or her financial standing with the municipality. Thus, a court would likely find that section 51.012 does not authorize an ordinance disqualifying an officer on the basis of default to the county. And since the Legislature has already determined what disqualifies an elected officer from continuing to hold office, a court would likely find that an ordinance adding to those disqualifications is "inconsistent with state law" such that section 51.012 does not permit it.

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[4]Section 141.001 of the Election Code establishes the general eligibility requirements to be a candidate for public office in Texas, such as citizenship, age, and residence. TEX. ELEC. CODE § 141.001(a)(1), (2), (5). The Election Code also includes disqualifications such as mental incapacity or conviction of a felony. *Id.* § 141.001(a)(3), (4).

S U M M A R Y

Local Government Code subsection 22.008(a) prohibits an officer of a Type A general-law municipality entrusted with the collection or custody of municipal funds from holding office while in default to the municipality until the amount, plus interest, is paid.

A court would likely conclude that applying subsection 22.008(a) to an officer in default to the county, or to an officer residing with another person in whose name a utilities account in default is held, goes beyond the authority the statute provides.

Because the Legislature has determined the qualifications for a Type A general-law municipality's governing body, a court would likely conclude that the City has no authority to add to those qualifications.

A court would likely find that the general ordinance authority found in section 51.012 of the Local Government Code does not authorize an ordinance disqualifying an officer on the basis of default to the county. And since the Legislature has already determined what disqualifies an elected officer from continuing to hold office, a court would likely find that an ordinance adding to those disqualifications is "inconsistent with state law" such that section 51.012 does not permit it.

Very truly yours,

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