

Legal Q&A
May 2017

By **Christy Drake-Adams**, TML Assistant General Counsel

Q: What does state law require when a city councilmember seeks to resign?

A: State law provides that, in order to be effective, a public officer's resignation must be in writing and signed by the officer. TEX. ELEC. CODE § 201.001. In addition, the law requires that the resignation be delivered to the city council, the presiding officer of the city council, or the city secretary. *Id.*; TEX. LOC. GOV'T CODE § 22.012 (addressing resignations in a Type A general law city). Thus, if a disgruntled councilmember announces in the middle of a city council meeting that he/she is resigning and walks out, it is not an effective resignation.

Q: May the city council refuse to accept the resignation of an elected official?

A: No. State law provides that the city council may not refuse to accept a resignation. *Id.*

Q: Does a vacancy occur immediately upon an elected official's resignation?

A: No. For purposes of filling a vacancy, the vacancy occurs on the date the resignation is "accepted by the appropriate authority or on the eighth day after the date of its receipt by the authority, whichever is earlier." *Id.* § 201.023. Those dates are binding, regardless of any contrary date in the written resignation. *Id.* ("If an officer submits a resignation, whether to be effective immediately or at a future date, a vacancy occurs on the date the resignation is accepted by the appropriate authority or on the eighth day after the date of its receipt by the authority, whichever is earlier.")

Q: May a vacancy on the board of aldermen (city council) in a Type A general law city be filled by appointment?

A: Yes, but only if there is a single vacancy and members of the governing body serve two year terms. TEX. LOC. GOV'T CODE § 22.010. An appointment is made by a majority of the "remaining" members. The mayor may only vote on the appointment if there is a tie. The appointee only serves until the next regular city election, at which time the office would go on the ballot for any unexpired portion of the term.

If there are two vacancies, the city council must order a special election to fill the vacancies for the remainder of the unexpired term. *Id.* That does not mean, however, that just because two councilmembers resign simultaneously, the city is powerless to avoid a special election. As explained above, for purposes of filling a vacancy, a resignation does not occur until the council votes to accept the resignation, or until eight days have passed, whichever occurs earlier. If a city council can act prior to the passage of eight days, it may accept one resignation, fill that vacancy by appointment, *then* accept the second resignation, and fill that position by appointment as well. By precisely timing its actions in this way, the council avoids two vacancies from occurring simultaneously, and can avoid the considerable expense of a special election. The attorney

general's office affirmed the legality of this procedure in a 2003 opinion. Tex. Att'y Gen. Op. No. GA-0046 (2003).

Q: May a vacancy on the board of aldermen in a Type B general law city be filled by appointment?

A: Yes, so long as members of the governing body serve one- or two-year terms. TEX. LOC. GOV'T CODE § 23.002. In other words, Type B general law cities may fill multiple vacancies by appointment, assuming there is a quorum present to conduct business. Vacancies are filled by the remaining aldermen for the unexpired term.

Q: May a vacancy on the city commission (city council) in a Type C general law city be filled by appointment?

A: Yes, but only if there is a single vacancy and members of the governing body serve two-year terms. TEX. LOC. GOV'T CODE § 24.026. The "other" members of the commission fill the vacancy for the remainder of the term.

If there are two vacancies, the county judge must order a special election to fill the vacancies. *Id.*

Q: May a vacancy on the city council in a home-rule city be filled by appointment?

A: Maybe. Vacancies in a home-rule city are filled in accordance with the city charter. However, if the population of the city is 1.5 million or more and 270 days or more remain before the date of the next general election, the governing body must order a special election to fill the vacancy, unless the city has provided by charter another procedure to fill a vacancy for an unexpired term of twelve months or less. TEX. CONST. art. XI, § 11; TEX. LOC. GOV'T CODE § 26.045.

Q: How are vacancies filled in cities that have adopted either three- or four-year terms?

A: In order to have terms of office of more than two years (i.e., terms of three or four years), a city must hold an election. TEX. CONST. art. XI, § 11. Once three- or four-year terms have been adopted, vacancies must be filled by special election, with the exception of a home-rule city that provides by charter for a different procedure for filling a vacancy for an unexpired term of twelve months or less. TEX. LOC. GOV'T CODE § 26.045.

Q: If the mayor's office in a Type A or B general law becomes vacant as the result of resignation, does the mayor pro tem become mayor?

A: No, the mayor pro tem does not actually become the mayor as a result of the mayor's resignation. It is important to note that if the mayor is absent or unable to perform the mayor's duties, the mayor pro tem *only assumes the duties* of the mayor. TEX. LOC. GOV'T CODE §§ 22.037, 23.027. Such duties include presiding at council meetings. In such a capacity, the mayor pro tem retains the power to vote, even when presiding at the meeting.

Q: When appointment is an option, who may be appointed to fill a vacancy on the city council?

A: State law authorizes a city to adopt procedures that will ensure that any appointment to the governing body “is representative of the constituency served by the governing body.” TEX. LOC. GOV’T CODE § 180.005. Any city that has adopted such procedures should follow them. And any home-rule city should follow any procedures set out in the city’s charter. Otherwise, any person eligible for the office may be appointed to fill a vacancy in that office.

Q: May a relative of a sitting councilmember be appointed to fill a vacancy?

A: The nepotism laws prohibit close relatives of a member of a governing body from being appointed by that body to serve on the governing body, but only if the members of the governing body are paid. TEX. GOV’T CODE § 573.041; Tex. Att’y Gen. LO-96-10. Thus, while the electorate could elect close relatives to the same governing body, the governing body itself could not appoint close relatives of its members to a paid office.

Q: Are there circumstances under which a councilmember who has resigned could still participate in a meeting?

A: Yes, even after resigning, a councilmember may be able to participate in a council meeting as a holdover officer. The Texas constitution provides that an officer continues to perform the duties of office until his/her successor is duly qualified (e.g., appointed and sworn in). TEX. CONST. art. XVI, § 17.

As a result of the holdover doctrine, the question sometimes arises whether a councilmember who has resigned may participate in nominating and voting on his/her replacement. The answer depends on the type of city. In some general law cities, state law provides that the “remaining members” or “other” members of the council appoint to fill the vacancy. Some attorneys argue that the term “remaining” or “other” necessarily excludes the councilmember who has resigned. Others argue that because the resignee is a holdover, the resignee may make a nomination and vote. There appears to be no case that settles the issue. Thus, each city should consult its local legal counsel in making a final decision about the matter.