



TEXAS MUNICIPAL LEAGUE

*Empowering Texas cities to serve their citizens*

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President **Martha Castex-Tatum**, Vice Mayor Pro Tem, Houston  
Executive Director **Bennett Sandlin**

April 20, 2022

The Honorable Paul Bettencourt  
Chairman, Local Government Committee  
Texas State Senate  
PO Box 12068  
Austin, Texas 78711-2068

**Re: Texas Municipal League Comments on Senate Local Government Interim Charges:**  
*Review and report on voter participation and bond election result differences between November and May elections. Make recommendations for improved voter turnout, increased election efficiencies, and better accountability of local debt.*

*Study the development of the language used for constitutional amendment and local ballot propositions. Recommend changes to make ballot propositions more easily understood by voters.*

Dear Chairman Bettencourt:

The Texas Municipal League (TML) is a non-profit association of 1,170 incorporated cities. TML provides legislative, legal, and educational services to its members. Thank you for the opportunity to provide written comments on the above-mentioned interim charges relating to bond elections and ballot language.

### **City Bond Elections in May and November**

Under current law, cities have two uniform election dates per year that can be used to take a debt proposition to the voters – the first Saturday in May, and the first Tuesday after the first Monday in November. Interestingly enough, prior to 2005 cities actually had four uniform election dates per year that could be used for local elections, including debt elections.

Having two uniform election dates per year at which the voters may approve the issuance of debt strikes the proper balance between ensuring adequate turnout, alleviating concerns over voter fatigue, and giving cities the ability to hear from their voters on a regular basis. On debt elections specifically, retaining two possible election dates ensures adequate flexibility for cities across the state to take debt propositions to the voters and let their residents' voices be heard on important matters governing the future of the city. Many Texas cities are growing as fast, if not faster, than any other area in the country, and it is imperative that city residents have ample opportunity to make decisions on debt that will help address the capital projects that are often necessary to deal with rapid growth.

Legislation has been introduced and referred to the Senate Local Government Committee in past sessions that would eliminate use of the May uniform election date for bond elections. For example, S.B. 1224 (2019) would have forced all local bond elections to the November uniform election date under the rationale that there's greater voter participation in November elections as compared to May elections, and

because of the claim that local governments “cherry-pick” voters that will approve the bond issuance by holding elections in May instead of November.<sup>1</sup> Turnout and bond election data demonstrates that neither rationale is entirely accurate.

On the question of turnout, it is true that elections on the November uniform election date in even numbered years are high-turnout elections. However, elections held on the November date in odd-numbered years often only include propositions amending the Texas Constitution, and those elections generally have historically low turnout.<sup>2</sup> Proposals to eliminate options for voter input on the grounds that doing so forces the propositions to a higher turnout election isn’t necessarily true in all cases. Again, the flexibility for cities connecting with voters twice a year instead of once, in our opinion, outweighs a shift to one date for the sake of higher turnout that may not always happen.

Additionally, the Bond Review Board (BRB) collects historical data on city bond elections dating back several years indicating how many city bond propositions have gone to the voters, and what percentage of those propositions were successful.<sup>3</sup> According to BRB data, over the past ten years there is a negligible difference in pass rate of city bond propositions in May as compared to November. From 2012 to 2021, 88 percent (243/277) of bond propositions in May were approved by the voters. This compares to 86 percent of bond propositions passing in November (309/358) over the same time frame.

The similar passage rates on both uniform election dates indicates that there is little incentive for a city to deliberately place a bond election on the May date to garner more favorable consideration by the electorate. Indeed, BRB data demonstrates that any claim that cities are stacking bond elections on the May date to gain an advantage is misguided. In the past 10 years, cities have placed more bond propositions before the voters on the November uniform election date than the May date. This is borne out in both the number of cities holding bond elections (on average 12 cities in May versus 15 cities in November), in addition to the number of propositions (277 total city bond propositions in May versus 358 total city bond propositions in November).<sup>4</sup>

As Texas cities continue to lead the nation in population growth, now is the wrong time to eliminate the use of the May uniform election date for bond elections. Keeping two possibilities for bond elections each year gives Texas cities flexibility to finance critical infrastructure while also maximizing opportunities for voter engagement.

### **City Ballot Proposition Language**

Over the past three legislative sessions, the Texas legislature has considered bills that would impose some degree of state oversight over the drafting of city ballot propositions for charter amendment elections and initiative and referendum elections. In 2021, the legislative vehicle for this type of reform considered by the Senate Local Government committee was S.B. 1430.

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<sup>1</sup> See <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB01224I.pdf#navpanes=0>.

<sup>2</sup> See <https://texaspolitics.utexas.edu/educational-resources/comparing-turnout-constitutional-elections>.

<sup>3</sup> See [http://www.brb.state.tx.us/bond\\_elections\\_search.aspx](http://www.brb.state.tx.us/bond_elections_search.aspx).

<sup>4</sup> We note there were no May elections in 2020 due to the pandemic. Even taking out the November 2020 elections, more cities have opted for elections in November over the past ten years and more total propositions have gone to the voters in November.

S.B. 1430 would have required the Secretary of State's office to review and approve language if requested by a registered voter. With this proposed ballot language review procedure, one would reasonably expect that city liability to ballot language challenges would be limited, especially if the language is approved or even drafted by the Secretary of State's office. However, the bill would have actually expanded city exposure to legal challenges by waiving governmental immunity and requiring the payment of attorney's fees and court costs, even if the city used language approved by the Secretary of State's office.

This expansion of city liability would open the door to increased and often frivolous litigation against Texas cities based on ballot language and would force taxpayers to pick up the tab. Once again, if the state proposes an administrative process to review city ballot language, that additional oversight should insulate the city from lawsuits, not encourage more of them. We ask that any future legislation that adds state agency review of local ballot language also protect public servants from more lawsuits. Doing so would accomplish proponents' goal of increased oversight while also protecting taxpayers from footing the bill on increased litigation costs.

Under current law, the city council in conjunction with the city attorney is responsible for crafting ballot language that submits the question to the voters with definiteness and certainty in a way that does not mislead. This general test for local ballot language comes from case law, including a 2015 Texas Supreme Court decision – *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). Existing case law gives relatively clear guidance to city attorneys when drafting ballot language. Although there have been legal challenges to a handful of city ballot propositions in recent years, this may be a reflection of increased litigiousness when political measures are on the ballot and not a trend of cities drafting ballot language to deliberately mislead the voters. For example, see the following examples of city ballot language litigation:

- The City of Austin received a petition to call an election on the implementation of a city land use plan. The petition required any new land use plan to include a waiting period and voter approval before it could go into effect. The city's ballot language provided that the waiting period could be "up to three years." The plaintiffs sued the city over this language, arguing that the city's ballot language should have excluded the length of the waiting period. The Texas Supreme Court rejected the plaintiffs' challenge.
- The City of Austin received a petition to mandate the city to conduct an annual "efficiency audit." The city's ballot language included the cost of each proposed efficiency audit, estimated at \$1 - \$5 million. The plaintiffs argued that the inclusion of the cost was misleading political commentary on the proposed requirement. The Supreme Court rejected the plaintiffs' challenge.
- The City of Houston hadn't finalized its ballot language for an upcoming charter amendment election prior to being sued over the language. The proposition was to establish a dedicated fund for street and drainage infrastructure spending. The lawsuit claimed that proposed ballot language didn't comply with the common-law ballot language standard requiring that the "key features" be included in the language. (The draft language didn't state that the funding would come from fees on city residents.) The city ultimately adopted ballot language that referenced the drainage charges. The Supreme Court rejected plaintiffs' challenge.
- The City of Austin recently placed a voter initiated ordinance on police funding before the voters. The city prepared its own ballot language instead of using the ballot language in the petition for the ordinance. The organization responsible for the petition filed suit, claiming that the city was required by its charter to use petitioners' caption language in the proposition and could not add language addressing the ordinance's financial impact. The Supreme Court concluded that the city

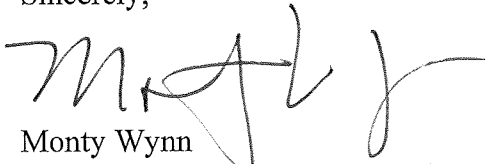
correctly added the financial impact language to the ballot proposition in accordance with the *Dacus* decision, but was otherwise required by its charter to use the caption from the petition in the proposition.

The disposition of these city ballot language challenges in recent years indicates that city officials are doing a more than adequate job of drafting ballot propositions in line with existing case law. Legal challenges to ballot language are commonplace in other states with statewide initiative and referendum authority – not necessarily due to nefarious intent by the drafters, but instead because litigation is often seen as a step in the process when controversial issues are at stake. Recent confusion over the drafting of statewide constitutional amendment ballot language in Texas is a further indication of just how difficult the task of writing a ballot proposition can be when dealing with complicated policy matters. We ask that the committee's recommendation on this charge acknowledge that increased liability for cities and increased litigation related to ballot language is not necessary or in the best interest of the taxpayer.

TML respectfully requests that your office consider these comments when issuing your interim report.

Please contact me if I may be of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Monty Wynn", with a long horizontal flourish extending to the right.

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