TEXAS PUBLIC POLICY FOUNDATION

Testimony

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Center for Local Governance

Local Ordinance Integrity

Presented to the Senate Committee on Intergovernmental Relations

by James Quintero, Director of the Center for Local Governance

Chairman Lucio & Members of the Committee:

My name is James Quintero and I am the director of the Center for Local Governance at the Texas Public Policy Foundation, a nonprofit, free-market think tank based in Austin, Texas. I would like to thank the Committee for exploring such an important topic that doesn't often receive the attention it deserves—that of local ordinance integrity.

The interim charge before the Committee today asks its members to examine local legislative practices and recommend ways to make the process more transparent and accountable. Specifically, the interim charge states:

> Examine the processes used by home rule municipalities to adopt ordinances, rules, and regulations, including those initiated by petition and voter referendum. Determine if additional statutory safeguards are necessary to ensure that ballot language accurately describes proposed initiatives. Identify ways to improve transparency and make recommendations, if needed, to ensure that local propositions and the means by which they are put forth to voters, conform with existing state law.

Though some may seek to characterize this particular charge as unnecessary or unwarranted, there is a growing body of evidence that suggests increased legislative scrutiny is well deserved. In fact, an honest assessment of the policy landscape leads me to believe that the committee is right on target with this area of study.

Certain challenges appear common across the landscape. Some home-rule municipalities seem to be challenged to put forth simple and direct ballot language, while others appear to have difficulty including all of the relevant information on ballot propositions. Still other cities seem to have adopted a policymaking position that puts them at odds with state law.

Examining some of these situations further, my testimony today will focus on three problem areas in the local legislative process that are deserving of increased attention from state lawmakers: muddy language, missing features, and rogue policies.

MUDDY LANGUAGE

City of Houston, HERO—November 2015

Earlier this year, the Texas Supreme Court ordered Houston's city council to either repeal the Houston Equal Rights Ordinance (HERO) or put the measure up for a popular vote. The council opted against repealing the measure and instead moved forward with a vote in November 2015.

Prior to the popular vote, however, controversy arose over the proposed language to be put before voters. The language, as approved by council, read:

> [Original language] *Shall the City of Houston repeal the Houston Equal Rights Ordinance, Ord. No. 2014-530 which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity or pregnancy?*

The problem with the council's proposed language is that it ran afoul of the city's own home rule charter. As Section VII-b, Section 3 of the city charter states that if an ordinance is challenged by petition, "the council shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election, or the council may, in its discretion, call a special election for that purpose; and **such ordinance or resolution shall not take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.**" [emphasis mine]

continued

Thus, instead of the ballot asking for a yes or no vote on *enacting* the ordinance, the city council asked voters to submit a yes or no vote on *repealing* the measure—something that is clearly confusing to voters.

After the Texas Supreme Court reviewed the ballot language, it ordered that the city must present the ballot language in a manner that is FOR or AGAINST the *enactment* of the ordinance, not its repeal. Revised ballot language was required of the city.

> [Revised Language] *"Proposition 1: [Relating to the Houston Equal Rights Ordinance.] Are you in favor of the Houston Equal Rights Ordinance, Ord. No. 2014-530, which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?"*

City of Houston, Term Limits—November 2015

In November 2015, Houston voters were asked to decide on several propositions, including a measure changing the city's term limit system. As put before voters, the proposition read:

> *"(Relating to Term Limits for City Elective Office) Shall the City Charter of the City of Houston be amended to reduce the number of terms of elective offices to no more than two terms in the same office and limit the length for all terms of elective office to four years, beginning January 201, and provide for transition?*

There are several challenges with this language. First, while a voter may read the proposition at face-value to mean that it "limit(s)" terms, the measure instead lengthens them from two-year terms to four-year terms.

Second, the language has been constructed in such a way as to give the appearance of being pro-limits when in fact this is a measure to relax certain restrictions. Even Mayor Annise Parker acknowledged that the language was confusing, stating: "I don't know that they realized that they were giving council members more time in office."[1]

Finally, the ballot language omits an important feature about the ballot proposition—that the initiative would result in the total amount of time a municipal elected official can serve increasing to eight or 10 years based on certain circumstances.

In response to the uncertainty surrounding this proposition, a lawsuit has been recently filed a Houston resident who "alleges the city misled voters, because it wasn't clear that a for-vote meant extending term limits."[2]

MISSING FEATURES

Statewide, Capital Appreciation Bonds

Capital Appreciation Bonds (CABs) are long-term debt instruments that allow a borrowing entity to defer principal and interest payments for decades, with maturity dates as long as 40 years and repayment ratios as high as 10-to-1. In simpler terms, CABs allow local governments to borrow now and push off huge balloon-style payments onto the next generation of Texas taxpayers.

As bad as CABs are from a public finance perspective, they are particularly challenging from an election standpoint in that voters do not know, at the point of decision-making, whether the new debt proposition being deciding upon will include or be exclusively borrowed in the form of CABs. This vital piece of information is missing from the ballot.

Without this key piece of information, voters are being led, unknowingly, into a potentially perilous fiscal position. According to the latest data from the Texas Bond Review Board:

	Outstanding as of August 31, 2014									
Entity Type	Total Par Outstanding (CIB+CAB)	CAB Par Outstanding	CAB Par/Total Par	Total Interest Outstanding (CIB+CAB)	CAB Interest	CAB Interest/Total Interest	Total Debt Service (CIB+CAB)	CAB Maturity Amount Outstanding	CAB Maturity Amount/Total Debt Service	% of Total CAB Par Outstanding	% of Total CAB Maturity Amount Outstanding
Independent School District	$ 67,963,542,470	$ 2,542,585,099	3.74%	$ 44,257,706,863	$ 7,279,848,742	16.45%	$ 112,221,249,333	$ 9,822,433,841	8.75%	61.33%	62.82%
Water District	31,155,762,675	102,768,560	0.33%	17,412,409,755	224,273,411	1.29%	48,568,172,429	327,041,971	0.67%	2.48%	2.09%
City	67,952,239,274	386,883,989	0.57%	37,430,432,468	1,317,778,224	3.52%	105,382,671,743	1,704,662,212	1.62%	9.33%	10.90%
Comm College / Junior College	4,768,060,367	35,360,541	0.74%	2,478,634,576	40,069,503	1.62%	7,246,694,943	75,430,044	1.04%	0.85%	0.48%
County	14,131,821,815	116,590,916	0.83%	7,297,042,886	229,164,084	3.14%	21,428,864,700	345,755,000	1.61%	2.81%	2.21%
Health & Hospital	3,437,504,772	11,214,367	0.33%	2,879,627,249	26,811,617	0.93%	6,317,132,021	38,025,984	0.60%	0.27%	0.24%
OSD	15,859,188,391	950,514,461	5.99%	17,222,743,467	2,372,445,581	13.78%	33,081,931,858	3,322,960,042	10.04%	22.93%	21.25%
Total	$ 205,268,119,763	$ 4,145,917,933	2.02%	$ 128,978,597,263	$ 11,490,391,161	8.91%	$ 334,246,717,026	$ 15,636,309,095	4.68%	100.00%	100.00%

Source: Texas Bond Review Board – Bond Finance Office

City of Houston, Drainage Fee—November 2010

On November 2, 2010, the following ballot language was put before voters in Houston:

> *"Relating to the Creation of a Dedicated Funding Source to Enhance, Improve and Renew Drainage Systems and Streets.: Shall the City Charter of the City of Houston be amended to provide for the enhancement, improvement and ongoing renewal of Houston's drainage and streets by creating a Dedicated Pay-As-You-Go Fund for Drainage and Streets?" The amendment passed by a narrow majority.*

The problem with this proposed language was that it did not mention a chief feature of the amendment—the widespread drainage fee charges—and thus was misleading to voters.

In response to the controversial measure, a group of voters filed an election contest suit, challenging the validity of the proposition. The suit went all the way to the Supreme Court where a decision was rendered that Houston's ballot language did not meet the common law standard of preserving ballot integrity.

The Court found that proposed amendments must be submitted with such definiteness and certainty that voters are not misled. The ballot does not to reproduce the amendment or mention every detail, but must substantially identify the amendment's purpose, character, and chief features.

In its opinion, the Court's decision stated: "The city did not adequately describe the chief features—the character and purpose—of the charter amendment on the ballot. By omitting the drainage charges, it failed to substantially submit the measure with such definiteness and certainty that voters would not be misled."

Note: Some parties argued that the City's charter governs ballot procedures and trumps common law, but the Supreme Court rejected this argument, pointing out that *state* law is actually what defines charter amendment procedures and election contests.

ROUGE POLICIES

Cities of Kermit, Fort Stockton, Austin, Sunset Valley, Dallas (recently repealed), Freer, Laredo (litigation), Port Aransas, Laguna Vista, Brownsville, & South Padre Island—Ongoing

The Texas Constitution states:

> "Neither a home-rule city nor a general-law city may adopt an ordinance that is inconsistent with the Texas Constitution or Texas statutes." Tex. Const., Art XI, § 5.

In spite of this constitutional prohibition, a number of home-rule cities have enacted local legislation establishing restrictions or prohibitions on the retail sale of single-use plastic bags. Setting aside the policy arguments against this type of action—of which there are many—these municipal bans and restrictions are troubling in that they violate existing state law. In August 2014, then-Attorney General Greg Abbott issued an advisory opinion stating that a court would likely find municipalities "enact[ing] bans on plastic bags and adopt[ing] fees on replacement bags" to be in violation of state law. The AG's opinion concludes that such ordinances run afoul of two particular provisions of the Health and Safety Code.

The laws in question are found in section 361.0961 of the Health and Safety Code which states:

> A local government or other political subdivision may not adopt an ordinance, rule, or regulation to:
>
> (1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law; [or]…
>
> (3) assess a fee or deposit on the sale or use of a container or package.

While neither the terms "container or package" are defined in the text, the AG's opinion suggests that the common understanding of those words could reasonably be construed to include single-use plastic bags. Given that single-use plastic bags likely fall within the definition of container or package, the opinion finds that those ordinances enacted with the intent of managing "solid waste," which single-use plastic bags will eventually become, conflict with section 361.0961(a)(1)

Municipal ordinances that assess a plastic bag fee also run afoul of the Code, in a much more direct way. The opinion states: "The plain language of subsection 361.0961(a)(3) prohibits a political subdivision from adopting an ordinance that 'assess[es] a fee or deposit on the sale or use of a container or package.'" And unlike the potential violation of section 361.0961(a)(1), the prohibition of plastic bag replacement fees is not limited to instances of "solid waste management," but is instead much broader.

Though these ordinances likely violate existing state statute—and some cities have begun to recognize that and take corrective action to repeal the bans, i.e. Dallas—the fact of the matter is that the Attorney General lacks the explicit authority to take corrective action against these political subdivisions and instead the rule of law is reliant upon individuals risking their time, money, and reputation to see that local governments observe state law.

RECOMMENDATIONS

Examine empowering the Attorney General with enforcement authority. Per Article 4, Section 22 of the Texas Constitution, and Section 402.021 of the Texas Government Code, the Attorney General has the power and responsibility to "represent the State in all suits and pleas," and to "prosecute and defend all actions in which the state is interested." Tex. Const., Art. IV, § 22; Tex. Gov't Code § 402.021.

This responsibility confers both explicit and implied powers on the AG. *See, e.g. State v. Farmers' Loan & Trust Co*., 81 Tex. 530, 551 (Tex. 1891) ("The right of the attorney general, in behalf of the state, through the courts, to prevent any private corporation from exercising any power not conferred by law, when this is hurtful to the public, or the assumption of a franchise, which in itself is a public wrong, cannot be questioned, and would exist from the nature of the office, in the absence of a constitutional provision expressly conferring it."); *State v. Perkins,* 360 S.W.2d 555 (Tex. Civ. App.Eastland), *overruled on other grounds by Perkins v. State*, 367 S.W.2d 140 (Tex. 1963). One such implied power is the ability to intervene when municipalities violate or attempt to evade the law. *State v. Perkins,* 360 S.W.2d 555, 559 (Tex. Civ. App.Eastland), *overruled on other grounds by Perkins v. State*, 367 S.W.2d 140 (Tex. 1963)(" We also hold that the Attorney General was authorized to bring this suit [challenging the validity of a municipal incorporation]."); *Yett v. Cook*, 115 Tex. 205, 221 (1926) ("On the whole, it is evident that the state, not only for the reasons we have given predicated upon our statutes and from the status of a municipal corporation as an agency of the state, but under the ancient and modern rules of the common law, has sufficient interest to, and can, maintain an action to require municipal officers to call an election to fill their own offices. This, too, is the practice both in this country and in England. Since the state can bring a mandamus suit similar in purpose to the one before us, it is elementary that the Attorney General has the power to institute such an action."). **Thus, the Attorney General has both the standing and authority to challenge municipal overreach.**

However, as the dated nature of the case law suggests, this authority is largely unused at the present time. Given cities' current disregard for the rule of law, the Legislature should affirm and refine the Attorney General's power to intervene by enacting reforms that explicitly authorize the AG to challenge local government overreach, and by establishing defined procedures therefor.

Codify the Supreme Court's decision defining the common law standard for ballot integrity. In the drainage fee case, the Supreme Court defined the common law standard for ballot integrity, resolving a split among the appellate courts. The decision stated that proposed amendments must be submitted with such definiteness and certainty that voters are not misled. The court said that the ballot proposition did not have to reproduce the amendment or mention every detail of the measure, but that it should substantially identify the amendment's purpose, character, and chief features. It would be ideal for the Legislature to follow-up on this decision by codifying it in state law.

Bring transparency to the voting booth. Basic financial information should be included in the ballot language for propositions seeking revenue enhancements or additional debt. Additional information is needed to properly educate voters about the cost to taxpayers of the proposed initiative. These type of changes would allow voters to make more informed decisions about the fiscal position of their community and household.

Thank you for your time. I look forward to answering any questions that you may have. ★

ENDNOTES

[1] Martin, Florian. 2016. *Did Voters Know They Were Approving Extended Term Limits in Houston? The ballot language didn't tell the whole truth*, Houston Public Media, November 6.

[2] Martin, Florian. 2015. *Term Limits Lawsuit Against City of Houston Not the First Controversy Over Ballot Language. The city of Houston is again being sued over a ballot measure. This one doesn't come as a surprise to some.*, Houston Public Media, November 23.