



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 594

September 27, 2023

ISSUE

Whether a written communication, created by a political subdivision and related to the political subdivision's special election for a sales tax ballot measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). (AOR-690).

SUMMARY

The specific communication considered in this opinion is not political advertising for purposes of Section 255.003 of the Election Code because it is entirely factual and does not include any advocacy.

FACTS

The requestor represents a city that has called a special election for November 7, 2023, regarding a sales tax ballot measure. The city wishes to publish "educational materials with factual descriptions of the ballot measure to help voters make informed decisions." The requestor included a proposed communication attached with the request.

The communication includes:

- The election and early voting dates;
- A statement that "while the City Council voted in favor of calling the Special election to place the proposition before the voters, the City . . . as an entity does not advocate for or against passage or any proposition";
- Contact information for the city and county elections administrators;
- The ballot language;
- The history of various tax rates set by the city;
- The legal authority for making tax rate changes.

We assume that facts contained in the communication are true. (**Appendix 1**)

ANALYSIS

Under Section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). Section 255.003(a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b).

“Political advertising” means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id.* at § 251.001(16) (emphasis added).

A significant factor “in determining whether a particular communication supports or opposes a public officer [or measure] is whether the communication provides information . . . without promotion of the public officer [or measure].” Tex. Ethics Comm’n Op. No. 476 (2007). For example, in Ethics Advisory Opinion No. 211, we concluded that an informational brochure was not a political advertisement—despite identifying the incumbent in the letterhead—because it “merely describe[d] the duties” of the public office and did not reference the incumbent “in a way that would lead one to believe that the purpose of the brochure was to support the incumbent.” Tex. Ethics Comm’n Op. No. 211 (1994).

No matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible under Section 255.003(a). Tex. Ethics Comm’n Op. No. 564 (2021).

When viewed in its entirety, the communication is informational and does not support or oppose any candidate or measure. The proposed communication does not include any express advocacy, motivational slogan, or call to action. Viewed as a whole, the communication is not a statement of support or opposition, but rather a factual description of the measure presented to the voters. The communication does emphasize that the changes in the tax rates “d[o] not increase the current combined rate of all local sales and use taxes in the City.” However, highlighting a particularly salient fact does not necessarily equate to advocacy for the measure.

In conclusion, the proposed communication does not constitute political advertising and does not advocate passage or defeat of a measure. Consequently, Section 255.003(a) of the Election Code does not prohibit an officer or employee of the political subdivision from using public funds to create and distribute the written communication.

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Explanation of November 2023 Special Election Sales Tax Ballot Measure

Introduction

The City of Bastrop has called a special election on November 7, 2023, regarding a sales tax ballot measure. Early voting starts on October 23, 2023.

All registered voters of the City may cast a vote on the ballot measure. Voters can vote FOR or AGAINST the ballot measure. The proposed measure will be adopted if approved by a majority of the qualified voters at the election held for that purpose.

Below is the proposition and a brief explanation of why it is offered for consideration.

The City of Bastrop provides this explanation for voters as *educational material, only*. While the City Council voted in favor of calling the Special Election to place the proposition before the voters, the City of Bastrop as an entity does not advocate for or against passage of any proposition.

For information regarding voter registration and polling times and locations, you may contact either the City Secretary or the Bastrop County Elections Administrator:

City of Bastrop, City Secretary
1311 Chestnut Street
Bastrop, Texas 78602
(512) 332-8800
citysec@cityofbastrop.org
<https://www.cityofbastrop.org/page/cs.election>

Bastrop County Elections
804 Pecan Street
Bastrop, Texas 78602
(512) 581-7160
elections@co.bastrop.tx.us
<https://www.bastropvotes.org/>

Proposition A

Proposition A: “Without increasing the current combined rate of all local sales and use taxes imposed by the City of Bastrop, the adoption of a local sales and use tax within the City of Bastrop for the promotion and development of new and expanded business enterprises and any other purpose authorized by Texas Local Government Code Chapter 505, as amended, at the rate of one-eighth of one percent (0.125%), which is a reduction from the current local sales and use tax for this purpose at a rate of one-half of one percent (0.50%), and the adoption of an additional local sales and use tax within the City of Bastrop at the rate of three-eighths of one percent (0.375%) to provide revenue for maintenance and repair of municipal streets and any other purpose authorized by Texas Tax Code Chapter 327, as amended.”

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Explanation: Proposition A asks voters to vote FOR or AGAINST changes to the City’s local sales and use tax rates which would at the same time:

- (1) Reduce the current sales tax rate dedicated to funding the Bastrop Economic Development Corporation (the “EDC Sales Tax”) from 0.50% to 0.125%, and
- (2) Adopt a new street maintenance and repair tax (the “Street Maintenance Sales Tax”) at a rate of 0.375%.

The proposed change *does not increase the current combined rate* of all local sales and use taxes in the City.

The proposed change keeps the same combined rate while reallocating the individual tax rates to reduce the amount dedicated to economic development purposes (the EDC Sales Tax) and to provide a new source of tax revenues dedicated to fund city street maintenance and repair (the Street Maintenance Sales Tax).

If the voters pass Proposition A, the City would submit the tax rate changes to the Texas Comptroller to take effect on April 1, 2024, so that the sales and use tax rates in the City would change as follows:

Tax	Current Rate	Proposed Rate
City of Bastrop, General Sales Tax (adopted 1967)	1.00%	1.00%
City of Bastrop, EDC Sales Tax (adopted 1967; proposed reduction in 2024)	0.50%	0.125%
City of Bastrop, Street Maintenance Sales Tax (proposed adoption in 2024)	0.00%	0.375%
<i>Subtotal of Combined City Sales Tax Rates</i>	<i>1.50%</i>	<i>1.50%</i>
County of Bastrop	0.50%	0.50%
<i>Subtotal of Combined Local Sales Tax Rates</i>	<i>2.00%</i>	<i>2.00%</i>
State of Texas	6.25%	6.25%
<i>Total Combined Sales Tax Rates</i>	<i>8.25%</i>	<i>8.25%</i>

In 1995 the voters of the City approved the EDC Sales Tax at a rate of 0.50% to be used for the promotion and development of new or expanded business enterprises and any other purpose authorized by Section 4B, Article 5190.6, of the Development Corporation Act of 1979, as amended (which has subsequently been codified in Texas Local Government Code Chapters 501 through 507). In accordance with the referenced state law, the EDC Sales Tax funds the Bastrop Economic Development Corporation’s activities as a Type B economic development corporation. Under Texas Local Government Code Section 505.2566, the EDC Sales Tax Rate may be reduced to any rate that is an increment of one-eighth of one percent (0.125%) by an election for that purpose under Texas Tax Code Chapter 321.

Texas Tax Code Section 321.409 allows for combined ballot propositions regarding

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municipal sales and use taxes, so that the voters may at the same time vote to reduce a municipal sales tax and by the same proposition adopt another municipal sales tax, as long as the total combined sales tax rate of all local government taxing entities (including the City and the County) does not exceed 2.00%.

Texas Tax Code Chapter 327 allows the City to adopt a Street Maintenance Sales Tax at a tax rate that is an increment of one-eighth of one percent (0.125%) by an election for that purpose under the procedures of Texas Tax Code Chapter 321. In accordance with state law, the Street Maintenance Sales Tax may be used to fund maintenance and repair of city streets or sidewalks in existence on the date of the election adopting the tax. Once in effect, the Street Maintenance Sales Tax must be reauthorized by the voters in subsequent elections every four years, or else it expires.