CAUSE NO. 110998-D-CV

	§	**IN THE DISTRICT COURT OF**
	§	
IN RE:	§	
	§	
	§	**POTTER COUNTY, TEXAS**
CITY OF AMARILLO	§	
	§	
	§	
	§	**320th JUDICIAL DISTRICT**

Trial Brief of Attorney General of Texas

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Trial Brief of Attorney General of Texas

COMES NOW, Ken Paxton, Attorney General of Texas, a Party herein, and pursuant to Texas Government Code Chapter 1205, provides this trial brief, and would respectfully show the Court the following:

This case involves the interplay between three different types of public securities issued by cities for public works that are paid from its limited ad valorem tax: general obligation bonds requiring voter approval, certificates of obligation requiring notice and an opportunity for a petition for referendum, and short-term ad valorem tax notes. Amarillo voters already rejected 30-year general obligation bonds for a $275,000,000 civic center complex in 2020. Unwilling to observe the 3-year moratorium imposed by the legislature before proposing certificates of obligation for the same purpose, the City now seeks to issue 7-year tax notes for $260,525,000, for the same civic center complex improvements. The City does so with the intent to then turn around and refund the short-term tax notes with long-term unvoted tax refunding bonds, thereby attempting to achieve exactly what the voters rejected, and thwarting the spirit of how the legislature intended for tax notes to be used. In addition to asking the Court to validate its manipulation of various financing statutes, the City also asks the Court to declare that a petition for referendum filed under its home rule charter does not apply to the tax notes. The purpose of this brief is to inform the Court of the legal issues before it as it considers the declarations sought by the City and the defenses and counterclaims made by the Intervenor.

I. Background

All statements under this heading are for informational purposes and to advise the Court of the background of the matter.

A. Public Securities and Public Finance Review

Cities borrow money by selling public securities and using the sales proceeds to pay for municipal projects. The terms of a proposed public security are set forth in an authorizing document called an ordinance that must be duly adopted by its governing body. State law dictates how the public security may be issued and for what purposes, what the city may pledge to secure its repayment, and what procedural requirements govern their issuance, such as whether voter approval is required. State law comprises the state constitution, legislative statutes, and the city's home rule charter to the extent the applicable charter provisions are not inconsistent with the constitution or legislative statutes.

Texas law requires that all public securities proposed to be issued by cities, regardless of the financing statute used, must be reviewed and, if determined to be authorized in compliance with state law, approved by the Attorney General's office. Tex. Gov't Code § 1202.003. The public finance division of the Attorney General's office performs this review and considers three fundamentals: the proposed purpose of the public security, the pledge securing repayment of the public security, and the procedural requirements imposed by state law for the public security's "issuance," meaning the initial delivery by the City of its tax notes to the initial purchaser in exchange for the purchase price. Tex. Gov't Code § 1202.001(1).

For public securities issued by home rule cities that are payable from ad valorem taxes, various constitutional provisions govern their purpose, their tax rate, and the method by which they may be issued. Ad valorem taxes may be levied for public purposes only. Tex. Const. Art. VIII, § 3. The public purpose must be for the City's authorized municipal purpose, not an impermissible lending of credit for another entity, such as a private entity. Tex. Const. Art. III, § 52(a). If the public security operates to make a grant or loan for an economic development program and is secured from ad valorem taxes, an election is required. Tex. Const. Art. III, § 52-a.

Constitutionally limited to $2.50 per $100 of taxable assessed valuation, and as may be further limited by their charters, home rule cities may levy taxes "as may be authorized by law or by their charters," but they may not create debt without at the same time making provision to assess and collect annually a sufficient sum to pay the interest and create a sinking fund of at least two percent. Tex. Const. Art. XI, § 5(a). This provision for payment for city tax debt is often called the "tax levy," which must be included in the ordinance authorizing the public security that a city council must lawfully adopt in an open meeting.

Though not exclusive, home rule cities primarily issue three types of public securities payable in whole or in part from ad valorem taxes. First, home rule cities may issue long-term general obligation bonds not exceeding forty years to make various permanent public improvements or for another public purpose in the amount and to the extent provided by its charter; however, the bonds must first be approved by the city's qualified voters. Tex. Gov't Code §§ 1201.022(b), 1251.001, 1331.052.

Second, under the Certificate of Obligation Act, home rule cities may issue up to forty-year certificates of obligation (COs) payable from ad valorem taxes and revenues to construct any "public work," a term not defined in the CO Act; however, cities may not issue COs without first providing approximately 45 days' advance notice of its intent to issue the COs, during which at least five percent of the qualified voters may protest the issuance. Tex. Loc. Gov't Code §§ 271.045(a)(1), .049. Two main procedural circumstances preclude or delay their issuance: either a qualifying petition is filed, in which the city may not authorize the COs unless the issuance is approved at an election; or (2) absent certain exceptions, a bond proposition to authorize the issuance of general obligation bonds for the same purpose was submitted by the voters during the preceding three years and failed to be approved (often referred to as the "three-year moratorium" on the issuance of COs). Tex. Loc. Gov't Code §§ 271.047(d), .049(c).

Third, cities may issue short-term anticipation tax notes (also known as "tax notes"), in which the maximum maturity is determined by the purpose sought to be financed. For example, notes issued for operating expenses must mature within one year, notes issued for the construction of a public work must mature within seven years, and emergency notes issued by certain coastal issuers in response to a disaster-declared hurricane must mature within ten years. Tex. Gov't Code § 1431.009 (a), (d), (e). It is this third type of public security—seven-year tax notes proposed to be issued under Chapter 1431—of which the City asks the Court to make various declarations under Chapter 1205 of the Government Code. In order to better frame the issues before the Court, the Attorney General provides a brief discussion of Chapter 1431.

B. Chapter 1431 Anticipation Notes and the Tax Levy

Certain local governments can issue anticipation notes under Chapter 1431 for various improvements. A city authorizes the issuance of an anticipation note by the city council adopting an ordinance. Tex. Gov't Code § 1431.002(b). The applicable ordinance at issue in this case is Ordinance No. 7985, attached as Exhibit A to the City's Original Petition (the "Ordinance"). Cities may issue seven-year notes for the construction of a "public work," the purchase of materials, supplies, equipment, machinery, buildings, lands, and rights of way for the city's authorized needs and purposes, and certain professional services. Tex. Gov't Code § 1431.004(a)(1). Cities can pledge as payment for the notes one of the following categories of sources: (1) revenue, (2) taxes, (3) a combination of revenue and taxes, or (4) the proceeds of bonds to be issued by the issuer. Tex. Gov't Code § 1431.007(a). In the last category, when anticipation notes are payable from a future general obligation bond issuance, the notes are often called "bond anticipation notes," and in such case, the anticipation notes cannot be issued unless the bond election has already been held and approved by voters and the bond proposition states that anticipation notes may be issued. Tex. Gov't Code § 1431.008(a). However, in this case, the City has not pledged the proceeds of bonds to the Tax Notes. Rather, the City has pledged ad valorem taxes as evidenced by the following tax levy contained in the Ordinance:

> SECTION 9. Levy of Taxes. To provide for the payment of the "Debt Service Requirements" of the Notes, being (i) the interest on the Notes and (ii) a sinking fund for their payment at maturity or redemption or a sinking fund of 2% (whichever amount is the greater) there is hereby levied, and there shall be annually assessed and collected in due time, form and manner, a tax on all

> taxable property in the City, within the limitations prescribed by law, and such tax hereby levied on each one hundred dollars' valuation of taxable property in the City for the Debt Service Requirements of the Notes shall be at a rate from year to year as will be ample and sufficient to provide funds each year to pay the principal of and interest on said Notes while Outstanding . . .

Ordinance at 11 (Section 9 of the Ordinance herein referenced as the "Tax Levy"). The Tax Levy provided in the Ordinance is required to comply with Article 11, Section 5 of the Texas Constitution, which prohibits a city from creating a debt without at the same time making provision to assess and collect annually a sufficient sum to pay the interest on the debt and creating a sinking fund of at least two per cent of principal. Article 11, Section 5 does not require the levy of a fixed tax rate in the ordinance authorizing the debt; rather it requires that provision be made for the annual collection by taxation of a sufficient sum to pay the interest thereon and create a sinking fund. The fixing of such rate is left to city council for each successive year while the debt is outstanding. *See Basset v. City of El Paso*, 30 S.W. 893, 894-95 (Tex. 1895). The Tax Levy made in Section 9 of the Ordinance authorizing the issuance of a public security as a tax note under Chapter 1431 is distinct from the annual tax rate adopted each fiscal year, in which the governing body must comply with the truth-in-taxation provisions of Chapter 26 of the Tax Code. How proposed tax notes are treated under Chapter 26 is independent from the public finance division's review of public securities under Chapter 1202 of the Government Code.

C. Section 1205 Bond Validation Actions

Section 1205 of the Texas Government Code, commonly referred to as the Expedited Declaratory Judgment Act ("EDJA"), provides an "issuer" of "public

securities" an expedited declaratory procedure to establish the "legality and validity" of public securities and "public security authorizations." Tex. Gov't Code § 1205.021. In enacting the EDJA, the Legislature sought to protect the public interest by providing a quick and efficient means to resolve public securities validation litigation through an *in rem* action. The EDJA effectuates this purpose as reflected in the parameters set out by the statutory text. Tex. Gov't Code §§ 1205.001-.152.

Through the EDJA, the Legislature has created a specific and narrowly focused statutory scheme to ensure the expedient adjudication of "the validity of public securities and acts affecting public securities," and to "resolve disputes relating to public securities." *Holtze v. City of Houston*, 339 S.W.3d 809, 814 (Tex. App.—Austin 2011, no pet.). A "public security authorization" means "an action or proceeding by an issuer taken, made, or proposed to be made in connection with or affecting a public security." Tex. Gov't Code § 1205.001(3). The public security authorization must have an authorizing connection with or effect on the public securities. *City of Conroe v. San Jacinto River Authority*, 602 S.W. 3d 444, 453 (Tex. 2020).

An issuer of a public security may seek a declaratory judgment under the EDJA as to:

(1) the authority of the issuer to issue the public securities;

(2) the legality and validity of each public security authorization related to the public securities, including if appropriate:

(A) the election at which the public securities were authorized;

(B) the organization or boundaries of the issuer;

(C) *the imposition of* an assessment, *a tax*, or a tax lien;

(D) the execution or proposed execution of a contract;

(E) the imposition of a rate, fee, charge, or toll or the enforcement of a remedy related to the imposition of that rate, fee, charge or toll;

(F) the pledge or encumbrance of a tax, revenue, receipts, or property to secure the public securities.

(3) the legality and validity of each expenditure or proposed expenditure of money related to the public securities; and

(4) the legality and validity of the public securities.

Tex. Gov't Code § 1205.021 (emphasis added). Additionally, an action under the EDJA is *in rem* and so cannot impose personal liability. Rather, its effect is limited in scope to the *res*. *See* Tex. Gov't Code § 1205.023(1).

The EDJA also is a class action binding on all persons who reside in the territory, own property within the boundaries of the issuer, are taxpayers of the issuer, or have or claim a right, title, or interest in any property or money to be affected by the public security authorizations or the issuance of the public securities. Tex. Gov't Code § 1205.023(2). A judgment under the EDJA is binding on the issuer, the Attorney General, the Comptroller, and any party to the action, whether named and served with notice of the proceedings or a member of the EDJA class. Tex. Gov't Code § 1205.151(b). The judgment serves as a permanent injunction against the filing by any person of any proceeding contesting the validity of: (1) the public securities, a public security authorization, or an expenditure of money related to the public

securities described in the petition; (2) each provision made for the payment of the public securities or of any interest on the public securities; and (3) any adjudicated matter and any matter that could have been raised in the action. Tex. Gov't Code § 1205.151(c).

An interested party can opt to become a named party and participate in the litigation either by filing an answer to the petition at or before the time the action is set for trial or by intervening, with leave of court, after the trial date. Tex. Gov't Code § 1205.062.

In this case, the City asks the Court to validate its proposed "City of Amarillo, Texas, Tax Notes, Taxable Series 2022A," (the "Tax Notes"), and the "public security authorization" containing the purpose, principal amount, terms, tax levy and pledge for the Tax Notes is the Ordinance.

D. Factual and Procedural Background

1. The November 2020 General Election

In November 2020, the voters of the City of Amarillo voted on a bond proposal identified on the ballot as Proposition "A." This proposal sought the approval for general bonds for projects involving the Amarillo Civic Center Complex and included the relocation of the Amarillo City Hall. Proposition "A" was rejected by the voters.

2. The Gualtiere and City's EDJA actions

Following the November 2020 General Election, the City published notice of a vote to issue COs to fund its City Hall project. In response, Craig Gualtiere filed a lawsuit in the 320th District Court of Potter County, Texas, seeking a declaratory

judgment that the City's proposed action was unlawful as well as temporary and permanent injunctions prohibiting the issuance of COs in violation of Section 271.047 of the Texas Local Government Code, which prohibits the use of COs within three years after an electoral defeat of the same project. In addition to the lawsuit, Gualtiere also filed with the City a protest petition, which he argued nullified the City's notice of intent to issue COs and invalidated any certificates issued pursuant thereto, as provided by Section 271.049(c) of the Texas Local Government Code, which prohibits the issuance of COs following receipt of a petition signed by at least five percent of the registered voters protesting the issuance of COs unless and until such issue is submitted to the voters and is approved.

On July 29, 2021, the City filed a Chapter 1205 lawsuit for an expediated judgment in Travis County, Texas declaring that its proposed COs were legal, valid, enforceable, and incontestable. That lawsuit was transferred to Potter County and consolidated with Gualtiere's suit. In August 2021, the City voted to repeal the resolution that authorized the issuance of the COs, and filed a plea to the jurisdiction requesting the Court dismiss the case for want of jurisdiction. On November 16, 2021, the Court granted the City's plea.

Having abandoned the COs, in December of 2021, the City submitted to our office for review tax and revenue notes in the amount of $23,900,000, under Chapter 1431 to finance the very purpose challenged in the petition for COs. Prior to reviewing the proposed Series 2022 combination tax and revenue notes, the Attorney General asked City's bond counsel about the applicability of Article II, Section 23 of the City's

Charter (regarding referendum to repeal ordinances) to the City's ordinance adopting tax and revenue notes under Chapter 1431 given the fact that Section 23 does not except out ordinances levying a tax or authorizing public securities and the conflict provision in section 1431.016 only applies to emergency tax notes issued under section 1431.015, which was not applicable. When Gualtiere filed a motion to reconsider the Court's order granting the City's plea to the jurisdiction, the Attorney General put a temporary hold on his review. As a condition to approval, the Attorney General required the court's order denying the motion for reconsideration and certification that no petition had been received challenging the Series 2022 Note ordinance in accordance with the City's charter.

3. The current EDJA proceeding

Now the City seeks to issue over $260 Million in tax notes under Chapter 1431 to fund the improvement and expansion of Amarillo's Civic Center Complex, the very purpose rejected by the voters in 2020. On May 24, 2022, the Amarillo City Council adopted the Ordinance, setting forth the purpose, pledge, and terms of the Tax Notes.

On May 27, 2022, Alex Fairly brought a suit in the 108th Judicial District, Potter County, Texas for declaratory and injunctive relief to prevent the issuance of the Tax Notes. On June 8, 2022, the City brought a EDJA as provided by Chapter 1205 of the Texas Government Code. The cases were consolidated and Mr. Fairly intervened, asserting violations against the City under the Open Meetings Act, the Texas Constitution, the Tax Code, and Chapter 1431.

4. The Current Dispute

The City asks the Court to make nine specific declarations regarding whether the City is authorized to issue the Tax Notes for the purposes stated in the Ordinance and to annually levy the tax for their payment at the maximum rate imposed by their charter, whether the Tax Notes were properly introduced and enacted under state law and the City's charter, and whether the petition for referendum provision in the city's charter applies to the Ordinance. See Original Petition, ¶ 17(a)–(h). Such declarations necessarily require the Court to determine whether the City's use of short-term Tax Notes in this case and for the purposes stated in the Ordinance is valid, whether the City Council lawfully adopted the Ordinance as required by state law, including the Open Meetings Act, what maximum tax rate does the charter impose on these tax notes, and whether the petition for referendum provision in the city's charter applies to the Tax Notes.

Intervenor argues the City has abused the purpose of short-term anticipation notes available under Chapter 1431 by intending at the outset to turn around and issue unvoted general obligation refunding bonds to refund the Tax Notes, thereby achieving long-term tax obligations without having to secure voter approval as required for general obligation bonds or provide notice and opportunity for a petition for referendum as required for certificates of obligation. Notes issued under Chapter 1431 are intended to be short-term obligations. However, Chapter 1431 was amended in 2001 to expressly provide that a bond issued under Chapter 1207 to refund a tax note issued by a city for the construction of a public work is not subject to the seven-

year maturity limit under Chapter 1431, but to the 40-year limitation provided in section 1207.006. Tex. Gov't Code § 1431.009(d). A city may not refund short-term tax notes with long-term refunding bonds for gross loss unless the city council first determines in the proceedings authorizing the issuance of refunding bonds that the refunding is in the best interest of the issuer. Tex. Gov't Code § 1207.008(1). There are instances when refunding for a gross loss is in the best interest of the issuer; however, doing so merely to avoid or disregard a failed election is not one of them.

The Attorney General is strictly confined to his analysis of Texas law and whether the City's proposed Tax Notes comport with state law. As such, the Attorney General informs the Court of the following with regard to the declarations sought by the City.

II.
Issues For the Court to Consider Regarding the Validity and Legality of the Proposed Tax Notes

The City requests that the Court, after trial and final hearing, enter a final judgment on certain declarations. The Attorney General provides guidance for the Court's consideration on the following issues in advance of the trial:

- The City must demonstrate to the Court that the proposed civic center improvements and arena to be financed with the Tax Notes will be generally accessible to the public.

- A plain reading of the City's Charter limits the City's tax rate for the Tax Notes to $1.30 per $100 valuation, rather than $1.80, and the City must demonstrate coverage at a lower bond allowable rate under public finance division rules.

- The Court should consider whether the City's charter referendum provision in Article II, Section 23 can be harmonized with Chapter 1431.

- For purposes of determining whether the City Council adopted the Ordinance in compliance with the Open Meetings Act, the Court should consider the previous rejection by the voters of bonds for the same purpose as the Tax Notes as evidence of heightened public interest as discussed in the *Cox* case.

- Any Declaration as to the City's Tax Levy should be limited to the language used in the Ordinance.

- Should the Court determine that the issue of whether the unvoted Tax Notes are "debt" under Chapter 26 of the Tax Code is properly before the Court, the City will need to demonstrate how the Tax Notes are "issued for a project under Chapter 311" of the Tax Code.

A. The City must demonstrate to the Court that the proposed civic center improvements and arena to be financed with the Tax Notes will be generally accessible to the public.

The City asks the Court to declare that the purpose of the Tax Notes is proper under Chapter 1431 and that the proceeds of the Tax Notes may be expended for such purpose. Original Petition, ¶ 17(c), (d). Section 1 of the Ordinance states the title and purpose: the "City of Amarillo, Texas Tax Notes, Taxable Series 2022A," for "acquiring, constructing, improving, expanding, and equipping of the City's convention center facilities: to wit: the City's civic center complex, including the addition of an arena related thereto and improvements to the Amarillo Santa Fe Depot property[.]" Section 1431.004 authorizes issuers to use the proceeds of a tax note for "the construction of a public work," which is not defined in Chapter 1431. In determining whether a proposed project is a proper "public work," the public finance division looks to other financing statutes to find instances in which the Legislature has authorized cities to issue debt for a particular project, thereby evidencing the legislative intent that such project constitutes a public work. So long as the particular

financing statute is not exclusively enabling legislation under Article 3, Section 52-a, in which an election would be constitutionally required, a revenue bond statute may provide evidence of a proper public work that could be financed with tax notes. In this case, section 1504.001(a)(1) of the Government Code expressly allows a municipality to construct a civic center and auditorium and section 1504.002 authorizes a city to issue revenue bonds to finance them; moreover, nothing in Chapter 1504 suggests that it is the exclusive means by which civic centers and auditoriums may be financed. *See Navarro Auto-Park, Inc. v. City of San Antonio*, 574 S.W.2d 582, 584 (Tex. Civ. App.–San Antonio 1987, writ ref'd, n.r.e) (city-owned off-street parking garage is a public work under CO Act and city's authority to build off-street parking not limited to revenue bonds); *Jones v. Sharyland Indep. Schl. Dist.*, 239 S.W.2d 216, 218 (Tex. Civ. App.–San Antonio 1951, no writ) (separate statute providing for gymnasiums to be financed with revenue bonds was merely cumulative and did not preclude school district from issuing tax bonds for gymnasiums).

However, in this case the proposed Tax Notes are identified in section 1 of the Ordinance as being issued on a taxable basis, as evidenced by their title, "City of Amarillo, Texas Tax Notes, Taxable Series 2022A." Traditionally, public securities financing city-owned improvements are issued on a tax-exempt basis, meaning holders of the public security are not required to pay taxes on the interest earnings. When public securities are instead proposed to be issued on a taxable basis, the public finance division will inquire as to the reason because the taxable status can indicate that some private use will be involved. Chapter 1431 authorizes municipalities to

authorize the issuance of tax notes for public works such as a civic center and arena, provided the City demonstrates to the Court that the center and arena will be generally accessible to the public, and not for long-term use by a private entity, such as professional sports term, which would pose lending of credit concerns under Article 3, Section 52(a), and require further analysis as to whether it rises to the level of economic development under Article 3, Section 52-a of the Texas Constitution, thereby requiring an election. If the Tax Notes are being issued on taxable basis solely because a private entity will be operating the civic center and arena on the City's behalf, this is permissible provided there are safeguards in place to ensure that the public purpose will be accomplished and that the political subdivision receives a return benefit. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-84 (Tex. 2002).

B. A plain reading of the City's Charter limits the City's tax rate for the Tax Notes to $1.30 per $100 valuation, rather than $1.80, and the City must demonstrate coverage at a lower bond allowable rate under public finance division rules.

In two separate declarations, the City asks the Court to declare that it may levy its ad valorem tax in an amount not to exceed $1.80 per $100 valuation, pursuant to its City Charter. Original Petition, ¶ 17(b), (c). As explained in the Attorney General's Special Exceptions, the City must demonstrate to the court why it is not bound by the lower tax rate limit of $1.30 per $100 of valuation because Article III, Section 1(a) of the City Charter provides:

> SECTION 1. - TAXATION

> The City shall have the power and is hereby authorized annually to levy and collect taxes not exceeding one dollar and eighty cents ($1.80) on each one hundred dollars ($100.00) of assessed valuation of all real and personal property within the City limits of the City of Amarillo, not exempt from taxation by the constitution and laws of the State of Texas; *provided that* all taxes levied and collected in excess of one dollar and thirty cents ($1.30) on each one hundred dollars ($100.00) of assessed valuation of such property shall only be levied and collected for the purpose of paying the interest on and creating a sinking fund to redeem water works bonds of the City of Amarillo, legally issued under Section One, of Article 4, of the Charter of Amarillo.

(emphasis added). A plain reading of the above provision would reserve 50 cents of the $1.80 for paying debt service on bonds issued for water works utility improvements, with $1.30 remaining for all other purposes, including debt service not issued for water works purposes, such as the Notes. Because the City must use its ad valorem tax collection to pay both debt service and annual operation and maintenance expenses, our rules require the city show coverage of debt service at the "bond allowable rate", which is 2/3 of the maximum rate imposed by the City's charter, when such rate is lower than the constitutional rate. *See* 1 Tex. Admin. Code §§ 53.5, 53.6. This would mean that the City needs to show coverage of the maximum annual tax debt service of all tax debt, including the proposed Notes, at 2/3 X $1.30 = $.86, and applying a collection factor of 90%, unless the city can demonstrate a higher collection rate. *See* 1 Tex. Admin Code § 53.3(a)(4)(C). If the maximum debt service year includes debt service for water works utility purposes, then that portion of the debt service could be backed out so long as the City can show that such debt can be serviced with the 50 cents reserved for water work indebtedness under Article III, Section 1 of the City Charter.

C. The Court should consider whether the City's charter referendum provision in Article II, Section 23 can be harmonized with Chapter 1431.

The City asks the Court to declare that Article II, Section 23 of the City Charter does not apply to Ordinance 7985, which authorizes the Tax Notes. Pet. at ¶ 17(h). The Court should consider this declaration first in connection with the referendum petition because if the Court determines that Article II, Section 23 applies and the petition for referendum qualifies, the Court should abate the proceedings unless and until the Ordinance authorizing issuance of the tax notes is approved by the voters.

Article II, Section 23 of the Charter provides:

> (a) Any proposed Ordinance may be submitted for adoption, and any Ordinance or resolution enacted may be submitted to the people for repeal. In either event the Ordinance or resolution proposed to be adopted or repealed shall be set out in a written or printed instrument which shall be filed with the City Secretary (or acting City Secretary as the case may be in every mention), and at the time of the filing of such written or printed instrument, there shall be filed a statement signed by not less than five (5) registered voters within the City of Amarillo, stating that they have proposed such Ordinance or resolution for adoption or repeal and such electors shall be regarded as the initiating or referring committee, as the case may be, for the purpose hereinafter provided.
>
> The City Secretary shall not accept the registration of citizens as either an initiating or referring committee or their petition if the subject matter of the proposed petition has been the subject of a public election within the preceding three (3) years.
>
> (b) Before any such Ordinance or resolution may be submitted to the City Council, it shall be necessary that a petition signed by not less than five (5) percent of the registered voters within the City of Amarillo. (sic)

Home rule charters may not contain provisions inconsistent with the state

constitution or with the general laws enacted by the state legislature. Tex. Const. Art. 11, § 5. Therefore, the legal issue before the court with respect to this declaration sought by the City is whether Article II, Section 23 of the City's Charter is consistent with or conflicts with Chapter 1431 of the Government Code. Section 1431.016 contains a charter-conflict provision solely with respect to emergency tax notes in the event of a hurricane, which provides:

> To the extent of a conflict between a municipal charter and any provision of this chapter relating to an anticipation note or other obligation *issued under Section 1431.015*, this chapter controls.

Tex. Gov't Code § 1431.016 (emphasis added). As Chapter 1431 is silent with respect to ordinary tax notes issued under Chapter 1431, in contrast to emergency tax note financing, there would appear to be a presumption that that charter provisions should otherwise be harmonized with Chapter 1431 in the absence of an express conflict.

The City has argued that Article II, Section 23 cannot be harmonized with Chapter 1431 and other relevant law because ordinances authorizing public security issuances are effective when passed, claiming that allowing for the repeal of such ordinances would cause such uncertainty in the bond market as to risk crippling it. However, the City acknowledged the possibility of repeal in the Signature and No Litigation Certificate submitted as part of the transcript, which reads in pertinent part as follows:

> No authority or proceeding for the issuance, sale, or delivery of the Notes, passed and adopted by the governing body of the Issuer, has been amended, repealed, revoked, rescinded, or otherwise modified since the date of passage thereof, and all such proceedings and authority relating to the issuance and sale of the Notes remain in full force and effect as of the date of this certificate.

Certainly, the passage of an ordinance cannot be seen to bind a governmental entity to follow through on issuing a public security that it reconsiders before issuance. Indeed, failure to obtain approval by the Attorney General can prevent a public security from being issued despite the passage of an ordinance authorizing the security.

The City has also pointed to language within Article II, Section 23 stating "[t]he City Secretary shall not accept the registration of citizens as either an initiating or referring committee or their petition if the subject matter of the proposed petition has been the subject of a public election within the preceding three (3) years" as authority for the proposition that this ordinance, which involves subject matter that was the subject of an election in November 2020, is not a proper subject of a referendum petition. This provision is quite clearly intended to keep citizens from challenging, via a process that ends with an election, an ordinance that was already *approved*—not rejected—by a majority of voters. The City should not be allowed to hide behind this language to thwart the referendum process when, as here, a petition is brought to challenge an ordinance that the City passed despite a resounding (61-39) defeat at the ballot box.

On August 29, 2022, a petition was filed with the City Secretary of the City of Amarillo in which Amarillo residents purportedly totaling at least five percent of the City's registered voters sought the repeal of Ordinance 7985. Under the charter, the City Secretary then had 21 days to verify that the petition contained the required number of valid signatures before submitting the petition to the City Council at its

next regular meeting for reconsideration within the following 30 days. However, on or about September 20, 2022, the City Secretary notified the referring committee that she considered the petition to be defective and would not be validating the signatures or forwarding it to the City Council.

Intervenor filed a motion to abate this proceeding until the petition process could be carried out but is not urging the motion at this time. However, this issue remains before the Court pursuant to that motion and the City's request for a declaration that Article II, Section 23 of the City Charter does not apply to Ordinance 7985. Given the pending petition for referendum, if the Court determines that Article II, Section 23 of the Charter applies, the City should be required to prove up why they believe the petition does not comply with the requirements of the Charter. Should the Court determine that Article II, Section 23 applies but also that the Tax Notes are valid, that could create an illogical result wherein the City is able to proceed with the issuance before the petition process can be carried out, and any further proceedings regarding the petition could be deemed *res judicata*. Accordingly, should the Court determine to validate the Tax Notes, we urge the Court to make its validation contingent on further findings consistent with Article II, Section 23, or otherwise expressly carve out the petition issue from any validation of the Tax Notes.

D. For purposes of determining whether the City Council adopted the Ordinance in compliance with the Open Meetings Act, the Court should consider the previous rejection by the voters of bonds for the same purpose as the Tax Notes as evidence of heightened public interest as discussed in the *Cox* case.

The City asks the Court to declare that the City properly introduced and enacted the Tax Notes pursuant to the laws of the State and its home rule charter. Original Petition, ¶ 17 (g). As the Tax Notes were authorized by the Ordinance, this declaration necessarily includes determining whether the City Council adopted the Ordinance in compliance with the Open Meetings Act. Intervenor challenges the sufficiency of the notice provided in the agenda and agenda transmittal memorandum under Chapter 551 of the Government Code, also called the Open Meetings Act. The following law, which is largely cited in the parties' briefing, is primarily what the courts would look at to consider the sufficiency of a notice that is on a topic of special interest to the public.

"If the facts as to the content of a notice are undisputed, the adequacy of the notice is a question of law." *Burks v. Yarbrough*, 157 S.W.3d 876, 883 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 529 (Tex. App.—Austin 2002, pet. denied). The courts examine the facts to determine whether a particular subject or personnel matter is sufficiently described or requires more specific treatment because it is of special interest to the community. *River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dism'd) (concluding that notice stating only "discussion" is insufficient to indicate board action is intended, given prior history of stating "discussion/action" in agenda when action is intended).

The notice must be sufficient to apprise the general public of the subjects to be considered during the meeting. Generally, as long as a meeting notice alerts the reader to the topic for consideration, it is not necessary for the notice to state all of the consequences which may flow from the consideration of the topic. *Cox Enters. Inc. v. Bd. Of Trs.*, 706 S.W2d 956, 959 (Tex. 1986). However, when the topic is of special interest to the public, the description must be more detailed, and must provide "reasonable specificity of the subject matter to be considered." *Id.* at 959 (citing Op. Tex. Att'y Gen. No. H-1045 (1977)). Moreover, "as public interest in a matter increases, a correspondingly more detailed description of the subject under consideration must be given." *Rettberg v. Tex. Dep't of Health*, 973 S.W.2d 408, 411 (Tex.App.—Austin 2004, no pet.) (citing *Cox*, 706 S.W.2d at 959)); *Point Isabel Indep. Sch. Dist. V. Hinojosa*, 797 S.W.2d 176, 180 (Tex.App.—Corpus Christi 1990, writ denied)).

In *Cox*, the Texas Supreme Court found that the word "personnel" was insufficiently specific to notify the public of the selection of a new school superintendent. 706 S.W.2d at 959. The court, noting that the "[s]election of a new school superintendent is not in the same category as ordinary personnel matters," found that more specificity was needed in order to provide "full and adequate" notice to the public under the Open Meetings Act. *Id.* The Court also found that "litigation" would not sufficiently describe a major desegregation suit that had occupied the district's time for a number of years. *Id.*; *see also Mayes v. City of De Leon*, 922 S.W.2d 200, 203 (Tex. App.—Eastland 1996, writ denied) (determining that "personnel" was

not sufficient notice of termination of police chief); *Stockdale*, 867 S.W.2d at 124–25 (holding that "discussion of personnel" and "proposed nonrenewal of teaching contract" provided sufficient notice of nonrenewal of band director's contract); *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747 (Tex. App.—Austin 1993, writ denied) (indicating that notice need not list "the particulars of litigation discussions," which would defeat purpose of statutory predecessor to section 551.071 of the Government Code); *Point Isabel Indep. Sch. Dist.*, 797 S.W.2d at 182 (holding that "employment of personnel" is insufficient to describe hiring of principals, but is sufficient for hiring school librarian, part-time counselor, band director, or school teacher); Tex. Att'y Gen. Op. No. H-1045 (1977) at 5 (holding "discussion of personnel changes" insufficient to describe selection of university system chancellor or university president).

In *Point Isabel I.S.D. v. Hinojosa,* the Court of Appeals focused the analysis on comparing the content of the notice given and the action taken at the meeting. 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied). Finding the appropriate standard of notice is "full disclosure of the subject matter of the meetings" and that as "public interest in a particular subject increases, notice must become more specific." *Id.* The court found that at one end of the spectrum, the Open Meetings Act requires "highly specific subject matter notice of meetings in which important governmental actions are taken because of the high degree of public interest in such actions." *Id.* (citing *Cox*, 706 S.W.2d at 959). The appropriate process, the Court of Appeals held, "is a case by case comparison between the notice given and the action

taken." *Id.* If the notice does not inform the public of the action taken at the meeting, it fails under the Open Meetings Act. *Id.*

In this case, the public notice concerning the proposed tax notes is as follows:

> L. DISCUSSION AND CONSIDERATION OF ORDINANCE NO. 7985:
>
> This item is the discussion and consideration of an ordinance authorizing the issuance of the City of Amarillo, Texas Combination Tax and Revenue Notes, Series 2022A resolving other matters incident and related thereto including the approval of a paying agent/registrar agreement and a purchase contract.

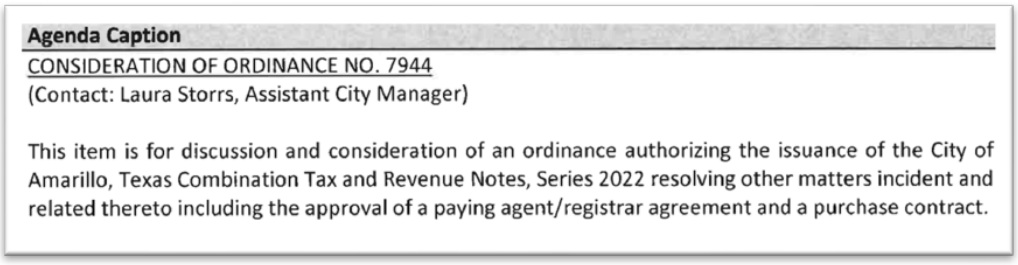
May 24, 2022 City of Amarillo City Council Meeting Agenda at COA_000061. The May 24 Agenda includes a Transmittal Memo describing Ordinance 7985 as follows:

> This ordinance authorizes the City to issue the Combination Tax and Revenue Notes, Series 2022A for the purpose of paying contractual obligations to be incurred for (i) acquiring, constructing, improving, expanding, and equipping the City's convention center facilities, to-wit: the City's civic center complex, including the addition of an arena related thereto and improvements to the Amarillo Santa Fe Depot property and any needed land and rights-of-way therefor and (ii) professional services rendered in relation to such projects and the financing thereof.

Id. at COA_000258. The Memo states that the action requested of the City Council is that it "adopt the ordinance authorizing the issuance of the Combination Tax and Revenue Notes, Series 2022A." *Id.*

As noted by the City, both Agenda Item 3-L and the Item 3-L Memo refer to the Notes as "Combination Tax and Revenue Notes." Ms. Storrs, the City Secretary, testified that the 3-L Agenda Item was created by copying and pasting language from a prior transmittal memo concerning combination tax and revenue notes recently

issued to finance the new City Hall. *See* Mot. For Security Hr'g Tr. 41:14-20. A comparison of the Agenda Captions show nearly identical language for the two different agenda items:

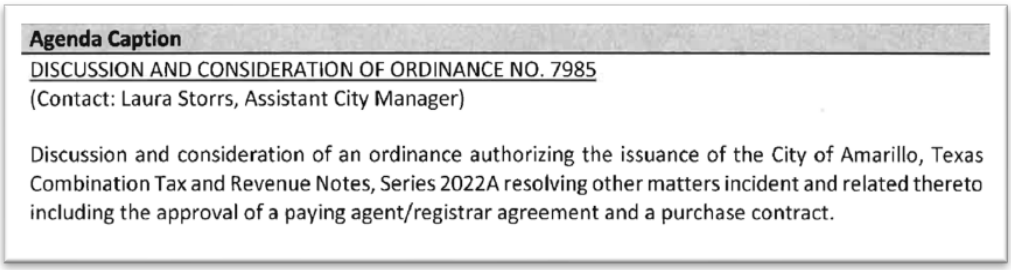


Agenda Caption

CONSIDERATION OF ORDINANCE NO. 7944
(Contact: Laura Storrs, Assistant City Manager)

This item is for discussion and consideration of an ordinance authorizing the issuance of the City of Amarillo, Texas Combination Tax and Revenue Notes, Series 2022 resolving other matters incident and related thereto including the approval of a paying agent/registrar agreement and a purchase contract.

December 14, 2021 City Council Meeting Agenda at 10.



Agenda Caption

DISCUSSION AND CONSIDERATION OF ORDINANCE NO. 7985
(Contact: Laura Storrs, Assistant City Manager)

Discussion and consideration of an ordinance authorizing the issuance of the City of Amarillo, Texas Combination Tax and Revenue Notes, Series 2022A resolving other matters incident and related thereto including the approval of a paying agent/registrar agreement and a purchase contract.

May 24 Agenda at COA_000258.

The Intervenor complains that this notice insufficiently communicates the subject of the Ordinance because it did not alert the public to the scope and cost of the proposed Amarillo Civic Center Complex project or the amount of the principal and proposed terms for the recommended financing options. The Intervenor also points out that, as shown above, there is no reference to "anticipation notes" because the notice discusses only "Combination Tax and Revenue Notes"—but the Ordinance does not propose combination tax and revenue notes, but only tax notes. Intervenor also alleges that the full text of the proposed Ordinance was not attached and that the agenda provided no notice of the anticipated impact upon tax rates. Based on this

failure to specifically describe the agenda item and thus provide proper notice, Intervenor claims that it failed to give taxpayers an opportunity to be heard with respect to the proposed tax at the City Council meeting.

As explained above, the Texas Supreme Court has noted that, under the notice requirements of the Act, "less than full disclosure is not substantial compliance." *Cox*, 706 S.W.2d at 960. However, the Court has also held that it is not necessary to "state all of the consequences which may necessarily flow from the consideration of the subject stated." *Texas Turnpike Auth. v. City of Fort Worth*, 554 S.W.2d 675, 676 (Tex. 1977).

In this case, for the purpose of determining whether the City Council adopted the Ordinance in compliance with the Open Meetings Act, the Court should consider the previous rejection by the voters of bonds for the same purpose as the Tax Notes. Based on the fact that the electorate previously voted down the project, it would seem clear that the proposed tax notes are a matter of "special public interest." *See Point Isabel I.S.D.*, 797 S.W.2d at 180 (finding that the Open Meetings Act requires "highly specific subject matter notice of meetings in which important governmental actions are taken because of the high degree of public interest in such actions"). Accordingly, the City was required to provide "reasonable specificity of the subject matter to be considered" at the meeting. *See Cox*, 706 S.W.2d at 959. With the level of public concern and unprecedented interest in this matter, including the rejection of voters in an election, and two referendum petitions signed by more than five-percent of the City's residents, the question for the Court is whether the matter of funding the

Amarillo Civic Center project was of such public importance that it required a notice with specificity beyond even that which is required under *Cox*, and similarly whether the notice gave "full disclosure of the subject matter of the meetings" in accordance with Section 551.051 of the Open Meetings Act. *See Cox*, 706 S.W.2d at 959; *Rettberg*, 873 S.W.2d at 411 (stating that "as public interest in a matter increases, a correspondingly more detailed description of the subject under consideration must be given"); *but see also id.* ("[N]otice is sufficient under the Act when it alerts a reader that *some action* will be taken relative to a topic"). As shown above, the meeting Agenda Notice 3-L was nearly an identical copy-and-paste from a recent agenda for a different project that used combination tax and revenue notes issued to fund the new Amarillo City Hall, although the Transmittal Memo included additional detail. Whether or not that was sufficient detail to alert the public of the subject matter under consideration is a question of law for the Court.

E. Any Declaration as to the City's Tax Levy should be limited to the language used in the Ordinance.

The City specifically asks the Court to make the following declaration:

> As long as any of the Notes, or any part of the principal thereof or interest thereon remain outstanding and unpaid, the City is authorized to levy and annually assess and collect in due time, form and manner, ***and at the same time as other City taxes are assessed, levied and collected in each year***, a continuing direct annual ad valorem tax, within the limits prescribed by law, upon all taxable property in the City, sufficient to pay the interest on the Notes as the same becomes due and to pay each installment of the principal of Notes as the same matures, full allowance being made for delinquencies and costs of collection.

City's Original Petition, ¶ 17(e) (emphasis added). To the extent the City is asking the Court to validate the Tax Levy contained in the Ordinance, any declaration as to the Tax Levy should be limited to the language used in the Ordinance. In comparing the above language to the Tax Levy contained in Section 9 of the Ordinance, it appears that the declaration in Paragraph 17(e) of the Petition is broader by including the following phrase "and at the same time as other City taxes are assessed, levied and collected in each year." Tax levies for debt are limited to the amount sufficient to authorize the debt and no other. To the extent the declaration seeks to reach to the City's annual budget process, this would likely involve how the Tax Notes are treated under Chapter 26 of the Tax Code.

F. Should the Court determine that the issue of whether the unvoted Tax Notes are "debt" under Chapter 26 of the Tax Code is properly before the Court, the City will need to demonstrate how the Tax Notes are "issued for a project under Chapter 311" of the Tax Code.

If the Court determines that the issue of whether the unvoted Tax Notes constitute "debt" under Chapter 26 of the Tax Code is properly before the Court, the City will need to demonstrate to the Court how the Tax Notes are "issued for a project under Chapter 311, Tax Code" that is "located in a reinvestment zone created under Chapter 311." Tex. Tax Code § 26.012(7)(A)(i). One question the Court should consider is whether the plain language of the phrase "issued for a project under Chapter 311" means not only that the project falls under Chapter 311, but also that the public security is being *issued* pursuant to Chapter 311. If the public security itself needs to be issued pursuant to Chapter 311, the Tax Notes would not qualify

because they are issued under a separate statute, Chapter 1431 of the Government Code.

To the extent the Court determines that Section 26.012(7)(A)(i) is broad enough to cover the Tax Notes even though they are not being issued pursuant to Chapter 311 of the Tax Code, then the City must provide at trial evidence not only of City Council's lawful adoption of the ordinance amending the project and financing plan to include the civic center and arena projects, but also compliance with the notice and hearing requirements in Section 311.003(c) and (d) of the Tax Code by increasing the total estimated project costs. Tex. Tax Code § 311.011(e).

Should the Court determine that issue as to whether the Tax Notes are treated as "debt" under Chapter 26 of the Tax Code is not before the Court, any judgment in favor of the City should make clear that nothing in the judgment declares how the Tax Notes shall be treated under Chapter 26 for purposes of an action brought under that chapter.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, a true and correct copy of the foregoing, *Trial Brief of Attorney General of Texas* was served on the attorney of record via EFileTexas.gov and/or email on:

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