

TEXAS ETHICS COMMISSION

IN THE MATTER OF
LUIS ZERVIGON,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-32009176

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (Commission) met on June 16, 2021, to consider sworn complaint SC-32009176. A quorum of the Commission was present. The Commission determined that there is credible evidence of a violation of Section 255.003 of the Election Code, a law administered and enforced by the Commission. To resolve and settle the complaint without further proceedings, the Commission adopted this resolution.

II. Allegation

The complaint alleged that the respondent spent or authorized the spending of public funds for political advertising, namely a videotaped statement by the respondent dated August 17, 2020, which was uploaded to the Williamson-Travis Counties Municipal Utility District 1 website, in violation of Section 255.003 of the Election Code.

III. Findings of Fact and Conclusions of Law

Credible evidence available to the Commission supports the following findings of fact and conclusions of law:

1. At all times relevant to the complaint, the respondent was a member of, and the board secretary for, the Board of Directors for Williamson-Travis Counties Municipal Utility District #1 (the District).

2. On August 17, 2020, the Board of Directors (the Board) for the District conducted a joint meeting of the Board and the Deed Restriction Committee, itself a subcommittee of the Board.¹ The meeting opened with public comments. In these public comments, three political opponents of the respondent and of other incumbent members of the Board spoke concerning allegations that David Flores, a challenger to the Board incumbents in the upcoming election, had interacted inappropriately with neighborhood residents. These public commenters were Sarah Teale, Linda Fabre (who was also a non-incumbent board candidate), and Tina Flores, who is David Flores' wife. The commenters denied the inappropriateness of Flores' actions and accused the respondent and the other Board members of manufacturing the allegations for advantage in the upcoming Board election. The public commenters further complained of oppressive enforcement of deed restrictions within the District. Apart from incumbent Board members, the commenters singled out for criticism a certain Megan Dudo, who was one of the Board's political allies and was also a candidate in the then-upcoming Board election. The meeting recordings posted to the District's website thoroughly establish the animosity between these three commenters and the Board.
3. Immediately following the public comments portion of the meeting, the respondent, who was presiding over the meeting, moved to the second agenda item. The agenda item read: "[o]nline postings; [i]naccurate or misleading site names and District information; [c]ommunications to residents to correct misstatements." The respondent pronounced that "if no one ha[d] anything to say [on this agenda item]," he wished to make a statement. In this statement, the respondent recounted past encounters with David Flores, in which Flores allegedly behaved in an intimidating or aggressive manner. The respondent denied that the individuals levying accusations of inappropriate conduct at Flores were doing so as part of a scheme to damage Flores' campaign. The respondent then responded to the allegations of oppressive deed restriction enforcement, speaking in defense of the District's deed enforcement contractors. Finally, the respondent alleged that the accusations of the Board's political opponents were rooted in "an obsession of dislike" for Board-aligned candidate Megan Dudo.
4. Shortly after the meeting, a complete video recording of the meeting was uploaded to the District's website. It was the District's usual practice to upload video recordings of the Board's meetings to the website, and the District had specialized audiovisual equipment and an ongoing contractual relationship with a communications vendor to facilitate this practice. In addition to the recording of the complete meeting, a short excerpt including only the above-described remarks by the respondent was separately uploaded. The District's website displayed similar short excerpts from prior meetings of the Deed Restriction Committee, the contents of which also concerned disputes with the above-discussed political opponents. These were excerpted from the same portion of the prior meetings, listed on the respective

¹ The board ordinarily conducted meetings of the Deed Restriction Committee as joint meetings with the Board of Directors itself.

meeting agendas as “[o]nline postings; [i]naccurate or misleading site names and District information; [c]ommunications to residents to correct misstatements.” In one of these previously-uploaded video excerpts, which was from the May 20, 2020 board meeting, the respondent named the Board’s opponents as Linda Fabre, Sarah Teale, and David Flores, and observed that that their “frequently stated objectives” were “to remove and replace all the existing [District] Directors and to dramatically change the scope of work that the [District] pursues.”

5. In response to Commission staff’s written questions and requests for documents, the respondent admitted that he requested that the District’s communications contractor upload the short video excerpt to the District’s website. According to documents submitted by the respondent, the charges to upload the videos from the meeting totaled \$54. The charges were not itemized between the complete meeting video and the excerpt, but the District’s communications contractor indicated that out of the 24 total minutes spent on the two tasks combined, six to nine minutes pertained specifically to the excerpt. The respondent further admitted that the District paid the contractor a “fixed fee” to maintain the website in general. The District’s budget performance evaluation for August 2020 indicates that the District had spent \$29,392 on expenses related to meeting videos and \$2,903 on website maintenance for the then-fiscal year to date; that is, from October 2019 through August 2020.
6. 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).
7. “Political advertising” means 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: 1) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or 2) appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication, or on an Internet website. *Id.* § 251.001(16).
8. The U.S. Supreme Court has long recognized that mentioning a candidacy, election, a challenger or taking a position on a candidate’s character, qualifications, or fitness for office are all indicia of electoral advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of C.J. Roberts & J. Alito).²

² Note that political advertising as defined by Section 251.001(16) of the Election Code is not limited to express advocacy or the functional equivalent of express advocacy as defined by the Supreme Court. *See* Tex. Ethics Comm’n Op. No. 540 (treating a communication’s classification as political advertising and its classification as express advocacy as distinct inquiries).

9. The excerpted remarks oppose David Flores, a candidate for the Board, by presenting him as a dangerous or unstable person and rebutting public comments made in support of Flores. Thus, to the extent the remarks concern Flores, they are an attack on Flores' character and fitness for office, an archetypal example of electoral advocacy as contemplated by the Supreme Court in *Wisconsin Right to Life*. *Id.* Further, the remarks support the incumbent members of the Board who were up for reelection by defending the Board's management of the deed restriction enforcement process and criticizing the Board's opponents as motivated by dislike for candidate Megan Dudo. Considered on their face, therefore, these remarks constitute political advertising.

10. The Commission noted in Ethics Advisory Opinion No. 456 that "[S]ection 255.003 [of the Election Code] was not intended to inhibit discussion of matters pending before a governmental body," and opined that Section 255.003 does not prohibit a political subdivision from broadcasting a tape of a meeting at which such discussions were held if the broadcast is in keeping with the city's regular practice of broadcasting meetings. *Tex. Ethics Comm'n Op. No. 456 (2004)*; *see also In re Turner*, 558 S.W.3d 796, 801 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (embracing Commission Advisory Opinion No. 456). However, the video excerpt at issue in the complaint is not a "tape of a meeting" as contemplated by the advisory opinion. The excerpt was not a recording of a complete meeting, uploaded as part of a regular practice of broadcasting meetings for the public's general information, but was instead a particular section of a meeting uploaded to convey a specific message. Further, the advisory opinion specifically anticipates a situation in which one or more of the members of a public body might arrange a discussion of a matter not pending before the body with the hope that broadcasts of the discussion would influence the outcome of an election. *Id.* As noted above, the agenda item for which the respondent made the excerpted remarks was labeled "[o]nline postings; [i]naccurate or misleading site names and District information; [and] [c]ommunications to residents to correct misstatements." This description identifies no specific District business. Considered in light of the content of the respondent's remarks, this item appears to have been included on the agenda specifically to afford incumbent members of the board an opportunity to rebut hostile narratives expressed by their political opponents, and was used to attack David Flores' character and fitness for office. Where this topic appeared on previous meeting agendas, the respondent's remarks, and the remarks of the other Board members speaking, evince a similar intent. The discussions on this agenda item at prior meetings were often also uploaded to the District's website as separate excerpts. Therefore, there is credible evidence, from the respondent's admission and in light of past Board practice, that by directing that the excerpted political advertising be uploaded to the District's website, the respondent authorized the spending of public funds for political advertising, both to upload the excerpt at issue and through the use of the District-maintained website to host the excerpt.

11. The respondent argues that because the subject of David Flores’s actions was raised in the public comments that preceded the uploaded excerpt, he did not “arrange [the] discussion of a matter not pending before the [Board]” to influence the outcome of an election, as Commission Advisory Opinion No. 456 cautions against. *See id.* The topics discussed in the excerpted remarks were raised in the preceding public comments, and partly related to official matters legitimately before the Board. However, the respondent’s statements were a rebuttal of political criticism containing attacks on a candidate’s character and fitness for office, and the respondent directed that this rebuttal be specifically highlighted on the publicly-funded District website. Neither the Commission opinion nor *In re Turner*, upon which the respondent relies, involved uploading specific excerpts from meeting recordings. *See In re Turner*, 558 S.W.3d at 796 (involving the publication of an entire meeting at which a measure election was discussed); Tex. Ethics Comm’n Op. No. 456. Further, neither the Commission opinion nor *In re Turner* involved attacks on a candidate’s character and fitness for office. *Id.* In fact, in the *Turner* opinion, the appellate court held, in language taken almost verbatim from the Commission opinion, that the discussion at issue in that case was not political advertising “even though an *incidental* effect of posting the video on the City’s website may [have been] to re-publish statements” alleged to be political advertising. *Turner*, 558 S.W.3d at 801 (paraphrasing from Tex. Ethics Comm’n Op. No. 456) (emphasis added). The contents of the meeting excerpt at issue in this complaint were not discussed and re-published incidentally, but deliberately, to rebut hostile statements made by the Board’s political opponents, to air attacks on a political opponent, and therefore to support certain Board candidates and to oppose others. As noted above, therefore, there is credible evidence that the respondent violated Section 255.003 of the Election Code by directing that the meeting excerpt be uploaded to the District website.

IV. Representations and Agreement by Respondent

By signing this order and agreed resolution and returning it to the Commission:

1. The respondent neither admits nor denies the Commission’s findings of fact and conclusions of law described under Section III, and consents to the entry of this order and agreed resolution solely for the purpose of resolving this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. The respondent further acknowledges that to the extent that Commission Advisory Opinion No. 456 provides a limited exception for the use of public funds to make available the complete recording of a meeting containing statements that might in isolation be considered

political advertising, the exception does not extend to the use of public funds to separately upload such statements as excerpts. The respondent agrees to fully and strictly comply with this requirement of law.

V. Confidentiality

This order and agreed resolution describes a violation that the Commission has determined is neither technical nor *de minimis*. Accordingly, this order and agreed resolution is not confidential under Section 571.140 of the Government Code and may be disclosed by members and staff of the Commission.

VI. Sanction

After considering the nature, circumstances, and consequences of the violation described under Section III, and after considering the sanction necessary to deter future violations, the Commission imposes a \$500 civil penalty.

VII. Order

The Commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of sworn complaint SC-32009176.

AGREED to by the respondent on this ____ day of _____, 2021.

Luis Zervigon, Respondent

EXECUTED by the Commission on: _____.

Texas Ethics Commission

By: _____
Anne Temple Peters, Executive Director