

September 2005 Legal Q&A

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Q: How were Texas cities originally created?

A: The evolution of the statutes that authorize the incorporation of a Texas city is somewhat convoluted. From 1836 through 1858, a time period that spanned the inception of the Republic of Texas and its annexation by the United States, the only way to incorporate a city was by a special act of the Congress of the Republic of Texas or the State Legislature.

Nacogdoches was the first town to be incorporated by virtue of a law approved on June 5, 1837. In addition to incorporating Nacogdoches, the 1837 law incorporated San Augustine, Richmond, Columbus, San Antonio, Houston, and twelve others. The special acts contained only ten sections, and were less than two pages long. They expressly spelled out the powers and duties of the cities they created. Under these special acts, a city could exercise only those powers expressly granted in the text of the act, or those necessary or implied from the express powers. Over the next ten years of the Texas Republic, the Congress of the Republic incorporated more than fifty towns in this manner, each of which had only the powers granted to it in the special act that created it.

After Texas became a state in 1845, the state legislature continued to incorporate cities by special act until 1912. The legislature also frequently amended or repealed the acts that governed the cities it created. (*Note: Much of the information in this Q&A comes from D. Brooks, *Municipal Law and Practice*, 22 Texas Practice Ch. 1 & T. O'Quinn, *History, Status, and Function*, Introduction to Title 28 of the TEX. REV. CIV. STAT. (Vernon 1963).*)

Q: When did Texas authorize the creation of "general law" cities?

A: In 1858, the first statute allowing incorporation under the general laws was passed. From 1858-1913, communities could incorporate either by special law or under the general laws.

The 1858 statute became the foundation for the Texas Local Government Code provisions relating to incorporation, powers, and duties of general law cities. The language of the current Local Government Code provisions is remarkably similar to the original statute. The statute allowed for the inhabitants of an area to petition the "Chief Justice of the County" for incorporation as a town or village. If the petition met the prescribed requirements, the justice ordered an election. If the results of the election were favorable, the justice ordered a subsequent election for a mayor and aldermen. The 1858 statute was amended in 1873 to reduce the number of inhabitants necessary to incorporate a community. Towns or villages incorporated under the 1858 statute and the 1873 amendment are generally classified as Type B cities today.

In 1875, the legislature passed a second law allowing for incorporation under the general laws. The 1875 statute allowed a city or town operating under a special law charter to adopt the general law form of government. The 1875 statute set the stage for what are now referred to as

Type A general law cities. Another statute, passed in 1909, allowed a city to adopt the commission form of government consisting of a mayor and two commissioners, which is the precursor to a Type C city. In 1911, yet another statute allowed any city, town, or village to change to a “city” (what we now know as a Type A city) if it met certain requirements.

Finally, in 1925, the legislature melded most of the laws relating to cities into Title 28 of the Texas Revised Civil Statutes. Title 28, entitled *Cities, Towns, and Villages*, evolved from the 1858 and 1875 statutes, as well as from various other statutes, including Title 17 (1879), Title 18 (1895), and Title 22 (1911). The Local Government Code, codified in 1987, did away with the distinction of city, town, or village and loosely replaced those terms with Type A, B, or C cities. Many minor differences, such as the method of filling vacancies and quorum requirements, exist in the operation of the different types of general law cities. Limits on the amount of ad valorem tax that may be levied, however, remain some of the most notable distinctions between the different types of cities. A Type B city is limited to twenty-five cents per hundred dollar valuation, a Type A city is limited to \$1.50 per hundred, a Type C city is limited to twenty-five cents or \$1.50 depending on population, and a home rule city is limited to \$2.50 per one hundred dollar valuation. *See* TEX. TAX CODE § 302.001, TEX. LOC. GOV’T CODE § 51.051, TEX. CONST. Art. XI, §§ 4, 5.

Q: When did Texas adopt the concept of “home rule” cities?

A: In 1874, the legislature passed a short law allowing voters to amend the special acts passed by the legislature. This law set the stage for the Home Rule Amendment to the Texas Constitution. In 1912, Texas voters passed the Home Rule Amendment, Article XI, § 5, which prohibited the incorporation of a city by special act. More importantly, the Home Rule Amendment gave a city with more than 5,000 inhabitants the power to adopt its own charter if approved by the city’s voters, thereby granting the power of self-government. Today, all cities in Texas are classified as general law or home rule.

Q: What is the basic difference between a general law city and a home rule city?

A: A general law city has no specific act that governs it, nor does it have an individual charter. Rather, the duties and powers of a general law city are governed by statutes, otherwise known as “general laws.” Upon incorporating, a city must look to the general laws of the state for any authority to act and any grant of power from the state.

When a general law city reaches a population of 5,001 inhabitants, it is authorized by Article XI, § 5 of the Texas Constitution to hold an election to adopt a home rule charter. Once a home rule charter is adopted, a city thereafter has the full power of local self-government. TEX. LOC. GOV’T CODE § 51.072. The words “home rule” mean exactly what they say, the power of a city to govern itself so long as charter provisions or ordinances are not inconsistent with state law. Home rule cities derive their power from the Texas Constitution and look to the state legislature only as a limit on that authority. In other words, home rule cities may do anything that is not specifically prohibited by state law. *Of course, there are many legal intricacies with regard to city authority. Thus, city officials should consult with legal counsel prior to adopting any regulation.*

Q: How can a general law city determine whether it is a Type A, Type B, or Type C city?

A: General law Type A and Type B cities have an aldermanic form of government, or city council, whereas a Type C city has a commission form of government, or city commission. Historically, the distinction between these two forms of government was that aldermen exercised legislative and limited judicial authority, whereas a commissioner was a person appointed or empowered to perform certain acts or exercise certain jurisdiction of a public nature. In modern times, the readily apparent distinction is that an aldermanic form of governing body in a Type A or B city consists of a mayor and, in most cases, five aldermen (although a general law city with a ward system will have an even number of aldermen), whereas a commission form of governing body in a Type C city consists of a mayor and two commissioners.

The difference between a Type A and Type B city is less apparent. A city with less than 600 inhabitants and no manufacturing establishment that incorporated as an aldermanic form of government has no option but to incorporate as what is now known as a Type B city. However, once its number of inhabitants exceeds 600, the city may adopt Type A status. Similarly, a city that incorporated as a Type A city would not lose its Type A status if its number of inhabitants falls below 600. Accordingly, one may not determine the city's type merely by population.

As mentioned above, a city's tax rate can provide a clue to its status, because a Type B city's tax rate may not exceed twenty-five cents per hundred dollars valuation. Therefore, a city with a tax rate that exceeds twenty-five cents certainly should be a Type A city. Nevertheless, because a Type A city may have a tax rate of less than twenty-five cents, this distinction is not dispositive of the question.

Other differences include the manner of filling vacancies and the length of the term of an alderman appointed to fill a vacancy. However, the only reliable method for determining the difference is to examine the city's order of incorporation, which should be on file with the county clerk. For a city incorporated between 1925 and 1987, an order stating that the city incorporated pursuant to Title 28, Chapters 1 through 10, is a Type A city, whereas a city that incorporated pursuant to Title 28, Chapter 11, is a Type B city. A city that incorporated after September 1, 1987, pursuant to Chapter 6, Local Government Code, is a Type A city, whereas a city that incorporated pursuant to Chapter 7, Local Government Code, is a Type B city. Having determined that a city incorporated as Type B, however, it is still necessary to ascertain whether the city council subsequently adopted Type A status, which was allowed by law if the city's number of inhabitants ever exceeded 600 or it had a manufacturing establishment. For a city incorporated before 1925, the determination of type requires more extensive research. Those cities may call the TML Legal Department at 512-231-7400 for assistance.