

## **Legal Q&A**

**By Scott Houston**, TML Director of Legal Services

### **What is the procedure for removal of a member of the governing body of a home rule city?**

A few home rule charters have unique provisions, but the most common process for removal in a home rule city is known as “recall.” Recall is a process by which local voters can oust members of the city council before the expiration of their terms through a petition and election on the question. The process is found in 93 percent of the 351 home rule charters in Texas. It is an inherent home rule power that is reserved for exclusive use by local voters, and it is not available to voters at any other level of Texas government, including the state or general law cities. Neither the Texas Constitution nor any statute expressly authorizes recall. The power is unique to home rule cities and may only be used when authorized by charter.

### **How does the recall process work?**

The eighth and latest edition of the National Civic League’s (NCL) model city charter provides a comprehensive section that addresses various issue relating to recall, including general authority, commencement of proceeding, petitions, procedures for filing, action on petitions, and the results of the election. The NCL model charter is available at [www.ncl.org](http://www.ncl.org). Many Texas cities’ recall provisions are similar to the NCL model charter provisions, but they have usually been slightly modified to meet the needs of each individual city.

The process commonly works like this:

- A petition is submitted pursuant to the recall provisions of the city’s charter and Chapter 277 of the Texas Election Code. (Chapter 277 prescribes petition requirements for a petition submitted pursuant to a law other than the Election Code.) The petition specifies the officer(s) sought to be removed and the grounds for removal. Grounds for recall vary according to individual charters, but “incompetency, misconduct, or malfeasance in office” are common.
- The city secretary verifies the petition form and the signatures. Many charters require a number of signatures equal to a percentage of the registered voters in the city or single-member district, or a percentage of those who voted in the last election for that officer or for mayor.
- If a recall petition is certified by the city secretary and the member whose removal is sought does not resign within a certain period of time as provided in the charter, the council must order a recall election for the earliest date allowed by law. The earliest date allowed by law must be on the uniform election date in May or November.
- If an election is held, and the majority of the votes cast at the recall election are in favor of the removal of the councilmember recalled, the councilmember recalled is usually

deemed to have vacated his office at the time and date the council votes to approve the ordinance declaring the results of the election.

### **Do any charters limit when and how the recall process can be used?**

Yes. Many charters limit when the power of recall may be used. For example, some charters provide that: (1) a recall petition may not be filed against a councilmember within six months of the date he or she takes office; and (2) a councilmember is not subject to more than one recall election during any one term of that office.

According to a 2008 TML study, fifty-five percent of charters give newly elected mayors or councilmembers a few months on the job before they can be the subject of a recall petition. The most common “grace period” for newly elected officials is six months, though the period ranges from one month to one year.

To save election costs, twelve percent of charters provide that recall petitions will not be honored within a specified period before the person in question will come up for election.

### **What if the city council refuses to call an election on a valid recall petition?**

Most charter provisions on recall state that if the mayor or city council does not call a recall election when presented with a valid petition, the county judge shall discharge these duties. Still other charters attempt to place this duty on a district court judge. These requirements may present problems, because a city does not have the authority to prescribe duties for a county or district judge.

The better remedy may be for the charter to provide that any citizen could file with the appropriate court for a writ of mandamus to force the city to call the election. For example, in *Blanchard v. Fulbright* 633 S.W.2d 617 (Tex. App.—Houston [14th Dist.] 1982), the court concluded that the City of Angleton charter did not grant discretionary authority to the city council to decide whether or not to call a recall election. The charter simply provided for the recall petitions to be presented to the city council by the city secretary. The court concluded that if the citizens of Angleton had desired that a delegation of authority and duty to review the factual sufficiency of the petitions be reserved in its city council, they could have easily so provided in the charter. *See also Young v. State ex rel. Hughes*, 87 S.W.2d 520 (Tex. Civ. App. 1935). (“We do not believe that under such circumstances as appear in this record and under the plain provisions of the city charter the board of aldermen have any discretion in the matter of calling the recall election when the petitions are properly filed with the clerk and the clerk has certified to the sufficiency thereof and filed same with the board, as was done in this case.”)

On the other hand, in *Burns v. Kelly*, 658 S.W.2d 731 (Tex. App. 1983), the court concluded that the council had discretion to reject a petition based on that city’s charter language. The court pointed out that the City of Colleyville charter required the following for a petition to be sufficient to impose the duty to order a recall election:

*The recall petition mentioned above must be addressed to the Council of the City of Colleyville, must distinctly and specifically point out the ground or grounds upon which such petition for removal is predicated, and if there be more than one ground, such as for incompetency, misconduct, or malfeasance in office, shall specifically state each ground with such certainty as to give the officer sought to be removed, notice of the matters and things with which he is charged ... Charter, sec. 5.03. (Emphasis added.)*

The petition presented to the city was predicated on, among other things, the “grounds” that “Councilman Kelly has repeatedly been mean, overbearing and obnoxious in forcing himself, his thoughts and verbosity upon citizens for the purpose of creating unrest and dissension within the City of Colleyville.”

After reviewing the petition, the court concluded that the so-called “grounds” for the recall of Councilman Kelly were, as a matter of law, insufficient under the charter to impose a *clear* duty upon the city council to order the election. The application for writ of mandamus was thus denied.

### **What if a recall leaves a council without a quorum?**

That is an interesting question. A few charters expressly provide for a different quorum for the purpose of filling vacancies in the case of a massive, successful recall. For example, one charter provides that “[i]f four or more councilmembers are recalled at one time, the remaining member or members constitute a quorum solely for the purpose of filling sufficient vacant positions by appointment as provided in this charter to provide for a quorum of four members.”

Attorney general opinion GA-0175 (2004) answered what happens in a city without such a charter provision. The requestor in that opinion asked whether each of the five councilmembers who were removed by the voters “continue to serve in office under Article 16, Section 17 of the Texas Constitution until his successor is elected and qualifies at the next regular election in May of 2004.” That constitutional provision declares that “[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.” In *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.—San Antonio 2003, pet. denied), the court held that “the right to holdover does not reside in one who has been removed from office,” and that the ordinance in question “effectively removed appellants from office.”

The recall election in GA-0175 left only two city council seats occupied. The attorney general concluded that “[b]ecause the municipal charter of Haltom City defines a quorum as requiring the presence of at least five members of its council, the municipal council of Haltom City cannot convene a quorum until at least three of its five vacancies are filled by special election in May 2004.”

### **How often is the recall process used in Texas, and how often is it successful?**

According to a 2008 TML survey, only twelve cities had reported recall elections in the previous five years, with disappointing results for petitioners. Of the 28 individuals who were subject to recall, only 12 recall elections resulted in removal. The remaining 16 recall elections failed.