

Legal Q & A

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Q What is a home-rule city charter?

A A home-rule city charter is the fundamental law of a home-rule city. Its relationship to the city is similar to the Constitution and the laws of the State. However, a city charter may not contain any provision inconsistent with the Texas Constitution or state law. Tex. Const. Art. XI, §5.

Q Why would a city want to become home-rule?

A The Texas Constitution, in Article XI, Section 5, grants the power of local self-government to a home-rule city. A home-rule city may act in a way that is authorized by its charter and not prohibited by state or federal law. This is the opposite of a general law city, which must look to state law for the authority to act. A Home rule-city has broad powers, and its city charter is interpreted by reading it as a whole and harmonizing its various provisions as far as possible, considering every word, phrase, and expression as if each had been deliberately chosen and used for a purpose. *Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986). A court will presume a city charter provision valid, and courts will not interfere unless the provision is unreasonable and arbitrary, amounting to a clear abuse of municipal discretion. *See City of Brookside Village v. Comeau*, 633 S.W. 2d 790, 792 (Tex. 1982). However, if a city charter provision attempts to regulate a subject matter that has been preempted by state law, the charter provision is unenforceable to the extent it conflicts with the state law. *See Dallas Merchant's & Concessionaire's Ass'n*, 852 S.W. 2d 489, 491 (Tex. 1993). To preempt a subject matter, the Legislature must do so with "unmistakable clarity." *Id.* Additionally, a court will not hold a state law and a city charter provision repugnant to each other if the court can reach a reasonable construction leaving both in effect. *Id.* The attorney general has opined that a city attorney bears primary responsibility for interpreting a city's charter. *See* Tex. Att'y Gen. Op. No. JM-805 (1987), at 1 n.1.

Q When can a general law city become a home-rule city?

A Once a general law city has more than 5,000 inhabitants, it is authorized to hold an election to adopt a home-rule city charter. Tex. Const. Art. XI, §5. Although the Texas Constitution and state law do not define the term "inhabitants," the Texas Supreme Court has determined that the governing body has the authority to determine the number of inhabitants in a city and that the census count does not necessarily control the determination of population for the purpose of adopting a home-rule charter. *State v. City of La Porte*, 386 S.W.2d 782, 785 (Tex. 1965). Absent proof of fraud, bad faith or abuse of discretion, the governing body's ascertainment of the number of inhabitants in the city is presumed to be valid. *Id.*; *but see City of Granite Shoals v. Winder*, 280 S.W. 3d 550, 554 (Tex. App.–Austin 2009, pet. denied) (finding that the city failed to make a good-faith effort to comply with the inhabitancy requirement when it willfully manipulated its "water tap" calculation in order to produce the desired figure and its determination of inhabitancy was reached despite - or in conscious disregard of - evidence that the city's actual inhabitancy figure was far below 5,000). As such, a city with a population, according to the federal census, that is less than 5,000 should consult with a population expert to help the city determine the number

of inhabitants in the city. Nonetheless, a city that has adopted a home-rule city charter does not lose its home-rule status and may still amend its charter if the number of inhabitants in the city falls below 5,000. Tex. Const. Art. XI, §5.

Q What is the procedure for adopting an initial city charter?

A A city charter is adopted when it is approved by a majority of the qualified voters of the city who voted at the charter election. Tex. Local Gov't Code §9.005. The first step to adopting an initial home-rule city charter is the selection of a charter commission to draft a proposed charter. *Id.* §9.002. There are four distinct ways in which a charter commission may be selected. First, city council may select the charter commission. *Id.* §9.002(d). Second, the charter commission may be selected at a mass meeting. *Id.* Third, the mayor may appoint the charter commission. *Id.* Fourth, a charter commission may be selected by voters at an election. *Id.* §9.002(a).

This last method requires the city council, by a two-thirds vote of its membership, to adopt an ordinance that provides for the submission to the voters the question of whether a commission to frame a new charter should be formed. *Id.* If the city council does not pass such ordinance voluntarily, it may be required to do so if it receives a petition signed by at least 10 percent of the qualified voters of the city. *Id.* At the same election, the ballot must also provide for the election of a charter commission from the city at large to draft the charter if the majority of the qualified voters approve the question of choosing a charter commission. *Id.* §9.002(c). The charter commission must consist of at least 15 members, but if the commission is made up of more than 15 members, it may not have more than one member for each 3,000 inhabitants of the city. *Id.* Additionally, the ballot to elect city charter commissioners may not contain any party designation. *Id.*

Q When is an election to select a charter commission held?

A The election to select the charter commission must be held on the city's next general election (must be on an authorized uniform election date) scheduled after the 30th day but on or before the 90th day after council adopts the ordinance ordering the election. *Id.* §9.002(b). If no general election is scheduled during that time period that allows sufficient time to comply with other requirements of the law, the election shall be ordered for the first authorized uniform election date that allows sufficient time to comply with other requirements of the law and that occurs after the 30th day after the date the ordinance is adopted and published in a newspaper that is published in the city. *Id.*; Tex. Elec. Code §41.001.

Q What happens after a charter commission is selected?

A After the charter commission is selected, the charter commission must prepare a charter, and to the extent practicable, the charter shall be prepared so that each subject may be voted on separately. *Id.* §9.003(c). Once the proposed charter is prepared, city council must then submit it to the qualified voters of the city for a vote. *Id.* §9.003(a). City council shall also order the city clerk or city secretary to mail a copy of the proposed charter to each registered voter of the city before the 30th day before the date of the charter election. *Id.* §9.003(b).

Q When is an election to vote on a charter held?

A An election to vote on the charter must be held on the first authorized uniform election date that allows sufficient time to comply with other requirements of law and that occurs on or after the 40th day after the date the charter commission completes its work. *Id.* Additionally, before the 30th day before the election date, city council shall order the municipal clerk or the city secretary to mail a copy of the proposed charter to each registered voter of the city. *Id.* §9.003. Voters may simultaneously elect persons to hold office under the new charter while also voting on the charter election. *Id.* §9.006. A city charter is adopted when it is approved by a majority of the qualified voters of the city who voted at the charter election. *Id.* §9.005.

Q Can a city amend its charter?

A Yes. The Texas Constitution empowers a city to amend its charter in any manner which it may desire, so long as it does not conflict with the Constitution and state law. Tex. Const. Art. XI, §5; *Davis v. City of Taylor*, 67 S.W. 2d 1033 (1934). Approval of a charter amendment requires approval by a majority of the qualified voters of the city who vote at an election held for that purpose. Tex. Local Gov't Code §9.005(a). Additionally, the attorney general has opined that a home-rule charter cannot provide that it may be amended by an ordinance alone rather than by voter approval. Tex. Att'y Gen. Op. No. GA-433 (2006).

Q How is a charter amendment initiated?

A A charter amendment may be initiated by city council, which, on its own motion, may order an election for the purpose of submitting a proposed charter amendment to the qualified voters of the city for a vote. *Id.* §9.004(a). Conversely, city council is required to order such an election if it receives a proposed charter amendment that is supported by a petition signed by at least five percent of the qualified voters of the city or 20,000 qualified voters, whichever number is less. *Id.*; *But see, City of Galena Park v. Ponder*, 503 S.W. 3d 625, (Tex. App. – Houston [14th Dist.] 2016) (the manner of submission of the election petition materials must conclusively demonstrate that the petition submitted was the one supported by the signatories). When the requirements of a petition are met, the proposed amendments must be put to a vote, and the duty of the members of city council to do so is a ministerial one. *See Coalson v. City Council of Victoria*, 610 S.W. 2d, 744, 747 (Tex. 1980); *Green v. City of Lubbock*, 627 S.W. 2d 868, 872 (Tex. App. – Amarillo 1981); *In re Roof*, 130 S.W. 3d 414 (Tex. App. – Houston [14th Dist.] 2004) (city secretary cannot refuse to submit petition to city council because of alleged conflict with state law). Further, State law provides that the proposed amendment may not contain more than one subject. *Id.* §9.004(d). However, one court has determined that this provision does not expressly prohibit a charter amendment petition from proposing more than one amendment, finding that the language of the ballot proposition is not the responsibility of the petitioner. *See City of Galena Park*, 503 S.W.3d at 634-35.

The city is also required to prepare the ballot in such a way that a voter may approve or disapprove any one or more amendments without having to approve or disapprove all of the amendments. *Id.* §9.006(e); Tex. Election Code §52.072(a).

Q Is a city required to appoint or elect a charter review commission to prepare a charter amendment?

A State law does not require that a charter review commission be appointed or elected to prepare a charter amendment. *Id.* §9.004(a). Additionally, the Texas Supreme Court has concluded that charter amendments do not require the appointment or reelection of a city charter commission. *Yett v. Cook*, 281 S.W. 837, 838 (Tex. 1926). But, some charters require the selection of a charter review commission, and most cities prefer to utilize one. If the charter contains provisions for utilizing a charter review commission, the city must follow those provisions. Otherwise, city council may establish a charter review commission, determine the size of such a commission, and is free to accept, reject, or modify any and all recommendations made by the commission.

Q When can a city hold a charter amendment election?

A City council must order a charter amendment election be held on the first authorized uniform election date prescribed by the Election Code or on the earlier of the date of the next municipal general election or presidential general election. *Id.* §9.004. The election date must allow sufficient time to comply with other requirements of law and must occur on or after the 30th day after the date the ordinance ordering the election is adopted. *Id.*

Q What notice must the city provide regarding a charter amendment election?

A The city must publish a notice of a charter amendment election in a newspaper of general circulation that is published in the city. *Id.* The notice must: (1) include a substantial copy of the proposed amendment; (2) include an estimate of the anticipated fiscal impact to the city if the proposed amendment is approved at the election; and (3) be published on the same day in each of two successive weeks, with the first publication occurring before the 14th day before the date of the election. *Id.*

Q When does a charter or charter amendment go into effect?

A A charter or charter amendment goes into effect when the city council enters an order in the records of the city declaring that the charter or charter amendment is adopted. *Id.* §9.005. As soon as practicable after the city adopts a charter or amendment, the mayor or the chief executive officer of the city shall certify to the secretary of state an authenticated copy of the charter under the city's seal showing the approval of the charter or amendment by the voters of the city. *Id.* §9.007. One court has determined that the mayor's role in certifying the charter election is ministerial and not dependent on whether the governing body has entered an order declaring that the charter is adopted. *In re Robinson*, 175 S.W. 3d 821 (Tex. App. – Houston [1st Dist.] 2005, no pet.).

The secretary of state is required to file and record the certification in the secretary of state's office in a book kept for that purpose. *Id.* §9.007. Also, the city secretary or another officer performing similar functions to those of a city secretary shall record the adopted charter or amendment in the city secretary's or officer's office. *Id.* §9.008. If the charter or amendment is not recorded on microfilm, it must be recorded in a book kept for that purpose. *Id.* Recorded charters or

amendments are public acts, and a court is required to take judicial notice of such charter or amendment without requiring proof of their provisions. *Id.*

Q How often may a city amend its charter?

A The Texas Constitution provides that a city charter shall not be altered, amended or repealed more often than every two years. Tex. Const. Art. XI, §5; *Berka v. City of Lewisville*, 818 S.W. 2d 891, 892 (Tex. App. – Ft. Worth 1991) (plain language the Constitution prohibits the holding of an election to amend the city charter within a two year period after last charter election irrespective of whether the amendment would be effective outside the two-year period). The term “year” refers to a calendar year, which equals 365 days or 366 days in a leap year. Tex. Att’y Gen. Op. No. JM-466 (1986).

Q Must a city charter commission be selected if a city wants to adopt a completely new charter?

A Yes. When a city that has previously adopted a charter decides to completely rewrite its charter and adopt a new charter, a charter commission must be elected. Tex. Local Gov’t Code §9.002(a). The definition of a “completely new charter” (as opposed to the city’s first charter) has not been litigated, but various cases have concluded that the amendment of some charter provisions, but not all, constitutes a charter amendment as distinguished from a new charter. *See Ex rel City of West Orange City v. City of Orange*, 300 S.W. 2d 706, 711 (Tex. App. – Beaumont 1957); *Yett*, 281 S.W. 837 at 838.