

THE CHARTER REVIEW PROCESS

Texas City Attorney's Association

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I. Introduction

In late 2014, the City Council of the City of Palestine appointed a citizen charter review committee. The Committee was directed to review the current charter and make recommendations for appropriate changes. The Committee was directed to respond to the council by January 2016 with its recommendations.

As City Attorney, I was asked to provide guidance and advice to this group. This started with a presentation at a special open meeting for citizens to explain what a charter was and what the process would be. Then, I led a meeting for the Charter Review Committee for the purpose of adopting its own rules of procedure and electing officers.

The process we experienced led to some surprising results, an appreciation for possible pitfalls, and a deeper understanding of the charter process.

In this paper, I will start out with some basic information about charters and the Texas structure for adopting and revising charters. This information will be much more basic than most of the readers will require. One of the purposes, however, is to give you as City Attorney a document that will be a useful outline for communicating these basics to your city client or to citizens who wish to understand the nature of home rule city government.

II. What is a "Charter?"

The fundamental governing document of a home rule city in Texas is its charter. I have frequently described the charter as the city's constitution. It is adopted by popular vote, and it effectively creates the municipality and defines its function.

Cities in Texas are divided into two basic classes: home rule and general law. General law cities may fall into one of three subclasses, but they are united by the common characteristic: their structure and powers are defined by state statute. Home rule cities, on the other hand, are defined by the charter that is adopted by the citizens of that city. Accordingly, the charter may create a "strong mayor" system, where the mayor is the city's chief executive officer, or a council-manager system, where the city council acts as the "board of directors" of the city, while the appointed city manager is the chief executive officer, appointing and discharging subordinates.

Although adoption (or revision) of a charter by citizen vote is now a defining characteristic of charters in Texas, it was not always so. The first congress of the Republic of Texas granted 18 charters for municipalities. In this way, the creation of municipalities was similar to today's general law cities, because the city was created and defined by the legislature. But there were two significant differences. First, the charter could be unique to the needs and desires of the particular city being created: City A might

have single member districts, while City B would elect its council at large. Second, at least one of the charters granted the broad powers that are the other defining characteristic of today's home rule city: the City of San Augustine, in 1837, was granted a charter that empowered the City to enact any ordinance, so long as it did not conflict with the laws or constitution of the Republic.

In the decades after the State of Texas joined the Union in 1845, the legislature adopted laws that permitted small towns to incorporate under generally applicable laws—the first general law cities—and provided for local ratification or amendment of some legislatively-adopted charters.

In 1876, the current Texas Constitution was adopted. It provided that all cities with a population of less than 10,000 would be governed by general law, and all cities with a population of 10,000 or more would be subject to special laws adopted by the legislature. While this dividing line was lowered to 5,000 in 1909, the system began to be unworkable. In 1911, about 25 percent of the bills considered by the legislature involved adopting or revising municipal charters.

The legislature reacted by proposing an amendment to the Texas Constitution that was adopted by the citizens in 1912. Article XI, Section 5 of the Texas Constitution provides that any city with more than 5,000 inhabitants may adopt a charter by a majority vote of the qualified voters. The property tax rate was limited and the charter could not be amended more often than every 2 years. Finally, however, the only limitation on the powers of the city to be granted by the charter was that the charter could not contain any provision in conflict with state law or the Texas Constitution.

The new system was immediately popular. Before the legislature had even adopted enabling legislation, 24 cities had drafted either charters or amendments to existing charters. In less than 10 years, 65 cities had adopted charters. In 2010, there were 351 cities in Texas that had adopted charters as home rule cities.

There is one quirky note. According to the Texas Constitution, a city must have “more than 5,000 inhabitants” to be eligible for home rule status. Under the statutory construction law passed by the legislature, the word “population” is defined to mean the population of a city “as determined by the most recent federal census.” CITE. However, the constitution uses the term “inhabitants.” Accordingly, this legislated rule of construction is inapplicable. How is the number of inhabitants calculated? By the city council, whose decision will be upheld unless it is clearly unreasonable. Population experts agree that the federal census, which only enumerates actual persons found as opposed to estimating the number of non-respondents, undercounts the number of people who actually live in a given area. Thus cities with official populations of less than 5,000 will often seek to adopt a new charter, based on a study by a population expert. (This same quirk applies, by the way, to the definition of a city's ETJ. TEX. LOCAL GOVT. CODE ANN. §42.021.)

III. How are Charters Adopted?

A. Charter Commission

The procedures for adopting a charter are found in Chapter 9 of the Texas Local Government Code. The first step is the creation of a Charter Commission. A Charter

Commission must have at least 15 members. It may have more than 15 members, provided that there is no more than one member for each 3,000 in population. Practically, this means that there will be no more than 15 members of a commission when enacting the original charter for a new home rule city, because it is difficult to imagine a city of more than 45,000 adopting home rule for the first time. However, this process may also be used for adopting an entirely new charter (as opposed to adopting amendments).

So how is the charter commission chosen? Essentially, it is chosen one of four ways:

- the governing body selects the commission;
- a mass meeting selects the commission;
- the mayor appoints the commission; or
- the charter commission is elected.

The fourth method requires (1) ordering an election by 2/3 vote of the council, (2) an election question on whether a charter commission shall be chosen; and (3) an election of the members of the charter. The council is required by the statute to order such an election if presented with a petition signed by 10% of the qualified voters in the municipality.

The fourth method is the required method if the new charter is being proposed to replace an existing charter.

The Charter Commission, if properly constituted, then prepares a city charter to be presented to the voters for approval. If approved by a majority of the voters, it is adopted. The charter is to be prepared so as to allow, to the extent practicable, a separate vote on each subject matter. (This provision seems to be unworkable. What happens if the voters approve 10 of 11 articles of a new charter, but do not approve the article that sets the number of council members and whether they should be elected from separate districts or at large? Is the city created but without a city council? If so, how does it operate?)

B. Charter Election

The Charter must be approved by the voters in order to go into effect. The statute does provide for the concurrent election of officers under the new charter at the same election. The election is to be called at least 40 days after the charter commission completes its work, but is to be held on the next authorized uniform election date after that date.

The city clerk is required to mail a copy of the proposed charter to each registered voter in the municipality at least 30 days prior to the election.

IV. How are Charters Changed?

Once a charter is created, it may be changed or amended. One option, of course, is to write an entirely new charter through the charter commission process. Alternatively, the voters may be presented with proposed amendments to the charter. Unlike the charter commission process, amendments may be proposed by a less formal process.

One crucial limitation exists, however, on the ability to propose changes to a city charter. Under the constitutional provision adopted in 1912, the charter may not be changed more often than every 2 years. As a practical matter, it is my experience that this tends to discourage making quick, simple changes to the charter due to the concern that fixing a small problem now may eliminate the chance to fix the larger unknown problem that is lurking around the corner.

A. The Proposal Process

1. Council Action

The simplest process is for the city council to submit, “on its own motion,” a proposed charter amendment. No further formalities are required. The city council can, by majority vote, order a charter amendment election and propose the amendment.

2. Citizen Petition

The statute provides that the council “shall” submit a proposed amendment to the voters if the amendment is supported by a petition signed by 5% of the qualified voters in the city (or 20,000 voters, whichever is smaller).

3. Review Committee

Although there is no specific provision in the statute, a fairly common process used by cities is to informally mirror the charter commission process provided for adoption of a new charter. This is the process used by the City of Palestine. In effect, this committee can only make a recommendation to the council. The council must forward this recommendation to the voters. If no council vote proposing the recommendation of the committee is taken, the proposed changes will not be presented to the electorate.

B. The Approval Process

The amendment must be approved by the voters before it may go into effect. The election is to be held at least 30 days after the ordinance proposing amendments is adopted, on the next general municipal or presidential election date.

Notice of the election is to be published at least twice on the same day of the week for two successive weeks. The notice must include a substantial copy of the proposed amendment and include an estimated fiscal impact of the change. Each amendment must contain only one subject.

V. Areas to be considered

When I started the process with the City of Palestine, I provided a list of potential areas of changes that could be considered. This list demonstrates the wide range of topics that are covered by a city charter. Further, these areas may be drastically changed (e.g., to either introduce or eliminate initiative or recall) or may be fine-tuned (e.g., to adjust the number of signatures necessary to begin the initiative or recall process).

A. General Powers of City

1. “Full Power of Local Self-Government”
2. Enumerated powers

Many older charters have listed powers which are anachronistic. For example, the City of Palestine charter had a provision

empowering the city “to regulate theatres, moving picture shows, tenpin alleys, vaudeville shows, and all places of public amusement.”

3. General or enumerated

The revision of the anachronistic powers may prove unnecessary if the charter grants the full power of local self-government or all powers not inconsistent with state law or the state constitution. Many charters have both types of provisions.

4. Annexation

The mechanisms of annexation are defined, and therefore preempted, by State Statute. While this may be an appropriate place to grant general power consistent with state law, the power of annexation is a power that is viewed by many with skepticism, if not alarm. Nevertheless, that power should generally not be a concern of those voting to adopt the charter or charter amendment—they have already been annexed

B. Governance Structure

1. Strong Mayor

2. Council-Manager

Virtually all home rule cities in Texas are either “strong mayor” or council-manager cities. This may, in fact, be one of the more fundamental debates regarding the most efficient structure of city government. While there are other options besides these two options (such as the commission system, where the city commissioners act not only as a board of directors but as administrators of individual departments in the city), they appear to be primarily older systems that have survived to today rather than newly chosen systems. In fact, research has shown that almost all cities that are technically commission cities have (by council action) created a city manager position and do not operate a traditional commission form of government.

C. City Council

1. Number of Council Members

2. Single-Member Districts/At-large

3. Term of Office

The structure of the council is one of the most basic and powerful provisions in the charter. Since the 1970s, the question of single-member districts has also been a controversial issue. Many feel that a city council with all council members elected at large is discriminatory in effect because the majority bloc can elect 100% of the council when, perhaps, the bloc represents only 60% of the electorate. On the other hand, defenders of the at-large system argue that a minority group will have greater power if they have a say in electing each of the council members, rather than just one or two seats on a seven- or nine-member council. One thing to be aware of is that the number of council members or the at-

- large/single-member mix may be the result of court order that is still binding on the city.
4. Term Limits
Another area which may elicit controversy is term limits. Typically, this is a policy question that has no legal aspect. There is no legal basis to either require or prohibit term limits.
 5. Qualifications
 - i. Age
 - ii. Residency
 6. Disqualifications
 - i. Debt
 - ii. Convictions
 - iii. Misconduct
 - iv. Absences
 7. Who is judge of qualifications?
Typically, the charter provides that the council is the judge of the qualifications of its own members. In fact, this is likely the default provision if the charter is silent.
 8. Vacancies
 9. Conflicts of Interest
Often the conflict of interest provisions in a charter may be more strict than those provided by state law, which is specifically permitted by state laws on conflicts of interest. Sometimes, however, the provisions are so strict that they are not well-enforced, so either a more realistic standard or a general awareness and agreement to abide by the strict standards may be advisable.
 10. Frequency of Meetings
 11. Open Meetings
Generally, compliance with state law is all that is necessary (and is in any event required). There may, however, be a requirement that is more broad than state law (e.g., applicability to advisory boards). It is also important to ensure that state law permitted exceptions (such as for attorney-client consultations) survive any charter language that may be more strict than state law.
 12. Passage and publication of Ordinances
The requirements for publication of ordinances (in newspapers? online?) should be reviewed. Also, some charters have more stringent requirements for passage of ordinances. For example, I have seen requirements that four affirmative votes are required for council action, even if a 3-2 vote with two absences would otherwise be sufficient.
 13. Elections
 - i. Plurality or Majority (Runoffs)
While a majority vote is commonly required in Texas, this method has also been criticized as having a discriminatory effect. On the other hand, if multi-candidate races are

common, it could pose problems if a candidate takes office where 75% of the voters voted for a different candidate.

ii. Other voting methods

In some general law cities, all candidates for council will run in a single race for more than one open seat, and the top vote-getters will be declared winners. Such a system, among others, could be adopted for an at-large council system by charter provision. In that instance, it should be defined whether each voter gets a single vote or a number of votes equal to the number of positions to be filled.

D. Mayor

1. How selected

i. Elected at-large

ii. Selected by Council

The Mayor's position is usually elected by the voters as a separate office. However, in some cities the city council elects one of its members as the Mayor.

2. Powers of Mayor

The powers of a Mayor can vary dramatically based on the Charter's provisions. Obviously, in a Council-Mayor system, the Mayor will typically act as the CEO of the city and will have broad powers to appoint department heads, hire and fire employees, and set budgets. Conversely, if the Mayor is simply designated by fellow councilmembers, the powers of the office may be largely ceremonial and procedural – presiding over meetings, signing proclamations, etc. There may be specific duties allocated to a mayor, such as signing contracts, deeds, or other official documents, or appointing members of committees. It should be noted, however, that some statutes confer specific duties on the Mayor (such as emergency declarations), while others may confer duties on officials other than the Mayor, overriding the charter provision (such as the requirement that the city manager appoint the members of the civil service commission).

E. City Officials

1. City Manager

An integral part of defining the council manager form of government is the definition of the duties of the manager. This provision will typically be detailed and exhaustive.

2. Department Heads

The charter may have a fairly detailed list of department heads, along with a list of duties and areas of responsibility, as well as the qualifications of those offices. It is probably advisable to have some language granting the city leeway to combine departments, have a single head for multiple departments, or allow the appointment of a candidate that does not meet the usual qualifications.

3. City Secretary
The office of City Secretary is one that is commonly, but not universally, appointed by the council directly. Other cities have the City Secretary appointed by the City Manager
 4. City Attorney
The office of City Attorney is one that is usually appointed by the council directly.
 5. Other Officials
 - i. City Auditor
 - ii. City Physician
 - iii. City Engineer
 6. Selection Process – for Department Heads or City Officers
 - i. Appoint by mayor, city manager, or council?
 - ii. If not appointed by council, is the approval of council required?
 - iii. Who has the power of termination, and does termination require council approval?
- F. Initiative, Referendum, Recall
One of the more fertile areas for controversy and debate will be found in charter provisions relating to initiative, referendum, and recall. Once these provisions, which retain powers in the electorate, are included in a charter, it will be difficult to remove them. However, the details of how the process works and what the hurdles are to accessing the process may be appropriate for revision. However, if the process is unused, the city may be in a poor position to judge whether it should tighten access to citizen initiatives or whether the petition requirements are unduly onerous.
1. What are appropriate subject matters of initiative and referendum?
Typically some subject matters are “off limits,” such as tax matters and perhaps some quasi-judicial matters such as zoning appeals.
 2. How many signatures are required?
For recall, the number of signatures may be based on how many voted in the election for that office in the last election or how many are registered to vote. For referendum or initiative, the number is likely based on the number who voted or the number who are registered. The percentage of the base number will vary based on whether the base number is narrower or broader. For example, if 15 percent of the people who voted in the last election can order a recall, then the supporters of a defeated candidate may be able to thwart the will of the majority by immediately requiring a recall election.
 3. When can there be recall?
There are often limits (1) immediately after an election; (2) immediately after an unsuccessful recall; or (3) immediately before an election when the recall power cannot be used. The last time period should be carefully crafted to avoid the situation where the

recall petition is set for vote at the same time the candidate subject to recall is up for reelection.

4. Are the grounds for recall defined or limited?
Requiring a recall petition to set forth grounds for recalling the council member could discourage frivolous recall efforts and encourage a recall effort to define the basis of their opposition. While this will not typically provide any legal basis for overturning the recall effort, it may provide an effective deterrent to some weakly supported efforts.
5. Can Council defeat initiative or referendum by taking action? Is there a committee that can agree to slightly changed language?
Some charters provide that the city Council can avoid a referendum or initiative election by repealing or adopting the provision at issue. In some cases, the charter will even provide that a committee of petitioning citizens can negotiate with the council to reach a compromise on the key issue, and not therefore limit the council's action to the specific language in the original petition.

VI. Pitfalls and Realities

A. Role of the attorney

When the City Council appointed a new charter review committee, the fact that the committee had no template to follow meant that I, as City Attorney, had to step forward and provide that template. This was an appropriate role, because providing a set of decisions to be made (e.g., officers, frequency of meetings, form of a final report, quorums, etc.) gave the citizen members of the committee the framework for organizing the ongoing operations of the Committee.

The pitfall of this process, however, was that on many occasions, the Committee turned to the city Attorney for the purpose of guidance on issues that were not, for the most part, legal. The dangers of accepting this expanded role are clear, but at the same time the relatively unsophisticated and inexperienced citizen committee desired this assistance. In addition, the committee often was seeking some idea whether the charter provision they were considering was common in other cities. The best solution, in my opinion, is to consistently remind the committee members that the decisions are theirs, to try to offer the guidance in terms of identifying issues and potential problems rather than presenting recommendations, and to speak up only when necessary.

B. Fixing yesterday's problem

Another of the problems with the citizen committee is that many of the committee members may have volunteered because they became active in city affairs because of a single problem they identified. Perhaps they were opponents of the city manager, so they now are amenable to suggestions about limiting the city manager's authority. Perhaps they opposed the latest tax increase, so they seek to make such increases harder in the future. Perhaps they supported the Chief of Police who was recently terminated, and therefore want to make the Chief of Police now directly reportable to the Council as a whole. In any event, this single issue can cloud the committee member's judgment regarding the long-range wisdom of the change they propose.

This syndrome can also manifest itself by trying to put things in the charter that are properly the subject of ordinances or council properties. For example, if a committee member is concerned about a recent failure by the city manager to keep the council apprised of budgetary matters, a suggestion that the charter require monthly or quarterly budget updates may be made. This may be good policy, but it is a detail that is probably not appropriate for the Constitution of the city.

VII. Conclusion

The Charter Review process is an opportunity to reexamine some of the fundamental ways the city operates. The participation of citizens in that process is, in my opinion, entirely appropriate because the charter is a document by which the citizens of a municipality confer powers on its government – a process fundamental to the American system of government of the people, by the people, and for the people. As attorneys, we can assist that process both by keeping our eyes on the underlying basics and by being aware of the specific details.