

JOSÉ R. RODRÍGUEZ
COUNTY ATTORNEY

EL PASO COUNTY, TEXAS
COUNTY COURTHOUSE
500 E. SAN ANTONIO, ROOM 203
EL PASO, TEXAS 79901

(915) 546-2050
FAX: (915) 546-2133

October 4, 1999

RECEIVED

OCT 07 1999

Opinion Committee

RECEIVED

OCT 06 1999

OPEN RECORDS DIVISION

RQ-0124-JC

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

The Honorable John Cornyn
Attorney General, State of Texas
Attn: Opinion Committee Chairperson
P.O. Box 12548
Austin, Texas 78711-2548

FILE # Mh-41044-99
I.D. # 41044

Dear General Cornyn:

I am requesting a formal opinion from your office on the following question:

Whether a city must fully comply with all the provisions of Chapter 9 of the Texas Local Government Code, including the appointment or election of a charter commission, in order to convert from special-law to home-rule status, or whether a city may follow the procedure set out in Sections 5.005 and 5.903 of the Texas Local Government Code, to simply amend its special-law charter by council action, without formation of a charter commission, to obtain home-rule status.

The following is our brief of the issues, including a summary of the relevant facts.

Factual Summary

The City of Socorro is a special-law charter city in El Paso County, incorporated by the Texas Legislature in 1871. In November 1989, the voters of the City of Socorro (the "City") passed an amendment to the City's special-law charter, reducing the number of Aldermen from 9 to 5. The City believed that this amendment effectively converted it to home-rule status pursuant to the City's interpretation of Section 5.005(b) of the Texas Local Government Code, which states that "[a] special-law municipality that has amended its municipal charter as authorized by Article

The Honorable John Cornyn
October 4, 1999
Page 2

XI, Section 5, of the Texas Constitution¹ is also a home-rule municipality.” TEX. LOCAL GOV'T CODE ANN. §5.005 (Vernon 1988). Consequently, the City passed an ordinance seeking to prohibit the operation of a fireworks stand within 5000 feet of its incorporated limits. The fireworks nuisance ordinance was promulgated pursuant to Section 217.042 of the Local Government Code, which authorizes home-rule municipalities to define and regulate nuisances within their corporate limits and within 5000 feet outside the limits. Again, the City believed that it had converted to home-rule status by virtue of amending its charter in accordance with Section 5.903 of the Local Government Code.

The City was subsequently sued by a fireworks manufacturer, U.S. Fireworks of America, Inc., which sought a declaratory judgment that the ordinance was void insofar as it purported to have extraterritorial application. The El Paso County Court at Law No. 5 held that the City was not a home-rule city and did not have the authority to enact the ordinance, and permanently enjoined the City from enforcing the provisions of the ordinance. The El Paso Court of Appeals affirmed the county court at law's holding, striking down the ordinance on the basis that the City had not legally converted to home-rule status and therefore could not regulate nuisances outside its corporate boundaries. *City of Socorro v. U.S. Fireworks of America, Inc.*, 842 S.W.2d 779, 781-82 (Tex. App.—El Paso 1992, writ denied). The court of appeals found that the City's voters would have to be informed that they were voting to become a home-rule municipality. *See id.* The court also examined the applicability of Chapter 9 of the Texas Local Government Code, ultimately concluding that it is “to apply in every situation in which a city desires to become a home-rule city” *See id.* at 782. A courtesy copy of the *U.S. Fireworks* opinion is enclosed for your reference.

The City intends to hold an election in November to amend its special-law charter to convert the municipality to home-rule status, but is unsure as to the proper procedure to follow, especially in light of the conflicting interpretations of *U.S. Fireworks* set out below.

¹ Article XI, Section 5 of the Texas Constitution authorizes a city of more than 5000 persons to adopt or amend its charter by a majority vote of the qualified voters of the city “at an election for that purpose” TEX. CONST. art. XI, § 5. Section 5.903 of the Texas Local Government Code provides that “[a] special-law municipality that was incorporated as a town or village before June 30, 1881, by the Congress of the Republic of Texas or by the legislature may amend its charter in any regard that does not conflict with the law of this state if the amendment is approved by a resolution of the governing body of the town or village and by at least a two-thirds vote at an election held to ratify the amendment.” TEX. LOCAL GOV'T CODE ANN. § 5.903 (Vernon 1988).

Interpretations of the Applicable Law

Since the court of appeals issued its opinion in *U.S. Fireworks*, the City has sought additional opinions regarding the proper mechanism by which a special-law municipality may convert to a home-rule municipality, including an informal letter opinion from the Attorney General dated February 3, 1998; a letter from the Texas Municipal League ("TML") dated January 25, 1999; and a letter from the Office of the Secretary of State dated March 22, 1999 (all of which are enclosed for your reference). The opinion issued by TML conflicts with the informal opinions issued by the Office of the Secretary of State and the Office of the Attorney General.

Attorney General Informal Opinion:

In response to the question of whether the City Council of Socorro can make a motion to submit to the qualified voters a proposed amendment to the existing city charter which by operation of Section 5.005(b) of the Texas Local Government Code would enable the City to become a home-rule municipality under Chapter 9 of the Texas Local Government Code, Carla Gay Dickson, Assistant Attorney General in the Municipal Affairs Section of the Attorney General's office cites Section 9.004(a) as the applicable statute. Section 9.004(a) states that "[t]he governing body of a municipality on its own motion may submit a proposed charter amendment to the municipality's qualified voters for their approval at an election." TEX. LOCAL GOV'T CODE ANN. § 9.004(a) (Vernon 1988). The letter states that a special-law municipality may amend its charter pursuant to Article XI, Section 5 of the Texas Constitution to become a home-rule municipality, but the amendment must be written so that the voters clearly understand that they are voting to change a home-rule municipality. The letter notes that the procedural guidelines to achieve such an amendment are in Chapter 9 of the Texas Local Government Code. The letter does not reference the requirement set out in Section 9.002 of the Local Government Code regarding forming a charter commission to effect such an amendment.

Texas Municipal League Letter:

In a letter from Alan J. Bojorquez, Assistant General Counsel, the Texas Municipal League takes the more stringent position that voters of the City may not secure home-rule status simply by voting "yes" or "no" on the issue. Rather, TML advises that the procedure mandated by the Texas Legislature provides that the approval of a charter is the basis for obtaining home-rule status, pursuant to Chapter 9 of the Texas Local Government Code, and specifically points out that the first step is the appointment or election of a charter commission. The proposed charter prepared by the commission is then put before the voters. Thus, TML reads *U.S. Fireworks* literally, recommending that each provision of Local Government Code Chapter 9 be followed for the City to amend its charter, completely ignoring the options set out in Section 5 of the Local Government Code.

Office of the Secretary of State Letter:

In a letter from Ann McGeehan, Deputy Assistant Secretary of State, the Secretary of State's Office takes a position similar to the Office of the Attorney General. The letter discusses three options that the City has regarding a conversion to home-rule status. First, the letter advises that the City may remain a special-law city only. Second, the City may choose the procedure set out in Sections 5.005 and 5.903 of the Texas Local Government Code, which would allow the City to simply amend its special charter to trigger home-rule status. The letter states that "[b]ecause Section 5.903 of the Code provides that this may be accomplished by council action, the amendment process alone can be accomplished without a charter commission." The letter then notes that the City's resulting status would be something of a hybrid because the law (i.e., Section 5.005(b)) says that the city is "also" home-rule, in addition to being special-law. Thus, any future charter amendments would need to pass by a two-thirds vote in accordance with Section 5.903 of the Code. However, pursuant to the *U.S. Fireworks* decision, the City would also need to apply the remaining procedures in Chapter 9 of the Code for amending the charter insofar as they can be applied without contradicting Chapter 5 of the Code, including publishing notice to the voters, with a statement that the City would become a home-rule city by amending the charter. Third, the letter notes that the City may opt to make a complete transition from special-law to home-rule status, using the constitutional procedure applicable to "any" city, pursuant to Article XI, Section 5 of the Texas Constitution, which would involve electing a charter commission under Chapter 9 of the Code. It is the second of these options that the City is interested in pursuing, whereby it would achieve a "hybrid" status, being both a special-law and a home-rule city.

Conclusion

As these three sources demonstrate, confusion exists as to the proper procedure the City must utilize to convert from a special-law municipality to a home-rule municipality, specifically as to whether a City must form a charter commission for the purpose of effecting such a charter amendment.² The preferred and most logical interpretation of the relevant law is the second option provided by the Office of the Secretary of State, which determined that the special-law charter amendment provisions of Section 5.903 coupled with the procedures found in Chapter 9, namely Section 9.004 which imparts certain notice and election procedures for adoption of charter amendments in home-rule cities, is a correct application of the law, even under *U.S. Fireworks*.³

² The language of Section 9.002 of the Texas Local Government Code is permissive, rather than mandatory: "The governing body of the municipality *may*, by an ordinance adopted by at least a two-thirds vote of its membership, order an election by the voters of the municipality on the question: 'Shall a commission be chosen to frame a new charter?' " TEX. LOCAL GOV'T CODE ANN. § 9.002 (emphasis added).


³ The court of appeals' opinion in *U.S. Fireworks* never mentions that formation of a charter commission is a requirement for charter amendment, only that a special-law municipality "must follow the procedures of Chapter 9 (Sections 9.001 et seq. of the Local Government Code)."

The Honorable John Cornyn
October 4, 1999
Page 5

If the court of appeals in *U.S. Fireworks* literally meant that only the procedures in Chapter 9 (beginning with Section 9.002's option of forming a charter commission) can be used by a special-law municipality to convert to a home-rule municipality, then the amendment procedure set out in Section 5.005(b) is given no effect. We believe that the Office of the Secretary of State's interpretation of the law gives meaning to Section 5.005, and fits within the prescribed framework of *U.S. Fireworks*. However, we ask that you issue a formal ruling clarifying these inconsistent interpretations and providing the City with guidelines for a future election.

I thank you in advance for your assistance in this regard.

Very truly yours,



José R. Rodríguez
El Paso County Attorney