

# ALPHABET SOUP: TYPES OF TEXAS CITIES



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## **Introduction**

Cities are formed for the purpose of managing the needs of people who live and work in close quarters. Cities provide basic services, such as streets, law enforcement, and utilities, and enact and enforce ordinances to protect citizens and foster a better city environment. City government in Texas, as in most of the United States, was founded on, and continues to evolve from, the premise that local communities know best how to run their local affairs. The following is a brief introduction to the types of cities in Texas and the power granted to them/taken away from them by the state. This is a brief overview of the area, and is not intended as legal advice. Local legal counsel should always be consulted prior to adopting any ordinance.

### **A Brief History of Texas Cities<sup>1</sup>**

The evolution of the statutes that authorize the incorporation of a Texas city is somewhat convoluted. From 1836 (during the Republic of Texas period) through 1845 (when Texas was annexed into the United States), and continuing until 1858, the only way to incorporate a city was by a special act of the Congress of the Republic of Texas or the State Legislature.

After 1836, the Republic of Texas Congress began incorporating towns by special acts of legislation. Nacogdoches was the first town incorporated by virtue of a law approved June 5, 1837. In addition to incorporating Nacogdoches, the 1837 law incorporated San Augustine, Richmond, Columbus, San Antonio, and Houston, in addition to twelve others. The special act, which resembled a very basic city charter, contained only ten sections, and was less than two pages long. It expressly spelled out the duties and powers, including ordinance-making power, of the cities it governed. Under the special act, 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, the Congress of the Republic of Texas 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 incorporating cities by special act until the passage of the Home Rule Amendment of 1912. Also, the Legislature frequently amended or repealed the acts that governed the cities it created.

In 1858, the first statute was passed allowing incorporation under the general laws of Texas. From 1858 to 1913, communities could incorporate either by special law or under the general laws. In 1874, the Legislature passed a short law allowing voters to amend the special acts passed by the legislature. In 1912, Texas voters passed the Home Rule Amendment, Article XI, Section 5, which prohibited the incorporation of a city by

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<sup>1</sup> Most of the information presented in this introduction 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).

special act. The Home Rule Amendment gave cities with over 5,000 inhabitants the power to adopt their own charter after an election, thereby giving them the power of self-government. Presently, cities in Texas are classified as general law or home rule.

The 1858 statute is the foundation for the Texas Local Government Code provisions relating to incorporation, powers, and duties of general law cities, and the present Local Government Code provisions are remarkably similar to the original language. 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 chief justice ordered an election. If the results of the election were favorable, the chief 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. Today, towns or villages incorporated under the 1858 statute and the 1873 amendment are classified as Type B cities.

In 1875, the Legislature passed a second law that allowed 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, setting 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, another statute was passed that 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. Mainly 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 remains one 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 or \$2.50 per hundred depending on the population, 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.<sup>2</sup> Another important distinction is the ordinance-making authority of the different types of cities.

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<sup>2</sup> See TEX. TAX CODE § 302.001, TEX. LOC. GOV'T CODE § 51.051, TEX. CONST. Art. XI, §§ 4, 5. Tex. Atty. Gen. Op. KP-0028 (stating that a type C can levy a property tax).

## **The Power to Enact and Enforce Ordinances**

The authority of a Texas city to enact and enforce ordinances is conditioned on the type of city. An ordinance is defined as “a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct relating the corporate affairs of the municipality.”<sup>3</sup> In other words, an ordinance is the equivalent of a municipal statute, passed by the city council, governing matters not already covered by federal or state law.

The Tenth Amendment to the United States Constitution reserves to the states “The powers not delegated to the United States by the Constitution.” The powers reserved to the states include “police powers,” which are those powers necessary to protect the public health, safety, and welfare of the citizens. Most states, including Texas, delegate part of their police power to their cities.

In the past, specific police powers were delegated to individual cities through special acts of the Legislature. The acts exclusively dictated the ordinance-making powers of cities they created. In 1858, many cities began operating under the general laws. 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.” A community that meets the population and area requirements of the Local Government Code submits a petition to the county judge, who orders an election on the question of incorporation. Once the city is incorporated, it must look to the general laws of the state for any authority to act and any grant of power from the state. Chapter 51 of the Local Government Code, as well as many other more specific statutes, gives general law cities their basic ordinance-making power. Section 51.012 provides that a Type A general law city “may adopt an ordinance, act, law, or regulation, not inconsistent with state law, that is necessary for the government, interest, welfare, or good order of the municipality as a body politic.” Section 51.032 provides that the “governing body of [a Type B] municipality may adopt an ordinance or bylaw, not inconsistent with state law, that the governing body considers proper for the government of the municipal corporation,” and Section 51.051 makes one or the other of those provisions applicable to Type C cities, depending on population.

Once a general law city reaches 5,001 inhabitants, it is authorized by Article XI, Section 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, the power to govern itself so long as charter provisions or ordinances are not inconsistent with state or federal law. TEX. LOC. GOV'T CODE § 51.072. Home rule cities derive their power from the Constitution and look to the Legislature only as a limit on that authority and may do anything that is not expressly or impliedly prohibited by state law.

Both general law and home rule cities are granted implied powers under the Local Government Code. Section 51.001 provides that “the governing body of a municipality

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<sup>3</sup> BLACK'S LAW DICTIONARY 1097 (6th ed. 1990).

may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that is for the good government, peace, or order of the municipality...and is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.”

Some complex topics are not included in this paper, but please contact the Texas Municipal League legal department if you need assistance with these or other issues.

### **Determining City Type**

To determine which state statutes apply to a city, it is necessary to know what type of city it is. The city’s “order of incorporation” will determine what type the city is and it should be on file at the county clerk’s office, which is the only place (other than city hall) to locate the information since there is no statewide database.<sup>4</sup>

Differences in the types of cities 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 articles or order of incorporation. 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 should contact local legal counsel for assistance.

### **The Different Forms of Government in Texas Cities – General Law Cities**

#### **Type A General Law Cities**

Type A general law cities operate under the aldermanic form of government. The term “alderman” is often used interchangeably with the term city council, and the modern name of the board of aldermen is the city council. The size of the council is determined by whether the city is divided into wards (e.g., special districts). *See* TEX. LOC. GOV’T CODE § 22.031. In cities where there are no wards (which includes most Type A cities), the council is made up of the mayor and five councilmembers. If the city has been divided into wards, the council is made up of a mayor and two councilmembers from each ward. In either case, the mayor does not vote except in the case that his/her vote is

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<sup>4</sup> The Texas Municipal League’s directory, available at <https://directory.tml.org/>, consists of information reported to the League by cities.

needed to break a tie (except in elections). *Id.* § 22.037. A quorum consists of a majority of councilmembers for general business (e.g., three councilmembers if city does not have wards), and two-thirds of the council for a special or called meeting or a meeting concerning taxation (e.g., four councilmembers if the city does not have wards). *Id.* § 22.039. The mayor does not count toward a quorum in either case. Type A city councilmembers have a two-year term of office unless a longer term of office is adopted under the Constitution. *Id.* § 22.035; TEX. CONST. art. XI, § 11. At each new governing body's first meeting or as soon as possible, the council must elect one of its members to be the mayor pro tem for a term of one year. TEX. LOC. GOV'T CODE § 22.037. The mayor pro tem continues to vote, but fills in for the mayor if the mayor refuses or is unable to act.

### **Type B General Law Cities**

Type B general law cities operate under the aldermanic form of government in which the "board of aldermen" is the governing body of the city. The board contains a mayor and five aldermen, all of whom are elected at-large. *Id.* § 23.021. A quorum consists of either the mayor and three aldermen or, if the mayor is absent, four aldermen. *Id.* § 23.028. The governing body must elect one alderman to serve as mayor pro tem for a term of one year at the first meeting of each new governing body. The mayor is the president of the governing body. *Id.* § 23.027. The aldermen, mayor, and marshal serve one year terms unless the governing body passes an ordinance allowing for staggered two year terms. *Id.* § 23.026.

Can the mayor of a Type B city vote? There are two schools of thought: (1) that, because the mayor in a Type B city counts towards a quorum, he or she votes; and (2) that, because there is no specific provision governing the issue, Local Government Code Section 51.035 "borrows" the applicable Type A city provision, and the mayor does not vote. Because there is no definitive answer, our advice is to follow prior practice and/or to consult with your city attorney in making a final decision.

The election for the aldermen is held annually on a uniform election date and is ordered by the mayor or two aldermen. *Id.* § 23.023. To be an alderman or mayor, the candidate must, in addition to certain other general eligibility requirements, be a qualified voter and must have resided within the city for at least six months prior to the election date. *Id.* § 23.024; TEX. ELEC. CODE § 141.001(providing eligibility requirements for public office in Texas). Generally, the terms of office for the aldermen are one year, unless two-year staggered terms are provided for by ordinance. TEX. LOC. GOV'T CODE § 23.026.

### **Type C General Law Cities**

Type C general law cities operate under the commission form of government and the governing body is known as the "commission." The commission always consists of a mayor and two commissioners. TEX. LOC. GOV'T CODE § 24.021. The commissioners and the mayor have a two-year term of office unless a longer term of office of up to four

years is adopted by election under the Texas Constitution. *Id.* § 24.023. The election for mayor and commissioners is held on an authorized uniform election date. The city commission shall hold at least one regular monthly meeting, but may call special meetings as necessary to attend to city business. *Id.* § 24.025.

### **The Place System**

Any general law city that is not divided into wards and elects its aldermen at large may provide by ordinance for the election of aldermen under a place system, if the ordinance is adopted at least 60 days before the regular election. TEX. LOC. GOV'T CODE § 21.001. Once the place system is adopted, the city should assign place numbers to each alderman's office and candidates for each office should file an application for a specific place on the governing body, such as "Alderman, Place No. 1." *Id.* § 21.001.

### **The City Manager Form of Government - Chapter 25**

Any general law city with less than 5,000 population may adopt the city manager form of government under Chapter 25 of the Local Government Code. Upon presentation of a petition signed by at least 20 percent of the number of voters for mayor in the last preceding city election, the mayor must call an election on the question of adopting the city manager plan. *Id.* §§ 25.022; 25.023; 25.025. If a majority of the votes cast at the election favor adoption of the city manager plan, the council must, within 60 days after the election, appoint a city manager and fix his or her salary by ordinance. *Id.* § 25.026. Procedures for repealing the city manager plan are essentially the same as for adopting it. *Id.* § 25.071.

If a general law city adopts the city manager form of government under the procedural requirements of Chapter 25, the administration of the city is to be placed in the hands of the city manager, who serves at the pleasure of the city council. *Id.* § 25.028. In any city where the city manager plan has been approved by a Chapter 25 election, all officers of the city, except members of the governing body, thereafter are appointed as provided by ordinance. *Id.* § 25.051. The city manager administers the city business and the governing body of the city ensures that the administration is efficient. *Id.* § 25.029. The city manager is the budget officer for the city. *Id.* § 102.001. The governing body by ordinance may delegate to the city manager any additional powers or duties the governing body considers proper for the efficient administration of city affairs. Adopting the city manager plan does not change the basic governmental framework of a city operating under the commission or aldermanic form of government. Rather, it is an administrative mechanism added to the basic structure. However, any city may create through ordinance a city manager, city administrator, or other managerial employee, regardless of whether the city has adopted Chapter 25 of the Local Government Code. *Id.* § 25.051.



## **General Law Cities: The “Borrowing Provisions”**

While some differences currently exist in the authority of the different types of general law cities, most of the differences in power are largely of historical, academic interest today. The reason is that Texas law now allows general cities to “borrow” the power of a different type of city in many cases. Specifically, Type B cities have the same authority, duties, and privileges as a Type A city, unless there is a conflicting state provision regarding only Type B cities. TEX. LOC. GOV’T CODE § 51.035.

Depending on the number of inhabitants, a Type C city has either the same powers as a Type B city or a Type A city. In a Type C general law city with inhabitants between 201 and 500, the city commission has the same powers and duties as the board of aldermen in a Type B city, except where the law specifically provides otherwise. *Id.* § 51.051. Where the inhabitants are between 501 and 4,999, the commissioners must follow the requirements of the governing body of a Type A city, except where specifically provided otherwise by statute. A Type C city that has \$500,000 or more of assessed valuation for tax purposes, may adopt the powers, privileges, immunities, and franchises of a Type A city regardless of any limitation prescribed by Section 51.051. *Id.* § 51.052.

## **The Different Forms of Government in Texas Cities – Home Rule Cities**

A home rule city may adopt and operate under any form of government, including aldermanic or commission form. *Id.* § 26.021. The city may create officers, determine the method of selecting officers, and prescribe qualifications, duties, and tenure of office for officers. *Id.* § 26.041. Home rule cities can extend an officer’s term from two to four years with a charter amendment. TEX. CONST. Art. XI, section 11.

A city charter may authorize nominations of partisan candidates for elected offices in the city. TEX. ELEC. CODE § 143.003. City charters in home rule cities supersede state statutory provisions for withdrawal, death, or ineligibility of city candidates. *Id.* § 145.097. A home rule city may prescribe its own age and residency requirements for city office, but the minimum age may not be more than 21 years and the minimum residency may not be more than 12 months preceding election day. *Id.* § 141.003. Home rule cities may charge filing fees for office, which must be refunded to a candidate or his family if the candidate dies, is declared ineligible, or his forms are incorrect. *Id.* § 141.038. Also, there must be an alternative procedure to paying the fee, and both the fee amount and alternative procedure must be in the city charter. *Id.* § 143.005(c).

A home rule city may prescribe eligibility requirements or grounds of ineligibility for election officers by city charter. TEX. ELEC. CODE § 32.056. A city charter may prescribe requirements, additional to Section 141.031(a)(4)(L), for a candidate’s application for a place on the ballot. *Id.* § 143.005. The city charter can designate who may accept a candidate’s application if it is not the city secretary. *Id.* § 143.006.

## **Changing City Type**

### **Changing to Type A**

A Type B or C city may change to a Type A city once it has reached 600 inhabitants or gains a manufacturing facility. TEX. LOC. GOV'T CODE § 6.011. To change to a Type A city, a city must follow Section 6.012 of the Local Government Code, which provides that: (1) there must be an affirmative vote of two-thirds of the city council; (2) a record taken and signed by the mayor; and (3) the record must be filed and recorded in the county clerk's office. A city can change its designation from "town" to "city" by ordinance once it becomes Type A. *Id.* § 5.902. Once a city changes to Type A, it continues to retain its powers, rights, immunities, privileges and franchises, as well as any rights it had to impose fines, penalties or be involved in causes of action, it had before the change. *Id.* § 51.017. The boundaries of the city also remain the same after changing to Type A. *Id.* § 41.004.

### **Changing from General Law to Home Rule**

Once a general law city gains inhabitants over 5,000, it may change to the home rule form of government by adopting a charter through an election. *See* TEX. CONST. art. XI, § 5. The city's governing body, through a two-thirds vote, may order an election to create a charter commission to write a charter, or the governing body must create a charter commission if asked to do so by at least ten percent of the city's qualified voters. TEX. LOC. GOV'T CODE § 9.002. The city's residents can vote on whether to elect a charter commission of fifteen members to draft a charter or the mayor can select the members of the charter commission at a mass meeting. After the charter commission is selected and finishes the charter, the city's residents must vote on the proposed charter. *Id.* § 9.003. The election is on the next uniform election date. Thirty days before the election a copy of the proposed charter has to be mailed to each registered voter. A proposed charter is adopted if approved by a majority of the voters at the charter election and the city enters an order recognizing the adoption of the charter. *Id.* § 9.005. The new governing body under the charter may be elected at the same time as the election for the charter. *Id.* § 9.006. As soon as practicable after the charter is adopted the mayor of the city must certify and send an authenticated copy of the charter to the secretary of state. *Id.* § 9.007.

## **Differences Between Home Rule and General Law Powers**

### **Introduction – What's the Difference?**

By way of a very brief introduction, it is important to understand the fundamental difference between a general law city and a home rule city. Volumes have been written on the differences between the two. For purposes of brevity, and as a basic rule of thumb, the following statement will suffice:

*A home rule city may do anything authorized by its charter that is not specifically prohibited or preempted by the Texas Constitution or state or federal law. A general law city has no charter and may only exercise those powers that are specifically granted or implied by statute.*

The previous statement is *very* generalized, but it serves to illustrate the fundamental difference between the two types of cities for all purposes. Several examples follow illustrating areas of regulation in which the authority of home rule and general law cities differ.

### **Mandatory Fees on Utility Bills**

A general law city has no authority to add mandatory non-related fees to its utility or other bills. The authority of a home rule city is not clear, but many cities have nonetheless imposed such fees.

In Texas Attorney General Opinion No. JM-338 (1985), the Texas Attorney General was asked whether a *general law* city may assess a six dollar charge against all home owners and business owners in the city. The charge would appear on monthly utility bills, and the proceeds would be used to finance the city's police department. The facts made it clear that the six dollar charge was intended to raise revenue, not to cover the expenses of administering utility services. Concluding that the additional fee was unconstitutional, the Attorney General stated that:

any charge or fee imposed by a municipality for the purpose of raising revenue is considered a 'tax.' *Municipalities functioning under the general laws* have no inherent power to tax. They possess only those taxing powers that the legislature or the Constitution expressly grants them. We find no statutory authority...for the method of taxation that you describe in your letter. Thus, the \$6 charge against all home owners and business owners is not a proper method for raising revenue to support the police department.

Tex. Att'y Gen. Op. No. JM-338 at 1 (1985) (emphasis added). The above opinion is not controlling on home rule cities because home rule cities have full power of self-government, and may enact any ordinance that the legislature could have authorized. TEX. CONST. art. XI, § 5; TEX. LOC. GOV'T CODE § 51.072; *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948). The issue for home rule cities is making sure each ordinance is not inconsistent, or in conflict, with law.

A home rule city is given broad powers under the Texas Constitution and statutes. *Jones v. City of Houston*, 907 S.W.2d 871, 876 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Under article XI, section 5 of the Texas Constitution, a home rule city has the full power of local self-government:

It was the purpose of the Home-Rule Amendment [to the Texas Constitution] ... to bestow upon accepting cities and towns of more than 5000 population full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.

*Lipscomb v. Randall*, 985 S.W.2d 601, 605 (Tex. App.—Fort Worth 1999, pet. dismissed)(citing *Forwood*, 214 S.W.2d at 286). In addition, Texas Local Government Code section 51.072 states that a home rule city has the “full power of local self-government.” See also *City of Houston v. State ex. rel. City of West University Place*, 176 S.W.2d 928, 929 (Tex. 1943). Pursuant to the full power of self-government, a home rule city may exercise any governmental power that the legislature has not withheld from it. *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998).

Under the grant of authority from article XI, section 5, “the power of the city to act is as general and broad as is the power of the Legislature to act.” *Le Gois v. State*, 190 S.W. 724, 725 (1916). In other words, “[state] legislation is not required for home rule cities to act.” D. Brooks, *Municipal Law and Practice*, 22 Texas Practice § 1.17. Under the theory of home rule, if state law and the charter are both silent as to a particular action, a city may undertake a wide range of actions by ordinance. TERRELL BLODGETT, *TEXAS HOME RULE CHARTERS* 18 (2010). A home rule city may pass any ordinance so long as the ordinance does not “contain any provision inconsistent with...the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, § 5; *MJR's Fare, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied). Of course, an ordinance that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute. *Dallas Merchant's & Concessionaire's Assoc. v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). Otherwise, a city ordinance is presumed valid, and courts have no authority to interfere with the authority of a home rule city unless an ordinance is unreasonable and arbitrary, amounting to a clear abuse of discretion. *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982); *Barnett v. City of Plainview*, 848 S.W.2d 334, 338 (Tex. App.—Amarillo 1993, no writ). The test for determining whether the legislature has intended to remove a field of regulation from a home rule city's authority is whether it has spoken with “unmistakable clarity” to that effect. See *Dallas Merchant's & Concessionaire's Assoc.*, 852 S.W.2d at 490-91; *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927); *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964). The Texas Constitution and statutes are silent as to utility bill fees. As such, many argue that the language of most charters allows an unrelated fee to be added to a utility bill. The authority to adopt a utility bill fee may be implied by some home rule charters, but the issue has never been definitively decided. See, e.g., *City of Arlington v. Scalf*, 117 S.W.3d 345 (Tex. App.—Fort Worth 2003, pet. denied).

## **Annexation**

For over 100 years, annexation was an excellent illustration of the contrast between general law and home rule authority. But the 2019 legislative session changed all that. On May 24, 2019, municipal annexation as it existed for over a century changed dramatically. On that date, House Bill 347 became effective. The bill ended most unilateral annexations by any city, regardless of population or location. Specifically, the bill: (1) eliminated the distinction between Tier 1 and Tier 2 cities and counties created by S.B. 6 (2017); (2) eliminated existing annexation authority that applied to Tier 1 cities and makes most annexations subject to the three consent annexation procedures created by S.B. 6 (2017), which allow for annexation: (a) on request of the each owner of the land; (b) of an area with a population of less than 200 by petition of voters and, if required, owners in the area; and (c) of an area with a population of at least 200 by election of voters and, if required, petition of landowners; and (3) authorized certain narrowly-defined types of annexation (e.g., city-owned airports, navigable streams, strategic partnership areas, industrial district areas, etc.) to continue using a service plan, notice, and hearing annexation procedure.

## **Initiative and Referendum**

Citizen initiative and referendum are powers that only home rule cities possess, and then only if the city's charter provides for it. Thus, a city council of a home rule city would have the authority to call a referendum on an issue, including an ordinance, if the city's charter allowed for such an election. See *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998); *Glass v. Smith*, 244 S.W. 2d 645, 648-49 (Tex. 1951); Tex. Att'y Gen. Op. No. GA-0222 (2004).

For general law cities, the answer is different because the calling of an election is something that must be authorized by a particular state statute. See *Countz v. Mitchell*, 38 S.W.2d 770, 774 (Tex. 1931) (“[t]he right to hold an election cannot exist or be lawfully exercised without express grant of power by the Constitution or Legislature”); *Ellis v. Hanks*, 478 S.W.2d 172, 176 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (stating that the right to hold an election “must be derived from the law”); Tex. Att'y Gen. Op. No. GA-0001 (2002) at 3 (“generally the right to hold an election depends upon statutory authorization”).

Because there is no state statute or Election Code provision that authorizes general law city councils to submit general ordinances to the electorate through a referendum election, a general law city may not do so.

A general law city is free to conduct a poll or hold a public hearing to gauge the preferences of the voters. The results of such a poll or hearing are not binding on the council, nor could the council make it binding on itself.

Cities sometimes ask whether non-binding election referenda may be placed on an official election ballot. The Secretary of State believes the answer is no, and cites

attorney general opinions LO-94-091 and H-425 (1974) for that conclusion. In fact, placing an unauthorized proposition on a ballot may be considered a misappropriation of public funds.

In 2019, the Texas Legislature considered legislation that would have taken away a city's authority to have these types of elections on certain topics. For example, S.B. 323, which did not pass, would have trumped a city charter in regard to certain aspects of an initiative or referendum election, including the petition process. Similar proposals returned in 2021 with H.B. 782, which also did not pass.

### **Removal of Councilmembers**

A home rule city's charter may provide for a "recall" provision under which citizens can petition the city council to order an election to recall members of the council. Each home rule city's recall procedure is unique, and is governed by its charter.

As with initiative and referendum, Texas law does not provide for recall in most general law cities. *But see*, TEX. LOC. GOV'T CODE § 21.101 (allowing recall of general law city councilmembers in certain border cities). In other words, a citizen's petition is not binding on the city council, regardless of how many signatures it contains. If a resident of a general law city wants to remove an officer, he must do so through Chapter 21 of the Local Government Code by filing a petition in district court. TEX. LOC. GOV'T CODE § 21.023. An officer of a city may be removed through a petition process in the district court for: (1) incompetency; (2) official misconduct; or (3) intoxication on or off duty caused by drinking an alcoholic beverage. *Id.* §§ 21.025; 21.026. Any resident who has lived in the city for at least six months may file a petition in district court to have the officer removed. *Id.* § 21.026. The officer who is the subject of the petition must be given notice of the petition and has a right to a jury trial.

### **Term Limits**

No state law provision exists that authorizes a general law city to impose term limits, but a home rule charter may provide for them.

In 2017, the Texas Legislature considered legislation that would have authorized or required term limits in all cities. These bills and resolutions (S.B. 110, H.B. 1185, and S.J.R. 13) did not pass. The issue was back in 2019 with S.B. 452, which also did not pass.

### **Preemption**

In the context of intergovernmental relations, preemption is a term involving the action of one government to limit or prohibit the actions of another. As to state and local government, preemption refers to action by the state to limit or prohibit the power of local government (city, county, school district, etc.). State preemption laws have long been used to set minimum standards on local activity by setting a floor on local

responsibilities and regulations. But in recent years, state legislatures have used such laws to thwart cities in a variety of ways, both large and small. This trend is reflected in legislation preempting local fracking bans, targeting sanctuary city policies, overturning LGBTQ policies (e.g., “bathroom bills”), and limiting/prohibiting a whole host of regulations, including those dealing with plastic bags, trees, short-term rentals, payday lenders, transportation network companies, and firearm regulations. According to the National League of Cities, some 37 states have laws restricting local measures regulating ridesharing and 17 states blocked cities from establishing broadband service. Some of the most high-profile fights over state legislation in recent years have been over preemption laws.

Several examples follow illustrating areas in which city authority has been limited or prohibited by the Texas Legislature.

### **Breed Specific Dog Bans**

Pit Bulls are a common topic of preemption. In the 1980s, the City of Richardson enacted an ordinance regulating certain breeds. A dog owner group sued the city, and the case went all the way to the Texas Supreme Court. The court ultimately upheld the city’s ordinance in the case of *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex.1990). The very next year, the dog owners successfully lobbied the legislature to overturn the court’s ruling. The Texas Legislature passed a comprehensive dangerous dog statute that included Texas Health and Safety Code Section 822.047, which provides that:

§ 822.047. LOCAL REGULATION OF DANGEROUS DOGS. A county or municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions:

- (1) are not specific to one breed or several breeds of dogs; and
- (2) are more stringent than restrictions provided by this subchapter.

This is specific statutory preemption that makes it clear that neither home rule, nor general law cities, can pass these types of ordinances.

### **Oil and Gas Regulation**

Many cities have oil and gas regulations, usually in the form of buffer zone ordinances. A buffer zone is where a city has prohibited oil or gas wells within a certain number of feet of certain uses, such as residential or schools. In 2015, there were 322 cities that regulated oil and gas drilling within the city. In one such city, the City of Denton, the city regulated aspects of oil and gas drilling and fracking, which is a particular type of oil and gas drilling that some consider hazardous to surface property owners. In Denton, the citizens called for an initiative election to completely prohibit fracking in the city. The election was a success for the citizens who voted to ban fracking. This ban drew the attention of the oil and gas industry and numerous bills were filed in the 84th Legislative Session in 2015. Many of these bills would have completely

preempted all city authority to regulate oil and gas uses, even so far as preempting the basic safety and zoning regulations with which all other businesses have to comply. In the end, House Bill 40 passed with input from the Texas Municipal League. This law, codified at Texas Natural Resources Code Section 81.0523, makes various findings related to the benefits of oil and gas operations in the state and provides that:

1. An “oil and gas operation” means an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities.
2. An oil and gas operation is subject to the exclusive jurisdiction of this state.
3. Except as provided by (4), below, a city may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the city.
4. The authority of a city to regulate an oil and gas operation is expressly preempted, except that a city may enact, amend, or enforce an ordinance or other measure that: (a) regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (b) is commercially reasonable; (c) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (d) is not otherwise preempted by state or federal law.
5. “Commercially reasonable” for purposes of (4)(b), above, means a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator’s capacity to act.
6. An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.

Thus, city ordinances related to oil and gas regulation need to be reviewed for preemption, but the authority to have setbacks, buffer zones, and other safety regulations appears to have been retained.

### **Cell Phone Bans**

The Texas Legislature passed H.B. 55 in 2009, making it a state offense to use a cell phone in a school zone under some circumstances. The bill makes the use of a



wireless communication device while operating a motor vehicle within a school crossing zone a class C misdemeanor, unless the vehicle is stopped or the device is being used in a hands-free mode. In other words, the bill preempts city ordinances governing cell phone use in school zones.

In the 2017 legislative session, H.B. 62 passed. The bill prohibits a motor vehicle operator from using a portable wireless communication device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped (i.e., a texting while driving ban) and thus, preempts city ordinances in that regard.

Several cities in Texas have adopted even more stringent ordinances, referred to as “hands free ordinances.” These city-wide ordinances prohibit the use of handheld mobile communication devices while operating a motor vehicle or bicycle. It remains to be seen whether the legislature will try to preempt cities from having these tougher regulations.

### **Streets**

The regulation of streets is ripe with state preemption, including the state regulation of towing, red light camera bans, and the example of cell phone bans given above. Another example of preemption of city authority comes in the regulation of speed limits on city streets. Speed limits on state highways and city streets are generally set by state law under Transportation Code section 545.352. Cities have some authority to regulate speed on highways; however, the state requires that a city perform a traffic study before it alters a speed limit on a street. *Id.* § 545.356. There are some streets that are exempt from this preemption under Section 545.356:

The governing body of a municipality, for a highway or a part of a highway in the municipality that is not an officially designated or marked highway or road of the state highway system, may declare a lower speed limit of not less than 25 miles per hour, if the governing body determines that the prima facie speed limit on the highway is unreasonable or unsafe.

*Id.* § 545.356(b-1). The state added some limitation on this grant of authority by also requiring:

(d) The governing body of a municipality that declares a lower speed limit on a highway or part of a highway under Subsection (b-1), not later than February 1 of each year, shall publish on its Internet website and submit to the department a report that compares for each of the two previous calendar years:

- (1) the number of traffic citations issued by peace officers of the municipality and the alleged speed of the vehicles, for speed limit violations on the highway or part of the highway;
- (2) the number of warning citations issued by peace officers of the municipality on the highway or part of the highway; and

(3) the number of vehicular accidents that resulted in injury or death and were attributable to speed limit violations on the highway or part of the highway.

*Id.* § 545.356(d).

A recent example of preemption regarding city streets is H.B. 100, passed during the 2017 legislative session and codified as Chapter 2402 of the Texas Occupations Code. It preempts city ordinances relating to transportation network companies (TNCs such as Uber and Lyft for instance). It provides, among other things, that the regulation of TNCs is an exclusive power and function of the State of Texas and that a city is prohibited from (in relation to a TNC): (1) imposing a tax; (2) requiring an additional license of permit; (3) setting rates; (4) imposing operational or entry requirements, or (5) imposing other requirements. While House Bill 100 transfers the power to regulate TNCs almost exclusively to the State of Texas, it does leave some regulatory authority with airport owners/operators and governmental entities with jurisdiction over cruise ship terminals. Thus, cities with airports and cruise ship terminals have some authority to regulate TNCs.

### **Conclusion & Other Resources**

This paper is meant to provide an introduction to the types of cities in Texas and their powers. Remember that there are a multitude of tools available to Texas cities to protect, preserve, and revitalize their communities. There are numerous city, federal, state, and private organizations that are excited and willing to share their knowledge and experience. Any city wishing to implement or enforce ordinances should take full advantage of the wide range of resources that are available, including the Texas Municipal League Legal Department.

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