

The Attorney General's Role in Charter Review and Approval

by Milton I. Firestone and George M. Elworth

State review of proposed charters

1. Requirement for gubernatorial approval
 - A. Home Rule City Act, Sec 22, MCL 117.22; MSA 5.2101
 - B. Home Rule Village Act, Sec 18, CL 78.18; MSA 5.1528
2. Referral of proposed charters to Attorney General's Office by the Governor's Office.
 - A. Certified copy of charter as adopted by Charter Commission
 - B. Certified resolution of adoption by Charter Commission
 - C. Certified copy of current charter
3. Allowance of time for review
 - A. Election on proposed charter is scheduled by Charter Commission. HRCA, Sec 20; MCL 117.20; MSA 5.2099
 - B. Consider discussing issues with Attorney General's Office during drafting state
 - C. Charters, if any, being used as models for proposed charter
4. Review process
 - A. Consultation with Elections Bureau, Michigan Department of State
 - B. Consultation with other divisions in the Michigan Department of Attorney General
 - C. Letter to Governor
5. Determination by Governor of approval or disapproval
 - A. Governor's Legal Counsel
 - B. Letter from Governor
 1. Conditional approval
 2. Unconditional approval
6. "Subject to" items in proposed charter on which conditional recommendation of approval may be based:
 - A. Mandatory charter provisions. HRCA, Sec 3, MCL 117.3; MSA 5.2073

- B. Prohibited charter provisions. HRCA, Sec 5, CL 117.5; MSA 5.2084
 - C. Conflicts with state law. HRCA, Sec 36, CL 117.36; MSA 5.2116
7. Follow-up revisions by Charter Commission
- A. Certified revision
 - B. Certified resolution of adoption
 - C. Marked copy showing additions and deletions
8. Topics of concern
- A. Open Meetings Act, 1976 PA 267, as amended, MCL 15.261 et seq; MSA 4.1800(11) et seq, and HRCA, Sec 3(1), CL 117.3(1); MSA 5.2073(1)
 - B. Freedom of Information Act, 1976 PA 422, as amended, MCL 15.231 et seq; MSA 4.1801(1), et seq; and HRCA, Sec 3(1), MCL 117.3(1); MSA 5.2073(1)
 - C. Odd-year election law, 1970 PA 239, MCL 168.644a et seq; MSA 6a.1644(1) et seq.
 - D. Publication of all ordinances before becoming effective. HRCA, Sec 3(k), MCL 117.3(k); MSA 5.2073(k)
 - E. Budgeting, accounting and auditing. HRCA, Sec 3(n), MCL 117.3(n); MSA 5.2073(n), and MCL 141.421 et seq; MSA 5.32228(21) et seq.
9. Ballot language
- A. Attorney General review of ballot language. HRCA, Secs 21 and 23, MCL 117.31 and 117.23; MSA 5.2100 and 5.2102
 - B. Sample ballot question for charter revision is set forth in HRCA, Sec 23, MCL 117.23; MSA 5.2101

Milt Firestone:

We are extremely pleased to be able to discuss with you the role of the Attorney General in this process of dealing with city charters and village charters. We think we have a very user friendly approach to the question of dealing with charters and charter amendments. The Attorney General, Mr. Frank Kelly, was city attorney in Alpena. He has a keen interest in the role of cities in the government, as a government agency. Our role in the Attorney General's office is partly dictated by statute and partly dictated by the fact the Governor refers matters to us. When you present a charter or charter amendments to the Governor for review under the statute, that review is carried out primarily by our office in addressing the legal issues that may exist. The Governor may discuss the political issues. But my experience in state government has been that the Governor refrains from dealing with political issues and does address the legal issues. That has been true with Governor Romney, with Governor Milliken, with Governor Blanchard and now with Governor Engler. My understanding is that it is true through most of the history of the state with most of the review that has taken place.

What do we look for in a charter that comes in? We are essentially looking for its compliance with any constitutional concept, with any statutory requirement, and with its effect on other bodies of the law. As you know, the Home Rule City Act, Section 36, says that no provision of any city charter shall conflict with, or contravene, the provision of any general law of the state. It is therefore important that we take a look at the problems so that when you do have the charter or charter amendment in effect, you are less likely to run into the problems of conflict with state law. The constitution really leaves to the Legislature the direction for city charter, the formation of city charters and the powers of cities to act. The Home Rule City Act is in place and its intent is to make sure that, as to local issues, the city charter will prevail and, as to matters in which the state legislature has dealt with the problem, that the charter will not conflict with those provisions.

Essentially when we receive the charter or charter amendment, we take a look at whether or not it complies with the mandatory provisions of the Home Rule City Act and whether there is some provision that is prohibited by the Act. Section 3 of the Home Rule City Act says: each city charter must include these items and then it lists them. In this section is a checklist that is pretty much the checklist that we use in the attorney General's Office to ascertain that all of the mandatory provisions of the Home Rule City Act have been complied with.

In addition, we look at Section 5 of the Home Rule City Act, which deals with the things that are prohibited. That section says: no city shall, and then it lists a variety of things that are prohibited to the city.

Section 4 consists of a number of subsections of state law which authorizes a whole host of permissible activities by cities.

There are also some traditions of historical rights and actions of cities included within the scope of local law. Municipal law really stems from the Roman idea of a particular law that relates to the people in Rome and then there is the Empire law which applies to everybody else.

The proposed local charter cannot conflict with such state law as the election law, municipal finance, budgeting and accounting, open meetings, freedom of information, taxation and a whole host of other state statutes. Basically the charter should be consistent with these laws. Charter provisions may be amended or nullified by state law, but essentially we attempt to address these questions and reduce the problems that you will encounter as you move toward implementing the charter or charter amendment.

How do proposed charters and charter amendments come to us? They come to us either because the statute says the Governor shall review, or they come to us because we are told that the Attorney General should look at a question involving a proposed charter amendment.

Within my knowledge, Douglas Clapperton was the first assistant attorney general who handled this charter review assignment. Following him, Maxine Boord Virtue headed the division and the people in the division did the review. I followed her and have been the division head and have overseen this and in my time, there have been a number of attorneys who have participated in this activity. At this point George Elworth, who is the first assistant in my division, handles this assignment. He is quite open to discussing issues with you. I don't know that we can always give a direct answer and certainly we have the duty that we have to the Governor in representing what the law is. But basically if we can understand your concept, we can deal with or suggest to you how to address the issue. I'd like to turn it over to my colleague, George Elworth, to discuss the detailed problems that we have encountered.

George Elworth:

The question was raised a little earlier as to the volume of activity in this area. In preparation for a meeting on this topic earlier this year, I collected some statistics on the number of charter amendments, and the number of charter revision and new charters that have been reviewed by the office over the last few years. On the average over the last 15 years, the Attorney General's office has reviewed approximately 10 charters per year. The office has also reviewed approximately 100 charter amendments each year. In the last five years, charter amendment activity has been along the general annual average. However, the number of proposed charters, charter revision and new charters has been substantially lower. I don't know the reason for that, and there may be some demand for new charters or charter revision, but in the last five years, our experience has been that there has been a significant decline in the number of charters proposed to the Governor for review.

Let me describe in general terms the process of review. The initial step is for the proposed charter to be submitted to the Governor. It has been the Governor's practice to send the proposed charter to the Attorney General for his review and his recommendation. That review takes place principally in the division of municipal and military affairs. As part of that review, we work very closely with the election bureau of the Michigan Department of State because of its expertise in election law. I would suggest that the elections provision of the charter is one of the most technically complicated areas that need to be coordinated with other units of government, including the elections division. The odd year election law is a statute that we continually refer to and try to re-educate ourselves on, which I would suggest you review as you go through the charter revision process, as to what the experience has been in your municipality under that legislation. You may find it helpful to consult with the elections division in that area, and you may also find it helpful to consult with other divisions of state government, such as the Department of Treasury on accounting and auditing issues and on questions involving municipal finance and the issuing of bonds and notes.

Once the review has been completed, the next step would be to submit a recommendation to the Governor that he approve the charter or that he reject it or that he approve it subject to certain changes or clarification being made in the charter. We may also make certain suggestions that the charter commission may wish to take into account.

The Governor reviews the recommendation of the Attorney General's office and then communicates his determination to the local charter commission. If the charter has been approved, the charter commission at that point would take the necessary steps to arrange for the election.

If the commission is advised by the Governor that he is approving the proposed charter subject to certain changes or clarifications, at that point the charter commission would consider the requirements of the Governor and take whatever action that was indicated. In that context, it is very helpful to us upon resubmission of the charter, that we receive not only the certified copies of the proposed charter, but also a marked copy which indicates where the changes have been made, so that we can expedite our review.

It would also be helpful for us to, at the onset, to have from the city a copy of the current charter, so that we can see what changes are being made, and what provisions are being retained. We would also suggest that careful attention be paid to scheduling issues. Most charters will provide for a transition schedule, which may be particularly important in terms of the terms of office. As you know, or as you learn, there is a requirement that a charter cannot lengthen or shorten the terms of existing offices. It is also helpful to consider whether you want to specify an effective date for a new charter, or simply leave it to the statute to provide that.

On the subject of charter amendments, we would suggest that among the things that we need to look at when those amendments are submitted to the Attorney General are: (1) that the ballot questions are objective, i.e., that they don't either argue for or against the proposition; (2) that the questions are limited to the 100-word limitation including any statement of purpose; (3) that the questions have been properly adopted; (4) that they are timely, i.e. at least 60 days prior to the day of the election; (5) that in some cases you may need to coordinate with the city and county clerks because you may have the questions adopted even sooner than that to meet ballot printing requirements; and (6) that there are provisions for questions being submitted by initiative as well.

Your particular current charter as it exists today may have specific provisions about how the charter may be amended. If that is the case, in addition to looking at the statutory provisions on charter amendments, you may need to consult your charter as well. (The statute provides: "unless otherwise specified in the charter, the amendment process shall be as follows.")

There are other provisions for villages and we do review both proposed charters for villages and village charter amendments. Many of those provisions are outlined in your materials today, but I do want to note that is an area we work in as well.

Discussion

Question: What is the most important issue in your review of the charter?

Answer: I think that the biggest problem that we have are instances where the mandatory provisions of section 3 of the Home Rule City Act have not been addressed. Charters which have made no provision for nominations for officers, or which have made no specific declarations as to the open meeting and public information requirements—things of that sort.

Question: Currently, what is the length of time that can be expected between submission to the Governor's office and a response back to the commission?

Answer: To my knowledge we have been able to accommodate the timing requirements of municipalities. If you have an election scheduled somewhere down the road and we know that, we will make every effort to accommodate that. In terms of planning, we would suggest that you allow from 60 to 90 days for that review process to take place at the state level, and then perhaps some additional time, depending on what your expectations would be for additional changes or modifications in the charter before it is submitted to the voters.

Question: Are cities free to experiment with charter revision, i.e., is it better to invent the wheel, or re-spoke the old wheel from the standpoint of the Attorney General's office, in dealing with a charter revision?

Answer: Generally, yes. Cities are free to experiment as much as statutes will let them, with regard to local government. We try very diligently not to inject our particular feelings toward new ideas. What we are looking for is that there be no conflict between the proposed charter and existing statutes.

Question: Could you comment on the idea of options in charter revisions where you have alternative provisions?

Answer: I think that came about by an amendment that we legislated when Detroit made its last charter revision. The Detroit charter commission wanted to present alternatives, but at the time, the statute did not permit it. The Home Rule City Act was amended to authorize alternative provisions to be presented to the voters so that, if there is strong feeling within the community going in both directions, you can pose alternative provisions to the electorate. If you do that, it would seem to me that you could clearly identify an issue that can go either way in the proposed charter, so that when the election is held to adopt the charter, the charter doesn't have to be revised and voted on again to provide the alternative to the provision that the voters rejected.

Question: If the Attorney General's office finds a provision in the proposed charter to be objectionable, would they identify the issue, what the problem is, and give the commission a chance to correct it, or does the Attorney General send the whole package back and the commission has to start all over again, from scratch?

Answer: Essentially we do send a letter to the Governor, with copies to the clerk of the municipality involved, indicating what our review discloses and what recommendations we made to the Governor. Most of the time, municipalities will adjust before the Governor issues a response to the municipality. Many times, because attorneys or consultants or members of the commission contact our office, we can indicate to them what might be done to correct an issue, it is something that we can simply tell them very quickly. On the other hand, many times, because of the complexity of the documents and the importance of timing, we do it through letter, which lets everybody know. Depending upon the timing, you can schedule the election when you want it, if you allow sufficient time.

In the case of charter revisions, I don't know of any charter commission which has proceeded to make changes without waiting for the formal letter of the Governor. (We may have given to the municipality some of the reactions we have had and some of the ideas, and some of the indications we have had as to what we could recommend.) On the other hand, for charter amendments, there are many instances where the municipality will see the problem that we have identified and they will have already dealt with the problem before the Attorney General has reached the stage of making recommendations to the Governor.

We have no pre-clearance procedure. Our practice is to look at the certified copy of whatever is adopted and rule on that. But that doesn't mean that we can't be consulted informally from time to time. The Attorney General's office is not in a position to be an advisor to a charter commission or to a city. I think the city attorney or the attorney for the charter commission is in the best position to give that kind of advice. But we are available to discuss the issues. We are available to give you ideas based upon what we have seen over the years and we're glad to share that experience.

Question: In the beginning of your presentation you indicated that usually it is on the basis of the legal issues that the Governor may reject the new or revised charter. Seldom will he reject a charter because of political issues. But in the statute, MCL 117.22, the charter commission by a two-thirds vote has the right to overrule the Governor's objection. It would seem to me that it would be foolish for any charter commission to exercise that authority if the issue is legal and non-political. In reality, if it is not the norm for the Governor to deal with political issues of a proposed charter, why would a charter revision commission override the Governor's objections?

Answer: Generally we do not find municipalities acting inconsistently with the Governor's recommendation. They do have the right to do so. By and large, municipalities want to have something that is strong for their charter and for their government. We want something strong for them as well. So that what is done in fact is to bring it into compliance. Or it may be that they would have an idea that had not been considered and they would raise that question. There are a very, very few instances, I think, over the years in my experience, that municipalities have acted inconsistently with the recommendations of the Governor.

In many of our letters you will find comment to the Governor that, while there may be a legal objection, the law is such that it has to be put on the ballot.

Milton I. Firestone

Milton I. Firestone, a graduate of Wayne State University Law School, was admitted to practice in 1953. His professional work has included private practice in municipal law and municipal law practice in the Livonia City Attorney's office. He joined the State Attorney General's office as assistant attorney general in 1965 and now heads the municipal affairs and finance division. He also served as adjunct professor of municipal finance at Cooley Law School. Mr. Firestone is now retired.

George M. Elworth

George M. Elworth is the Assistant in Charge of the Freedom of Information and Municipal Affairs Division (FOIMA) of the Michigan Department of Attorney General. He joined the Department of Attorney General in 1974. He has served as the First Assistant of both the State Affairs Division (1977-1979) and the Municipal and Military Affairs Division (1980-1997). He was a member of the litigation unit of the Executive Division during 1979.

Current assignments include matters involving the state's Freedom of Information Act and Open Meetings Act, as well as local governmental issues involved in the review of proposed charters, charter amendments, and interlocal agreements. The division advises the State Boundary Commission which regulates most municipal annexations and incorporations. The division also works on assignments related to the activities of the Department of Military and Veterans Affairs and the Michigan National Guard, including contracts with the U.S. Department of Defense and the administration of veterans homes in Grand Rapids and Marquette. He has represented the State of Michigan and its agencies in litigation involving constitutional issues, contractual and financial responsibilities, administrative law, and intergovernmental relations.

He serves as the designated representative of the Attorney General on three retirement boards: the State Employees Retirement Board, the State Police Retirement Board, and the Judges Retirement Board.

He has an AB in History from Stanford University (1964) and a JD cum laude from The University of Michigan Law School (1969).

He was a lieutenant in the United States Army Reserve (Quartermaster Corps) from 1964 to 1966. He was assigned to the 8th Army in South Korea and the 5th Infantry Division (Mechanized) at Fort Carson, Colorado.

He began his legal career with the Atlanta Legal Aid Society in 1969-1970 as the recipient of a Reginald Heber Smith fellowship. He spent the next four years as an associate attorney with the law firm of Lord, Bissell and Brook in Chicago.

George and his wife, Marilyn Weyhing Elworth, live in East Lansing. They have three sons – two who graduated from law school in 2003 and a third who is in college.

He is a member of the publications committee of the Public Corporation Law Section of the State Bar of Michigan.