



Office of the
SECRETARY OF STATE

George S. Bayoud, Jr.
SECRETARY OF STATE

EXECUTIVE DIVISION
P.O. Box 12697
Austin, Texas 78711-2697
(512) 463-5701

ELECTIONS DIVISION
P.O. Box 12060
Austin, Texas 78711-2060
(512) 463-5650

Disclosure Filings
P.O. Box 12070
Austin, Texas 78711-2070
(512) 463-5704

DATA SERVICES
DIVISION
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5609

SUPPORT SERVICES
DIVISION
Financial Management
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

Staff Services
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

STATUTORY FILINGS
DIVISION
Corporations
P.O. Box 13697
Austin, Texas 78711-3697
(512) 463-5555

Statutory Documents
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5654

Texas Register
P.O. Box 13824
Austin, Texas 78711-3824
(512) 463-5561

Uniform Commercial Code
P.O. Box 13193
Austin, Texas 78711-3193
(512) 475-2705

September 26, 1990

Mr. Lloyd Garza
City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

Election Law Opinion GSB-5

Re: Whether Section 51.079 of the Texas Local Government Code authorizes the holding of a nonbinding referendum election if a city charter does not provide for such an election.

Dear Mr. Garza:

By letter of July 17, 1990, you requested my opinion, as chief election officer of the State of Texas, and asked if Section 51.079 of the Texas Local Government Code (the "Code") authorizes the City of San Antonio (the "City") to hold a nonbinding referendum election even though nonbinding referenda elections are not authorized by the City's charter.

There is a well-established line of case law that requires either statutory or constitutional authorization to call an election. In Smith v. Morton Independent School Dist., 85 S.W.2d 853, 857 (Tex. Civ. App.—Amarillo 1935, writ *dism'd*), the court said:

In our form of government elections must be held by virtue of some legal authority, and an election held without affirmative statutory authority or contrary to a material provision of the law is universally held to be a nullity.



Mr. Lloyd Garza

Page 2

See also Countz v. Mitchell, 120 Tex. 324, ___, 38 S.W.2d 770, 773 (1931); Ellis v. Hanks, 478 S.W.2d 172, 176 (Tex. Civ. App.--Dallas 1972, writ ref'd n.r.e); Parks v. Elliott, 465 S.W.2d 434, 436 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.); Ellis v. State, 383 S.W.2d 635, 636 (Tex. Civ. App.--Dallas 1964, no writ); Williams v. Glover, 259 S.W. 957, 960 (Tex. Civ. App.--Waco 1924, no writ); Trustees of Independent School Dist. No. 57 v. Elbon, 223 S.W. 1039, 1040 (Tex. Civ. App.--Fort Worth 1920, no writ); Op. Tex. Att'y Gen. Nos. H-425 (1974), M-742 (1970), and V-564 (1948).

The only type of referendum election allowed by Texas law is one held in a home rule city whose charter provides for such an election. Home rule city charters may thus provide for (1) no referendum election procedure, (2) binding referenda elections only, or (3) binding and nonbinding referenda elections.

As the City's charter does not provide any authorization for the holding of a nonbinding referendum election, the City is not empowered by law to hold such an election.

Section 51.079 is part of Subchapter E of Chapter 51 of the Code and deals only with home rule municipalities. The section is captioned "Restrictions Applying to Nonbinding Referendum." (Emphasis added.) Subsection (a) of the section provides that:

A nonbinding referendum held by the municipality as a result of a petition by the voters of the municipality must be held on the same date of an election called by the governing body of the municipality on another question or for the election of one or more municipal officers.

The language of Section 51.079 speaks to the holding of a nonbinding referendum as a result of a petition by the voters of the municipality. No procedures or requisites for this petition are set forth. The absence of any guidelines in this regard indicates that the Legislature did not intend for Section 51.079 to be a positive grant of authority to a home rule city to hold nonbinding referenda elections. Those petition procedures and requisites are clearly a condition precedent that must exist in a home rule city's charter before Section 51.079 becomes applicable.

Section 51.079 does not allow home rule cities to hold nonbinding referenda elections; rather, Section 51.079 is applicable only to home rule cities whose charters authorize nonbinding referenda elections and is a circumscription of the authority contained in such charters to hold such elections.

As the court stated in City of Clute v. Linscomb, 446 S.W.2d 377, 379 (Tex. Civ. App.--Houston [1st Dist.] 1969, no writ), "Since the adoption of the home rule amendment to the Texas Constitution [Article XI, Section 5], home rule cities look to the

Mr. Lloyd Garza
Page 3

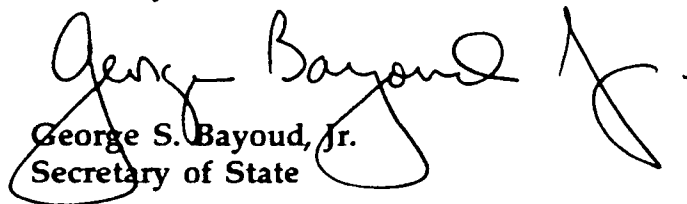
Constitution and general laws, not for specific grants of power, but to ascertain whether or not a specific power is denied them." (Emphasis added.)

In view of the foregoing, you are advised that Section 51.079 of the Texas Local Government Code does not empower a home rule city to hold a nonbinding referendum election when such an election is not authorized by that city's charter. You are further advised that, if a home rule city's charter provides for nonbinding referenda elections, such elections are subject to the constraints of Section 51.079.

SUMMARY

Section 51.079 of the Texas Local Government Code does not empower a home rule city to hold a nonbinding referendum election if such an election is not authorized by the city's charter.

Sincerely,


George S. Bayoud, Jr.
Secretary of State

Pete Wassdorf
Assistant Secretary of State

Prepared by Austin C. Bray, Jr.
Assistant General Counsel
Elections Division

APPROVED:

OPINION COMMITTEE

Tom Harrison, Chairman
Austin C. Bray, Jr.
Sharon Hanko
Rebecca L. Payne
Edward Shack

GSB:TH/ab/im