

FREDERICK, PERALES, ALLMON & ROCKWELL, P.C.

ATTORNEYS AT LAW

707 Rio Grande, Suite 200

Austin, Texas 78701

(512) 469-6000 (512) 482-9346 (facsimile)

Brad@LF-LawFirm.com

Of Counsel:

Richard Lowerre

May 18, 2015

Mayor Daniel Guerrero
Members of the San Marcos City Council
630 E. Hopkins
San Marcos, Texas 78666

Dear Mayor Guerrero and City Council members Prewitt, Presler, Thomaides, Hughson, Thomason and Scott:

As you know, a sizable number of the San Marcos voters have asked for the opportunity to vote on the question of whether “fluoride,” hydrofluorosilicic acid, should be added to their drinking water. I represent one of the organizations working hard to organize the petition effort to get this, Communities for Thriving Water Fluoride-Free San Marcos.

My client submitted a petition with at least 1,634 valid signatures to the Clerk on April 2 for an election on charter amendment to allow the voters to decide whether fluoride should be in the drinking water. My client and others were surprised to learn that the City Clerk has refused to certify the election and has rejected the petition. **There is no legitimate legal basis for any failure by the City Council to submit this charter amendment to the voters.** There are many rights and precedents under the law protecting the right of your San Marcos citizens to have their fluoride measure on the ballot. We hope that the position the City Clerk has taken is the result of legal advice she has received that has not taken fully into account all of these provisions of law. Laws governing the right of citizens to submit petitions to amend their city charters should be liberally construed. *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980). *Accord Quick v. City of Austin*, 7 S.W.3d 109, 124 (Tex. 1998). We ask that the City Clerk reconsider. We also ask that you vote to put this measure on the ballot for the November general election.

The law is rather simple. Section 9.004(a) of the Texas Local Government Code states: “the governing body shall submit a proposed charter amendment to the voters for their approval at an election if the submission is supported by a petition signed by a number of voters of the municipality equal to at least five percent of the number of qualified voters of the municipality....” (emphasis added). There is no dispute that a petition signed by more than 5%¹ of the municipal voters was submitted, thereby satisfying the letter and intent of this statute.

However, the City Clerk took the position on May 6 that the petition was “invalid” because “none of the petition papers contains an oath or affirmation [and therefor] none of the signatures may be counted.” This requirement of an oath or affirmation is not part of any enumerated requirement prescribed by the Legislature.² There is no dispute that each of these requirements were met. And the Texas Constitution clearly designates the Texas Legislature as the body who can impose limitations on the procedures for amending city charters. See Tex. Const. Art. XI sec. 5 (the “amendment of charters is subject to such limitations as may be prescribed by the Legislature”).

Instead of looking to the procedure proscribed by the Legislature, as the Constitution requires, the City Clerk took the position that an oath is required because section 6.03 of the San Marcos Charter purportedly required an oath or affirmation of each signature. That this requirement is mandatory for a charter amendment petition under state law or under section 6.03 of the Charter is an incorrect interpretation of law for three independent reasons.³

First, as pointed out above, it is the Legislature, and not a local body like a city, who the Texas Constitution expressly assigns responsibility for prescribing limitations on citizens’ rights to amend the charter. Tex. Const. art. IX, § 5. Assuming for purposes of argument, that the Legislature had the authority to delegate to San Marcos and other cities its responsibility to prescribe procedural limitations for the charter amendment process, Election Code section 277.004 provision would be ineffective in accomplishing this because it fails to establish clear, reasonable, and measurable standards to guide a city in

¹ This would be about 964.

² The only limitations on petition requirements affecting the validity of signatures which have been prescribed by the Legislature are found in section 277.002(a) of the Election Code: (a) a petition must: (1) contain in addition to the signature: (A) the signer’s printed name; (B) the signer’s: (i) date of birth; or (ii) voter registration number and, if the territory from which signatures must be obtained is situated in more than one county, the county of registration; (C) the signer’s residence address; and (D) the date of the signing; and (2) comply with any other applicable requirements prescribed by law.

³ When looking at law governing the right of San Marcos citizens to submit charter amendment petitions, it should be kept in mind that the Supreme Court requires laws to be liberally construed to effectuate citizens’ power to petition for the right to referendum and initiative. *Coalson*, 610 S.W.2d at 747.

carrying out these delegated powers. *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 467 (Tex. 1997).

Second, even if a city charter had the ability to impose limitations on the Charter Amendment process, a fair reading of the Charter⁴ shows that **the San Marcos Charter does not impose a requirement of an oath for petitions submitted for Charter Amendments.** There is only one section of the Charter that deals with Charter Amendments: section 12.11, which is titled “Amending the Charter.” Section 12.11 conforms to the Texas Constitution, art. IX, § 5, and acknowledges that it is the Legislature who prescribes the procedural requirements for Charter Amendments: “Amendments to this Charter may be framed and submitted to the voters of the city in the manner provided by state law.” That’s it. As pointed out above, the fluoride petitions did conform with applicable state law – i.e. Election Code 277.002(a) and Local Government Code section 9.004(a). The San Marcos City Charter section 12.11 titled “Amending the Charter” makes no reference to requirements outside of state law or to other sections of the City Charter.

The City Clerk cited to section 6.03 of the City Charter. This section contains no mention Charter amendments. Instead it expressly applies to initiative petitions and referendum petitions, which are expressly defined as pertaining to proposed ordinances or legislation, not charter amendments. See also 6.01 and 6.02. The Article of the Charter in which 6.03 is contained is titled Initiative, Referendum and Recall. Unlike section 12.11 of the Charter, there is no reference to or mention of charter amendments in this Article.

And finally, even if state law did include or did allow a requirement that the charter amendment petitions be accompanied by an oath, these are the very kinds of requirements that Texas courts reject under constitutional and statutory construction grounds when they are not essential to preventing fraud. The Texas Supreme Court in *In re Bell* exempted a petitioner from complying with the statutory requirement that signatures be accompanied by an identification of the signatory’s city of residence. 91 S.W.3d 784 (Tex. 2002). The Supreme Court identified the purpose of petition validation requirements to be the prevention of election fraud and applied the Code Construction Act to rule that the failure to comply with a statutory requirement for a petition is only grounds for rejecting the petition if the omitted requirement is essential to prevent fraud. *Id.* at 787. Omission of designation of the city of residence was held not sufficient to invalidate the petition. *Id.* The Supreme Court cited with approval other cases where courts have exempted petitioners from statutory requirements of designating signatory zip

⁴ *Coalson*, 610 S.W.2d at 747.

codes and designating the signatory's state of residence.⁵ *Id.* at 786-787. *Accord Withers v. Commissioners Court of Bandera County*, 75 S.W.3d 528, 530-531 (Tex. App. – San Antonio 2002, orig. proceeding) (no need to comply with signatory birth date requirement). In addition, the United States Constitution prohibits unnecessary burdens on election petitions. *Pitcher v. Rains*, 853 F.2d 334 (5th Cir. 1988) (voter registration numbers); *Tex. Independent Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996) (voter registration numbers). Therefore, even if state law generally requires charter amendment petitions to be submitted under oath, which it does not, under the authority of *In re Bell* and other cases, this requirement would be inapplicable here because there is no indication or evidence that any signatures are fraudulent.

For each of these reasons, the City of San Marcos is without authority to impose an oath or notarization requirement on the fluoride petitions. Due to the petitioners' compliance with state law, the City has a nondiscretionary duty to put the fluoride measure on the ballot and let the voters decide what will be in their water supply.

We ask the City Council to vote to put this fluoride measure on the ballot in November of 2015.

Sincerely,



Brad Rockwell

cc: Jamie Lee Pettijohn & Michael Cosentino

⁵ In addition, the United States Constitution prohibits unnecessary burdens on election petitions. *Pitcher v. Rains*, 853 F.2d 334 (5th Cir. 1988) (voter registration numbers); *Texas Independent Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996) (voter registration numbers).