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Opinion Committee

February 25, 1999

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

RQ-0030
FILE # ML-40697-99
I.D. # 40697

RE: Request for Attorney General's opinion

Dear Attorney General Cornyn:

Was the 1891 disincorporation of San Elizario (formerly also known as San Eleceario) by the Legislature unconstitutional? If it was constitutional, has time lapsed for a challenge to the 1891 Act?

Statement of Facts

In 1871, the Legislature incorporated by special laws the adjoining towns of San Elizario[1] and Socorro.[2] References herein to the "1871 Act" will be to the special law incorporating San Elizario. Soon after passage of these laws, both San Elizario and Socorro began to operate as general law cities, in violation of their special law charters. Residents of San Elizario then conducted elections to disincorporate their city, but these local attempts at disincorporation were void under law. [3]

In 1891, in response to land title problems created by the two cities operating as general law cities, the Legislature passed special laws validating deeds issued in San Elizario[4] and Socorro.[5] The Legislature, however, went a step further with San Elizario; it repealed the 1871 Act, citing that many provisions of the Act incorporating San Elizario "are unjust and oppressive to persons living and owning property within the corporate limits of said town."[6] References herein to the "1891 Act" are to the 1891 special law repealing San Elizario's 1871 Act. It is our general understanding that sometime between the late 1800's and early 1900's, San Elizario ceased to operate as a city. It is also our general understanding that around that same time, San Elizario residents continued attempts at reincorporating/disincorporating their city. However, to the best of our knowledge, none of the reincorporation attempts succeeded and/or remained permanent.

In 1997, a group of San Elizario residents organized and held at-large elections for municipal officers. They announced that they were acting under the charter and authority of the 1871 Act. They began to function as a City Council. When the 1891 Act was called to their attention, the San Elizario City Attorney responded that the 1891 Act violated the Texas Constitution, and that therefore, the San Elizario City Council could continue to operate San Elizario as a legally incorporated municipality. His arguments may be generally summarized as follows:

A) Article III, Section 57 of the Constitution requires publication of notice in a local newspaper of intent to introduce local/special legislation, and as the San Elizario City Attorney was unaware of any historical evidence that exists to substantiate such notice and publication, the 1891 Act cannot be relied upon today;
B) Article III, Section 56 of the Constitution says that no special law shall be enacted "in all other cases where a general law can be made applicable", and that a general law of some type could have been drafted and applied to accomplish the purposes(s) sought; and
C) A special law that repeals a corporate charter is the same as a law that changes a special law city's charter, therefore, the 1891 Act violates Article III, Section 56, Clause 11 of the Constitution that prohibits the Legislature from passing any special laws...incorporating cities, towns, or villages, or changing their charters".

Your opinion is sought as there is no authority, in the absence of contrary case law or opinions, for this office to rely upon arguments that an Act of the Legislature is unconstitutional.

Discussion

We believe the 1891 Act survives the constitutional challenges raised by San Elizario. We also believe that the statute of limitations has run for challenging the 1891 Act. If these assumptions are true, in the absence of an unrepealed incorporation after 1891 in due compliance with law, we believe that San Elizario does not appear today to be a validly incorporated city.

The blackletter presumption of constitutionality of statutes is well-stated in *Smith v. Davis*:

"In passing upon the constitutionality of a statute, we begin with the presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. The wisdom or expediency of the law is the Legislature's prerogative, not ours. There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, and that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Smith v. Davis*, 426 S.W.2d 827 (Tex. 1968) at 831.

The burden of overcoming the constitutionality presumption is a high one:

> " This Court has repeatedly held that no act of the Legislature will be declared unconstitutional unless some provision of the Constitution can be cited which clearly shows the invalidity of such act. And it has frequently been said in our decisions that an act of the legislature must be held valid unless some superior law in express terms or by necessary implication forbade its passage. An important established rule for construing the Constitution is that all of its provisions must be construed together and so construed if possible as to give effect to all of them." *Duncan v. Gabler,* 215 S.W.2d 155 (Tex. 1948) at 159.

In matters relating to municipal corporations, the Legislature enjoys wide latitude. Texas Attorney General Opinion JM-896 (1988) quoted the rule set forth by the U.S. Supreme Court in *Hunter v. City of Pittsburgh*, U.S. 161, 178-179 (1907):

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted to them...The State, therefore, at its pleasure may...expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation...The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." JM-896 at 3.

A statute which relates to persons or thing as a class is a general law, while a statute which relates to particular persons or things of a class is a special law. *Austin Bros. v. Patton*, 288 S.W. 182 (Tex. Comm. App. - 1926, no writ). The 1871 Act was identified by the Legislature as a special law. The Constitution places certain prohibitions on special laws. The Texas Supreme Court has said that the primary purpose behind the adoption of the prohibition of Article III, Section 56 was to "secure that uniformity in the application of law which is essential to an ordered society." *Rodriguez v. Gonzales*, 227 S.W.2d. 791 (Tex. 1950). The Court also has said that Article III, Section 56 "prevents granting of special privileges and suppresses practices of trading and 'logrolling.'" *Miller v. El Paso County*, 150 S.W.2d 1000 (Tex. 1941).

A) No evidence of notice under Article III, Section 57 prior to introduction of the 1891 Act

We are unaware of any documents, living persons or other historical evidence that can verify that the 30-day notice required under Article III, Section 57 was duly published. Notwithstanding, we believe the issue has already been addressed in both Texas civil and criminal jurisprudence in favor of a presumption of compliance. In *Cravens v. State*, 122 S.W. 29 (1909), the Court of Criminal Appeals of Texas quoted and approved the doctrine developed in *Moller v. City of Galveston*, 57 S.W. 1116 (1900), a case from the First Court of Civil Appeals:

> "We are of the opinion that the passage of the act by the Legislature is conclusive of the fact that due notice was given. The Constitution requires evidence of such publication to be exhibited to the Legislature before such act shall be passed. This, we think, is for the purpose of authorizing that body to pass conclusively upon this question of fact. To hold otherwise would be to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature, and to unsettle every special or local law that has been passed since the adoption of the Constitution." *Cravens* at 31.

B) Article III, Section 56 prohibition against special laws where a general law can be made applicable

Under the prohibition against enactment of a local or special law where a general law can be made applicable, it is the sole province of the Legislature to determine whether or not a general law can be made applicable. *Lamon v. Ferguson*, 213 S.W.2d 86 (Tex.Civ.App. - Austin 1948, no writ.) This is true even where the Legislature has previously enacted a general law on the subject. In matters deemed to be of public concern, the courts have consistently defended the Legislature's right to enact laws that were not of a general law format. *See generally*: *Stephensen v. Wood*, 34 S.W.2d. 246 (Tex.Comm.App. - 1931, no writ) (the preservation of fish in coastal waters a matter of general interest); *Lamon* (where the Legislature has interested itself in the matter of juvenile delinquency, "courts should not, in the absence of some compelling specific constitutional provision, undo its efforts." *Lamon* at 88.) For the reasons discussed below, we believe that the Legislature exercised thought and judgment in electing to address a matter of great concern by passing a special law.

C) Is the 1891 Act a prohibited special law that changes a charter?

The San Elizario City Attorney argues the 1891 Act is a law that changes a charter as it "effectuates the most dramatic change possible in the charter of San Elizario by nullifying it."

1) No express prohibition against repeal of a charter

Using the "express terms" language suggested in *Duncan*, discussed *supra*, we first note the obvious: Article III, Section 56 does not expressly prohibit *repeal* of a charter.

2) Precedent and practice for repealing special law charters

While we find no law on the issue of whether a special law passed between 1876-1895 for the purposes of repealing a pre-1876 special law charter constitutes a "changing of the charter" in violation of Article III, Section 56, we do find strong precedent and practice supporting the right of the Legislature to repeal special law charters and not violate similar constitutional provisions.

In *Central Wharf & W. Co. v. City of Corpus Christi*, 57 S.W. 982 (Tex.Civ.App. 1900, writ error dism'd or refused), the question was presented whether a 1875 special law of the Legislature repealing the special law charter of the City of Corpus Christi was a violation of Article 12, Section 40 of the 1869 Texas Constitution (as amended and ratified in 1873) that prohibited the Legislature from "incorporating cities or towns or changing or amending the charter of any city or village." In rejecting Appellee's argument that the 1875 repealer violated Article 12, Section 40, the Court said:

> "We do not think this is the proper construction of this article of the Constitution. From a reading of the entire section it is clear that its object and meaning is to prohibit the granting of special favors by the legislature, and to require that all legislation upon the subjects therein enumerated should be equal and uniform. *It certainly did not mean to take away from the legislature its inherent power of repealing any law passed by it, and we must hold that said repealing act is a valid law.*" (Original emphasis added.) *Central Wharf* at 983.

In *City of Oak Cliff v. State*, 77 S.W.24 (Tex.Civ.App.– 1903, aff'd, 79 S.W. 1 (Tex. 1904)), the Court upheld the 1903 special law by the Legislature repealing the charter of the City of Oak Cliff. Appellees said that the 1903 Act was a violation of Article III, Section 56. While the 1903 Act could have arguably been a violation of Article III, Section 56, the Court looked to a new provision in the Constitution (Article 11, Section 4), and used inconsistencies between the two provisions to argue that the repeal was constitutional under at least Article 11, Section 4.

The *Duncan* case mentions an additional test of "necessary implication." We believe that in deciding whether a repeal is, by necessary implication, a change in charter, the longtime practice of repealing special law cities by special laws negates any such implication. The Attorney General has opined that long historical practices can have some weight in interpreting constitutional questions:

> "(while such administrative and legislative interpretation can never 'fritter away' the obvious sense or boundaries of the Constitution), where a construction of the Constitution has been acquiesced in for a long period, particularly where there have been numerous occasions where it could be challenged, it affords a persuasiveness to the construction akin to precedence. An interpretation made within a few years of the adoption of the Constitution is entitled to great weight." Tex. Att'y. Gen. Op. LA-132 (1977) at 10048.

3) <u>The historical context</u>

It is instructive to look at the problems and considerations that were before the Legislature when it passed the 1891 Act. In the 1891 Act controversy, we have the benefit a century later of a companion reported case, and multiple legislation that sheds lights on the state of affairs in El Paso County's Lower Valley.

Pence v. Cobb, 155 S.W. 608 (Civ.App.-El Paso 1913, no writ) tells the story of Socorro, the city in El Paso County mentioned earlier in the Statement of Facts. Events occurring in these two towns up through 1891 bore striking resemblances. Socorro is adjacent to San Elizario. Socorro, like San Elizario, is an old Spanish mission township in existence years before the establishment of the Republic. Socorro, like San Elizario, was also incorporated by special act of the Texas Legislature in April, 1871. The citizenry of Socorro, like their brethren in San Elizario, apparently ignored their special charter of 1871, and illegally conducted affairs as a purported general law city. The mutual results of these attempts were clouds on land titles. The Legislature, noting the illicit deeds of its municipal offspring, deemed it necessary in 1891 to pass two special validating acts: one for San Elizario deeds, and one for Socorro deeds. The same rationale was stated for both special validating acts: the inhabitants ignored the special charter, organized as a general law city, subdivided and sold land, and now the lands were in good faith held and owned by hundreds of persons, most of whom cultivated or improved the same. Yet, the Legislature went further with San Elizario and repealed its charter. The Legislature must have noticed the plight of San Elizarians trying to disincorporate themselves out from oppressive legislative acts. The surety of land titles, and the obedience of special law cities to their legislative charters, also cannot be ruled out as a matter of public concern. The multiple legislative acts in 1891, and the consequences of a problem unaddressed as shown by *Pence*, provide us ample evidence of the reflections and intents of the Legislature in curing the problems in San Elizario by repeal of the charter.

D) Limitations on legal challenges to the 1891 Act

Whether our constitutional analysis is correct or not, San Elizario is likely time-barred from filing a challenge in Court to the 1891 Act. We believe the period of limitations to have mounted the challenge would have been two years under Texas Civil Practice and Remedies Code ("CRPC") Section 16.003 and its predecessors in law (limitations on injuries and/or damages), or four years under CPRC Section 16.051 and its predecessors in law (limitations on actions for which there is no express limitations period.) Under either statute, the time for challenge is passed. Limitations rest on a legislative policy judgment that requires the diligent pursuit of one's legal rights at the risk of losing them if they are not timely asserted. This policy choice finds value in settled expectations and reliance interests. *City of Murphy v. City of Parker*, 932 S.W.2d 479 (Tex. 1996) at 482.

Summary/Conclusion

We believe the 1891 Act of the Legislature repealing the 1871 special law charter of the City of San Elizario is constitutional, and that the period for contest of such 1891 Act is time-barred. Unless there exists documentation of an unrepealed incorporation after 1891 that is in compliance with Texas municipal incorporation law, San Elizario does not appear today to be a validly incorporated city.

Very truly yours,

José R. Rodríguez
by

José R. Rodríguez,
El Paso County Attorney

JRR/baq
Attachments: Authority cited in Endnotes
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ENDNOTES

[1] Act of April 5, 1871, 12th Leg, R.S., ch. XLII, 1871 Tex. Spec. Laws 83, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897, at 1221-1227 (Austin, Gammel Book Co. 1898).

[2] Act of April 26, 1871, 12th Leg, R.S., ch. CVI, 1871 Tex. Spec. Laws 176, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1866-1871, at 1314-1321 (Austin, Gammel Book Co. 1898).

[3] *Pence v. Cobb*, 155 S.W. 608 (Civ.App.-El Paso 1913, no writ) (Until an Act in 1895 by the Legislature establishing a means for local action on special law charters, the only way prior to 1895 to repeal a special law charter was by a special law of the Legislature.)

[4] Act of March 17, 1891, 22nd Leg, R.S., ch. IV, 1891 Tex. Spec. Laws 5, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897, at 233-234 (Austin, Gammel Book Co. 1898).

[5] Act of March 17, 1891, 22nd Leg, R.S., ch. V, 1891 Tex. Spec. Laws 6, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1889-1897, at 234-235 (Austin, Gammel Book Co. 1898).

[6] Act of March 23, 1891, 22nd Leg, R.S., ch. II, 1891 Tex. Spec. Laws 24, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897, at 252 (Austin, Gammel Book Co. 1898).