

OPINION OF THE CITY ATTORNEY
ON PROPOSED CHARTER AMENDMENTS

Section 10.02 of the Santa Fe City Charter requires that the “city attorney shall review and render and publish a public opinion as to the legality and form of any proposed charter amendment before it is submitted to the voters.” Pursuant to that directive, I have reviewed the seven proposed Charter amendments and find that all of them are in proper form. I have also reviewed each of the proposed amendments as to its legality and conclude that each has no legal infirmity.

Proposed Charter Amendments Nos. 1, 2 and 3 would change the requirements for petitions for Referendum, Initiative and Recall. None of these amendments has any legal issues. Each is firmly within the home rule authority of a municipality. No state statute restricts a municipality from specifying these petition requirements.

Proposed Charter Amendment No. 4 would amend Section 4.05 to require the governing body to adopt an ordinance which would provide meaningful public financing of elections. There is no legal impediment here. The City of Albuquerque has enacted an ordinance implementing public financing for its elections and recently successfully conducted an election under that ordinance.

Proposed Charter Amendment No. 5 would add a new section 4.06 to the Charter requiring that elected officials receive a majority vote and does so through a single election that provides for an instant runoff by using a ranked choice system of voting. Ranked choice works by having voters rank candidates for an office in order of their preference. If no candidate wins a majority counting each voter’s first choice, the candidate with the fewest votes is eliminated and the ballots that had the eliminated candidate as first choice are recounted using those voters’ second choice. If still no candidate has a majority that process is repeated until the winning candidate has a majority. Ranked choice voting differs from a standard runoff only in having voters make their decision as to their second (or third) choice initially, rather than some weeks later. Prior to 2004, the New Mexico Constitution art. VII, §5 provided that “the person who receives the highest number of votes for any office . . . shall be declared elected thereto.” The 2004 amendment allowed municipalities to have runoff elections:

C. In a municipal election, the candidate that receives the most votes for an office shall be declared elected to that office, unless the municipality has provided for runoff elections. A municipality may provide for runoff elections as follows:

* * *

(3) a municipality that adopts or has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, subsequent to the adoption of this amendment, provide for runoff elections as provided in its charter.

The amendment makes no restriction on the type of runoff, on what percentage of the vote must be achieved for a winning candidate, or any other details. There is no basis to conclude that a runoff that is achieved through expressing one's second (or third) choice at the time of the initial election would be treated differently from allowing that second (or third) choice to be made some weeks later at a separate election.

Proposed Charter Amendment No. 6 would permit the Mayor to vote not only to break a tie, but also when the vote could provide the necessary vote to pass a matter requiring more than a majority of those voting. This could occur enacting an ordinance, which requires a majority of the governing body, when a member is absent resulting in a vote of 4 in favor and 3 against; the Mayor's vote can provide the necessary 5th vote. It can also occur when a two thirds majority is required for a bond issue and the Mayor's vote would be the 6th affirmative vote. There is no constitutional or other legal inhibition to the voters' adopting this rule in the Charter.

Proposed Charter Amendment No. 7 would add the requirement that the municipal judge be a member of the New Mexico State Bar. Clear authority in state statute and case law supports the municipality's ability impose this qualification.

NMSA 1978 §35-14-3, explicitly permits a municipality to set the qualifications of the municipal judge. "The qualifications of municipal judges, bond required and salary received shall be provided by ordinance of the municipality."

The case of *Tsiosdia v. Rainaldi*, 89 N.M. 70 (1976), also provides express authority. The New Mexico Supreme Court there stated: "The determination of the qualifications of the municipal court judge presently is of a legislative nature (at the municipal level). Each municipality may, if it so desires, increase the qualifications of its municipal court judge." In that case, defendants brought an equal protection challenge to having a non-attorney judge preside over their criminal trials in Gallup municipal court while defendants in Albuquerque and Las Cruces municipal court had the benefit of attorney judges. The Court found that there was no denial of equal protection, commenting that such a challenge "would logically open up to the same challenge all other ordinances which vary from municipality to municipality even though enacted pursuant to a municipality's police, tax and other powers."

While this statute and case are clear and directly on point, it is possible that someone might raise a contrary argument based on *Cottrell v. Santillanes*, 120 N.M. 367 (Ct App. 1995). There, the Court of Appeals struck down an amendment to the Albuquerque City Charter which would have limited the term of its city councilors to no more than two elected terms as contrary to the Qualifications Clause of the N.M. Constitution, Art. VII, §2. The Qualifications Clause read: “Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.” The court held that adding a qualification that the candidate not have previously served two elected terms violated this provision. One could argue, similarly, that adding the additional qualification that a municipal court judge be an attorney would also violate the Qualifications Clause.

The analysis by the Court in *Cottrell v. Santillanes*, however, shows that it is distinguishable. The City had argued there that the Home Rule Amendment granted home rule municipalities the authority to impose the additional term limiting qualification, citing N.M. Const. art X, §6(D), which grants to home rule municipalities the authority to “exercise all legislative powers and perform all functions *not expressly denied by general law* or charter.” The Court recognized that the issue was whether the additional qualification was “expressly denied by general law” and cited two cases for determining what constitutes “general law.” In *State ex rel. Haynes v. Bonem*, 114 N.M. 627 (1992), the Supreme Court analyzed the home rule power of the City of Clovis to constitute its city commission with a different number of commissioners than provided by state statute. The *Haynes* court concluded “that the number of commissioners in a commission-manager form of government is a matter of local concern and not one of state-wide concern.” *Santillanes*, 120 N.M. at 369. In *Casuse v. City of Gallup*, 106 N.M. 571 (1987), the court held that a statutory requirement of districting, as opposed to at-large, elections was a matter of state-wide, rather than local concern because of the importance districting plays in insuring that voting strength is not diluted.

In deciding whether the added qualification requiring that a municipal judge be an attorney is a matter of local, rather than state-wide, concern, the discussion of the New Mexico Supreme Court in *Tsoisdia* is decisive. The Court there explicitly decided that it was perfectly appropriate that Albuquerque and Las Cruces require their municipal court judges to be attorneys and for Gallup to chose not to have such a requirement.

For these reasons, I conclude that Proposed Charter Amendment No. 7 is legal.

Should the Charter Amendment No. 7 be approved, it will go into effect on May 5, 2008. By that time, the election for municipal judge shall have been completed and the elected judge in office. Possibly, that judge could be a non-attorney. What would be the affect of the amendment on a non-attorney municipal judge’s tenure? For two reasons, I conclude that a non-attorney municipal judge would serve out his or her elected term. First, the transition provision in the Charter states that “City officials who are incumbent on the effective date of this Charter shall serve out their elected terms unless recalled

under the provisions of this Charter.” While not expressly referring to the effective date of amendments to the Charter, there is no reason to conclude that such language does not equally apply to amendments. Second, the language in Section 7.05, as amended with the underlined phrase, would provide that “the office of municipal judge shall be come vacant upon the judge’s death, resignation, termination of residency in the city or membership in the New Mexico State Bar, or removal from office in any manner authorized by law.” A non-attorney municipal judge incumbent upon the effective date of the amendment would never meet the condition of “termination of membership in the New Mexico State Bar” for the simple reason that he or she was never a member of the State Bar to begin with.

Dated: November 6, 2007

Frank D. Katz, City Attorney