

ELMIRA CITY CHARTER §§ 166-a, 166-d, 166-f(a), 166-f(b), 166-f(h), 166-g, 166-i, 166-n, 166-n(aa), 166-n(d), 166-n(e), 166-n(f), 166-n(h), 166-n(j), 166-o, 166-r, 166-s, 166-t, 166-u; MUNICIPAL HOME RULE LAW §§ 10(1)(I), 10(1)(ii)(a)(1), 10(1)(ii)(c)(1), 23(2)(e); NEW YORK STATE CONSTITUTION ART. IX, § 2(c), ART. IX, § 2(c)(1), ART. X, § 5; GENERAL CITY LAW §§ 20(2), 20(7), 20(7-a); SECOND CLASS CITY LAW §§ 94, 95; SESSION LAWS 1913 CHAPTER 660, 1913 CHAPTER 660, § 7, 1950 CHAPTER 535

The city cannot abolish the state-created Elmira Water Board or provide that the Water Board commissioners be appointed by city officials. Under the provisions of the City Charter, the City Chamberlain does not have authority to determine the amount of Water Board surplus funds, and the City lacks authority to amend the Charter to give the City Chamberlain such power.

August 28, 2007

J. William O'Brien
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City of Elmira
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City Hall
317 East Church Street
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Informal Opinion
No. 2007-6

Dear Mr. O'Brien:

You have asked several questions concerning the City's authority to amend provisions of the Elmira City Charter that govern the Elmira Water Board. These provisions were enacted by the State Legislature in 1950. You ask whether the City has authority to pass a local law (1) eliminating the Water Board and transferring to the City government direct control of water matters or (2) providing that the commissioners of the Water Board, who are currently elected, be appointed by city officials. If the City has authority to enact these laws, you inquire whether such laws would be subject to mandatory referendum. You also ask whether the current provisions of the City Charter relating to oversight of the Water Board authorize the City Chamberlain to determine the surplus to be paid over to the City each year and, if not, whether the City may enact a local law so providing and whether such law would be subject to mandatory referendum. For the reasons that follow, we conclude that the City lacks authority to abolish the Water Board or to give the City power to appoint Water Board Commissioners, and that amendment of the City Charter by special act of the State Legislature would be required to accomplish either of these changes. We also conclude that the current provisions of the City Charter do not give the City Chamberlain authority to determine the annual amount of any surplus in Water Board funds,

and that the City is without authority to amend the Charter to grant the City Chamberlain such authority.

THE ELMIRA WATER BOARD

The Elmira Water Board was originally established pursuant to special act of the State Legislature in 1913 to operate a public water system for the City of Elmira. See Act of May 23, 1913, ch. 660, 1913 N.Y. Laws 1733. In 1950, the Legislature enacted a new enabling act for the Water Board, which is codified as Article X-A of the Elmira City Charter. See Act of Apr. 10, 1950, ch. 535, 1950 N.Y. Laws 1292. These charter provisions, as subsequently amended in part by local law, currently govern the administration and operation of the Water Board.¹

Under these provisions, the Elmira Water Board has some attributes of an independent entity, while other characteristics create a close relationship between the Water Board and the Elmira city government. While the enabling act provides that the City's water department consists of the Water Board, it also denominates the Water Board as a "body corporate" with the power to sue and be sued. Elmira City Charter § 166-a. Further, the Water Board controls and operates the water system "for and in the name of the city of Elmira." Id. § 166-n. The Board is authorized to establish rules and regulations governing its administration and the operation of the water system, but the City may adopt ordinances to aid in enforcement of the Board's regulations. Id. § 166-i. Although the Board consists of five independently-elected commissioners, the commissioners file a bond to the City upon taking office and may be removed from office for cause by the City Council. Id. § 166-d. The Board has authority to appoint and remove its officers and employees, and to determine their salaries. Id. § 166-f(a),(b); id. § 166-n(aa),(j). The City Corporation Counsel serves as counsel to the Water Board, but may receive an additional salary for this position as determined by the Water Board. Id. § 166-f(h). Although the Water Board is authorized to acquire property, including through condemnation, it acquires property "in the name of the city." Id. § 166-n(d),(e).

The finances of the Water Board and the City are interconnected in a number of ways. The City financed the original purchase of the water works system through the issuance of city bonds, see Act of May 23, 1913, ch. 660, § 7; <http://www.elmirawaterboard.org/charter.html> (History of the

¹ None of the charter provisions at issue have been amended in relevant part by local law.

Water System), and under the current charter provisions the City is obligated to raise funds for capital improvements to the water system through taxes or the issuance of bonds, although the City Council must concur in the need to raise the additional money. Elmira City Charter § 166-t. The Water Board does not pay taxes on its property, id. § 166-u, and the City does not pay the Water Board for its water usage, id. § 166-o. The money the Water Board receives from the collection of water rates and penalties is managed by the Water Board treasurer and kept in a separate fund to be used for water board purposes - the operation and maintenance of the water system, the payment of principal and interest on the City's Water Board-related obligations, extensions and additions to the water system, and maintenance of a reserve fund. Id. § 166-r. The water rates set by the Water Board must be sufficient for these purposes, but may also include an amount equivalent to the taxes that the Water Board would otherwise be paying to the City on its property, and the Water Board may earn a fair return on the value of its property. Id. § 166-o. Upon a timely request by the City Council, any profits or surplus in Water Board funds may be used by the City for general municipal purposes. Id. § 166-o. Additionally, the City is statutorily obligated to provide for the payment of any Water Board deficiencies. Id. § 166-s.

Consistent with the financial interdependence between the Water Board and the City, the City Chamberlain is authorized to examine the books of the Water Board and annually verifies to the City Council the financial balances of the Water Board. Id. § 166-g. The Mayor and City Council are also authorized to inspect the books and accounts of the Water Board and the Board must submit an annual financial report to the Council. Id. § 166-n(h).

Recently, the Water Board denied a request from the City for surplus Water Board funds. Members of the City Council who question the Water Board's assessment of its financial condition have inquired whether the City may amend the relevant charter provisions to obtain greater control over the Water Board.

ANALYSIS

Your questions concern the authority of the City to adopt local laws amending the state-enacted provisions of the City Charter governing the Elmira Water Board. It is well-settled that a city has authority to amend its charter by local law. Municipal Home Rule Law § 10(1)(ii)(c)(1) (authorizing cities to amend their charter by local law pursuant to authority of the Municipal Home Rule Law). We have applied this rule to include those charter provisions that were originally enacted by the

State Legislature. See, e.g., 1984 Op. Att'y Gen. (Inf.) 123; 1976 Op. Att'y Gen. (Inf.) 199; 1974 Op. Att'y Gen. (Inf.) 276. With certain exceptions not relevant here, a city's authority to amend its charter is co-extensive with that of its home rule powers to adopt local laws. See New York State Department of State, James A. Coon Local Government Technical Series, Revising City Charters in New York State 2 (March 2007). Thus, the primary issue is whether the types of local laws with which you are concerned fall within the City's home rule powers.

A. Abolishing the Water Board or Changing the Mode of Selection of Its Commissioners

You have asked whether the City is authorized to adopt local laws amending the City Charter to eliminate the Elmira Water Board and transfer direct control of water matters to the city government or to change the method of selecting Water Board commissioners from election by the general public to appointment by city officials. As noted, the issue is whether such laws fall within the City's home rule powers.

A city is authorized to adopt local laws relating to its property, affairs, or government that are not inconsistent with the provisions of the Constitution or with any general law. N.Y. Const. Art. IX, § 2(c); Municipal Home Rule Law § 10(1)(i). A city is also authorized to adopt local laws creating or abolishing departments of city government or relating to the mode of selection of its officers that are not inconsistent with the provisions of the Constitution or with any general law, except to the extent that the Legislature restricts the adoption of such local laws. N.Y. Const. Art. IX, § 2(c)(1); Municipal Home Rule Law § 10(1)(ii)(a)(1). Additionally, cities are specifically authorized by state law to acquire property for, construct, and operate a water works system. See General City Law § 20(2),(7); Second Class City Law §§ 94, 95; see also General City Law § 20(7-a) (authorizing cities to sell city water system to a water authority, county water district or joint water works system). The control and operation of a public water system thus appears to relate to the city's property, affairs or government, and to the extent the administrators of a city water system are officers or employees of the city, their mode of selection would fall within the city's home rule powers. Thus, it is likely that the City would have home rule authority to amend its charter provisions in relation to the Water Board if the City operated the water system and the Water Board were part of the city government.

Under its state-created enabling act, however, we believe the Elmira Water Board is sufficiently independent of the City of

Elmira so that it cannot be considered part of the city government within the meaning of the relevant home rule provisions. Most significantly, the Water Board was created as a "body corporate," with the power to sue and be sued and with exclusive authority to set water rates and to bring enforcement actions in relation thereto. Elmira City Charter §§ 166-a, 166-o. Additionally, although the original acquisition of the water system was financed through the issuance of city bonds and the city may incur additional debt for capital improvements, the water charges are intended to provide sufficient revenue to operate and maintain the system and for payments on water-system related city obligations. See id. §§ 166-r, 166-t. Finally, the Water Board administers the water system independently of the city government. The Board appoints its officers and employees, and determines their salaries. Id. § 166-f(a),(b); id. § 166-n(aa),(j). It has authority to execute all necessary contracts and to exercise the power of eminent domain to acquire real property. Id. § 166-n(e),(f).

Although the relevant charter provisions also establish a nexus between the City and the Water Board - the Board is designated a city department and holds property in the name of the City - we believe that by endowing it with these significant powers, the Legislature intended the Water Board to exist as an independent entity. For this reason, we conclude that the Water Board is not part of the City's "property, affairs, or government" and that the independently-elected Water Board commissioners are not city officers for purposes of the City's home rule powers. Consequently, we do not believe the City has authority to amend its Charter by local law to abolish the Water Board and transfer its functions to the city government or provide that Water Board commissioners shall be appointed by city officials rather than elected by the general public. Enactment of another special act by the State Legislature would be required to effect these changes.²

² In light of our conclusion that the City does not have home rule authority to enact such laws, we need not reach the question whether such local laws would be subject to mandatory referendum. We note, however, that local laws abolishing elective offices are subject to mandatory referendum under the Municipal Home Rule Law. See Municipal Home Rule Law § 23(2)(e) (providing that a local law is subject to mandatory referendum if it abolishes an elective office); 1977 Op. Att'y Gen. (Inf.) 172 (local law abolishing position of elected town receiver of taxes and replacing it with appointive office is subject to mandatory referendum).

We note that our conclusion that the City lacks home rule power to abolish or significantly alter the structure of the Water Board is consistent with a municipality's power with respect to a local public authority. Although the Water Board differs from a public authority in that it does not have the power both to contract indebtedness and to collect charges, rates or fees, cf. N.Y. Const. Art. X, § 5, it is similar to a public authority in that it performs a municipal function while operating as an independent entity. It is well-settled that only the State Legislature has authority to create and dissolve public authorities, and thus municipalities lack authority to significantly modify their structure. See City of Rye v. Metropolitan Transp. Authority, 24 N.Y.2d 627 (1969) (under Article X, § 5 of the New York Constitution, only the state legislature is authorized to create public authorities); Town of Hoosick v. Eastern Rensselaer County Solid Waste Management Authority, 182 A.D.2d 37 (3d Dep't 1992) (noting that "the Legislature alone has the power to create, modify and dissolve public corporations" and concluding that municipality therefore lacked authority to unilaterally withdraw from public authority); 1975 Op. Att'y Gen. (Inf.) 201 (city lacks authority to modify structure of the Yonkers Parking Authority).

B. City's Authority to Determine Water Board Surplus

Your final question concerns the provisions of the City Charter governing the duties of the Water Board treasurer and the City Chamberlain, who serves as head of the City's department of finance and as city treasurer. Under the Charter, the City Chamberlain is authorized to examine the books of the Water Board and annually verifies to the City Council the financial balances of the Water Board. Id. § 166-g. The Mayor and City Council are also authorized to inspect the books and accounts of the Water Board, and the Board is required to submit an annual financial report to the Council. Id. § 166-n(h). The Charter also provides that upon a timely request by the City Council, profits or surplus in Water Board funds may be used by the City for general municipal purposes. Id. § 166-o. Your question is whether the City Chamberlain has authority under the present charter provisions to determine the amount of such surplus funds and, if not, whether the City may enact a local law amending the Charter to give the City Chamberlain such authority.

Interpreting the charter provision authorizing the City to use Water Board surplus funds for general municipal purposes in the context of the Water Board enabling act as a whole, we believe the Legislature intended to vest the Water Board, rather than the City, with the authority to determine the amount of any surplus Water Board funds.

The Water Board treasurer has responsibility for managing the Water Board's funds and they are maintained in a separate account to be used for Water Board purposes. Elmira City Charter § 166-r. The Legislature has given the Water Board exclusive authority to set water rates and has designated the specific Water Board purposes for which they must be used, including operation and maintenance expenses, the retiring of Water Board-related city debt, and extensions and improvements to the water system. Id. § 166-r. The Water Board may also set the water rates to allow it to earn an amount equivalent to the taxes that the Water Board would otherwise pay to the City on its property if it were privately owned and to earn a fair return on the value of its property. Id. § 166-o. Under these provisions, the Water Board retains authority to determine its financial status, and must use such information in setting the water rates. See id. The City, in contrast, has only the authority to examine the Water Board's books and financial records and to verify the Board's financial balances. Id. §§ 166-g, 166-n(h). We believe the authority to examine the accounts and verify the balances was intended as an accounting oversight function, rather than as a grant of authority to the City to determine the amount of any surplus or profit that may be made available to the City for general municipal purposes. Under the current charter provisions, such authority rests with the Water Board. Further, consistent with our previous conclusion that the City lacks authority to fundamentally alter the relationship between the Water Board and the city government, we also conclude that the City lacks authority to enact a local law specifically authorizing the City Chamberlain to determine the amount of such surplus funds.

CONCLUSION

For the foregoing reasons, we conclude that the City lacks home rule authority to abolish the state-created Elmira Water Board or provide that the Water Board commissioners shall be appointed by city officials rather than elected by the general public. Under the current provisions of the City Charter, the City Chamberlain does not have authority to determine the amount of Water Board surplus funds that may be available to the City for general municipal purposes, and the City lacks authority to amend the Charter to give the City Chamberlain such power.

Very truly yours,

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