LIMITATIONS OF HOME RULE CHARTER AUTHORITY FOR PARISHES AND MUNICIPALITIES

WHITE PAPER

INTRODUCTION

The Louisiana Constitution grants to Local Political Subdivisions authority to exercise additional local control through the adoption and use of home rule charters. This authority, although seemingly broad, is not without limitations. This document discusses some of the limitations placed on the otherwise broad local control given to local governing authorities operating under a home rule charter form of government.

I. Background

The current Louisiana State Constitution came into effect on January 1, 1975. One primary focus of this new Constitution was to provide additional local control and autonomy to local governing authorities. *Lafourche Parish Council v. Autin*, 648 So.2d 343 (La. 1994).

The Constitution, in addressing home rule charter forms of government, recognizes two groups; Home Rule Charter Governments existing at the time of the adoption of the 1974 Constitution and those authorized to be created subsequent to the Constitution's adoption.

A home rule charter provides for the organization and assignment of powers and duties for the officials of the local governing authority. This organization and distribution of powers may in some cases differ greatly from those of Lawrason Act municipalities or traditional police jury forms of parish government. The charter is adopted by the voters of the local political subdivision and generally may only be amended or repealed by a subsequent vote of the people.

Article VI, §6 of the Louisiana Constitution provides that the Legislature shall not enact laws which modify or address the specific organization or distribution of powers in a local political subdivision operating under a home rule charter. As noted below, this prohibition is not without limit, as general legislation, especially that enacted under the police powers of the State, may still impact the powers and rights of a local political subdivision operating under a home rule charter.

Municipalities, neither operating under a home rule charter form of government nor subject to special legislative charter, are generally subject to the provisions of the Lawrason Act, R.S. 33:321, *et seq.* The Act provides for the organizational structure and delegation of powers between the board of aldermen/city council and the mayor. Parishes, that are not operating under a home rule charter, generally operate under the police jury system of government under R.S. 33:1221, *et seq.*

II. Pre-1974 Home Rule Charters

Article VI, §4 of the Louisiana Constitution provides that any home rule charter or plan of government existing before or created at the time of the adoption of the 1974 Constitution shall remain in effect, and that it may be amended, modified, or repealed according to the terms of the charter.

Article VI, §4 notes that local governing authorities operating under an existing charter shall retain all the rights and powers afforded under its existing charter. However, this authority is subject to the limitation that the home rule charter and the local political subdivision may not provide for powers or other matters that are inconsistent with the State Constitution. These local political subdivisions may, if their charter provides, exercise a right to all powers and functions otherwise provided to local government subdivisions by matter of law.

Preexisting home rule charter governments are generally not subject to general laws adopted by the Legislature, except where such laws are enacted pursuant to the State's Police Powers or where such matters are reserved to the State through the Constitution, e.g. taxation, defining and punishment of felonies, etc.

III. Post-1974 Home Rule Charters

Article VI, §5 of the Louisiana Constitution provides for the general authority for local political subdivisions to adopt and operate under a home rule charter form of government subsequent to the adoption of the 1974 Constitution.

Unlike local political subdivisions operating under a Pre-1974 home rule charter, local political subdivisions that have adopted a home rule charter subsequent to the 1974 Constitution's adoption are granted less authority under their charter.

Article VI, §5(E) in addressing this limitation on Post-1974 home rule charters provides:

> **A home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution.**

This Section has been interpreted as a limitation on the local law authority of Post-1974 home rule charters in that they must yield to general state law that is prohibitory in nature, even if the law is not enacted under the State's police powers.

AG Op. No. 09-0050 and AG Op. No. 16-0205

IV. Limitations Affecting All Home Rule Charters

A. POLICE POWERS OF THE STATE

Article VI, §9 provides certain limitations for all local governing authorities, including those operating under a home rule charter form of government. Those limitations are as follows:

1. Police Powers of the State

The Constitution provides that the police powers of the State shall not be abridged.

The Louisiana Supreme Court has noted that "police powers" are best defined on a case by case basis, but are "generally described as the state's 'inherent power to govern persons and things, within constitutional limits, for promotion of general health, safety, welfare, and morals.'" *Morial v. Smith & Wesson Corp*., 2000-1132, p17 (La. 4/3/01), 785 So.2d 1, 15.

Examples of exercise of the State's police power can be seen through the regulation of certain professions such as the practice of medicine, law, and those related to the construction of buildings and other structures. Additionally, laws providing for the regulation of gaming, purchase and consumption of alcohol, and regulation of drugs and controlled substances are all considered to be enacted under the State's police powers. Laws regulating signage, speed limits, and operation of vehicles on public roadways and laws regulating vehicular safety and inspection are also exercises of the State's police powers.

2. Felonies and Criminal Acts

The Constitution reserves to the State the right to define and provide punishment for criminal felonies. Local governing authorities are expressly prohibited from doing so. The Attorney General has opined that local governments may "track" State law regarding criminal misdemeanors, but may not provide for the punishment of felonies and may not enact criminal ordinances that contain more restrictive penalties or that conflict with State law. **AG Op. No. 05-0231.**

3. Laws Governing Private and Civil Relationships

Local political subdivisions are prohibited from enacting ordinances and local laws which seek to govern private and civil relationships. For example, the courts have held that the State is the only proper public entity to legislate matters such as marriage.

B. TAXATION

Article VII, §1 of the Louisiana Constitution provides:

Except as otherwise provided by this constitution, the power of taxation shall be vested in the legislature, shall never be surrendered, suspended, or contracted away, and shall be exercised for public purposes only.

Specific taxing authority of political subdivisions is set forth in Part II of Article VI of the Constitution. For example, under Article VI, §27, municipalities are authorized to levy an ad valorem tax for general purposes not to exceed seven mills (General Alimony Tax), and further authorized to obtain voter approval for additional general purpose or separate specific purpose ad valorem taxes.

Generally, political subdivisions have no power of taxation beyond those provided for by the Constitution or through Acts of the Legislature. Article VI §30; **A.G. Op. No. 05-0282**. See also AG Op. No. 08-0084 (footnote citing 05-0282). However, political subdivisions operating under a Pre-1974 home rule charter may continue to exercise any taxation authority they held under their charter prior to the adoption of the 1974 Constitution, except insofar as those powers now conflict with the Constitution.

Local fuel sales taxes are an example of a form of taxation that are no longer compatible with the Constitution. Local fuel taxes that existed at the time of the adoption of the Constitution were allowed to be continued in effect for bond purposes under Article VI, §31, but could no longer be enacted (renewed) or have their rate increased.

A.G. Op. No. 92-0749

V. Additional Limitations Affecting Parish Government Authorities under Home Rule

A. DISTRICT ATTORNEY AS GENERAL LEGAL COUNSEL FOR PARISH GOVERNING AUTHORITY

Article V, §26 of the Louisiana Constitution provides for the position of District Attorney. Section 26(B) provides that the District Attorney shall perform other duties provided by law. The Legislature under this constitutional authority has enacted R.S. 16:1, et seq.

One of the statutory duties of District Attorneys is to serve as the general legal counsel for the parish governing authorities of the parishes (except for Orleans), school boards, and state boards and commissions within their judicial districts. R.S. 16:2(A).

State boards and commissions domiciled in the City of Baton Rouge, East Baton Rouge Parish, or boards in charge or control of state institutions, i.e. BESE, Board of Regents, Board of Supervisors for LSU, ULS, Southern, and LCTCS systems, are excluded from this requirement under R.S. 16:2(A).

An exception is provided in R.S. 16:2(D) for parishes operating under a home rule charter. However, this exception requires that the charter must provide for the employment of a parish attorney or hiring of general legal counsel. *Montgomery v. St. Tammany Parish Government by and through St. Tammany Parish Council*, 2018 WL 3151290 (La. 2018). The Supreme Court noted that the district attorney is by law required to serve as the general legal counsel

of the parish, unless the charter specifically provides for the parish to hire its own its own legal staff. The parish cannot rely on any of its other powers under the charter, such as the right to reorganize parish departments, to replace the district attorney as its general counsel. *Id.*

R.S. 16:2(B) also provides for specific exceptions for certain parishes, such as Orleans, St. Charles, St. John the Baptist, Ouachita, Morehouse, Calcasieu, Vermilion, and Acadia, and for city or parish school boards to hire attorneys to represent them generally. The employment of attorneys by these governing authorities or school boards relieves the District Attorney of any further duty in representing the parish governing authority or school board.

B. INCORPORATION OF MUNICIPALITIES

Article VI, §2 of the Louisiana Constitution states in relevant part:

> **The legislature shall provide by general law for the incorporation, consolidation, merger, and government of municipalities. …**

Article VI, §8 of the Louisiana Constitution further provides:

> **No parish plan of government or home rule charter shall prohibit the incorporation of a city, town or village as provided for under general law.**

Through its constitutionally enumerated power under Article VI, §2, the Legislature has enacted R.S. 33:1, et seq., to provide for the procedure for residents of an unincorporated area to petition for incorporation as a municipality.

Article VI, §8 clarifies that a parish's home rule charter, including those established prior to the 1974 Constitution, may not impair or otherwise restrict the incorporation of newly established municipalities within the parish under R.S. 33:1, et seq.

VI. Conclusion

Currently 38 of the State's 64 parishes operate under the Policy Jury System of Government.[1]

The remaining 26 parishes operate under some form of home rule charter, i.e. Council-President, Commission, Consolidated Government, or City-Parish forms of government.

Regarding the organizational structure of municipalities:[2]

- 33 municipalities operate under a home rule charter;
- 23 municipalities operate under a special legislative charter; and
- 247 municipalities operate under the Lawrason Act.

[1] According to the Police Jury Association of Louisiana, https://www.lpgov.org/page/ParishGovStructure, Accessed on July 27, 2020

[2] Pursuant to the Louisiana Municipal Association Directory, https://www.lma.org/LMA/About/Directory/LMA/About_LMA/directory_search.aspx?hkey=694df395-d483-47a4-b63a-361064fa308b, Accessed on July 27, 2020