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BY: OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr., Assistant Attorney General

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QUESTIONS

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1. Is a twenty-five year public utility franchise granted by municipal ordinance terminable prior to its expiration date?

2. If the answer is "yes" to question 1, under what conditions or upon what grounds may the franchise be revoked, and by what procedure?

3. In addition to the petition and referendum procedures authorized by Section 14-43-1 NMSA 1953 prior to the franchise becoming effective, what statutory or other lawful authority exists for the challenge of the validity of a franchise (in effect) by the qualified electors of a municipality as opposed to the governing body of that municipality?

CONCLUSIONS

1. Yes.

2. See analysis.

3. None.

OPINION

*{*6}* ANALYSIS

A franchise is a contract. **Farmers' Loan and Trust Co. v. Galesburg,** 133 U.S. 156 10 S. Ct. 316, 33 L.Ed 573 (1890); 37 C.J.S. 153. Like any contract a franchise may be rescinded for breach of the conditions upon which it was granted. The United States Supreme Court has said that, "Implied in every grant of franchise is the condition that it may be lost by misuse. Every such special privilege is subject to termination for breach of condition, whether express or implied, upon which the grant depends," **Commission v. Havemeyer,** 296 U.S. 506, 56 S. Ct. 360, 80 L.Ed 357 (1963); see also **Farmers' Loan and Trust Co. v. Galesburg, supra.** It is clear, then, that a municipality may terminate a franchise prior to its expiration date.

A franchise may be terminated either for misuse or for nonuser. For example, in **Farmers' Loan and Trust Co. v. Galesburg, supra,** the Supreme Court upheld the city's cancellation of a water company's franchise because the company had failed to supply water in the quantity and of a quality fixed by the contract. In **Boston Elevated Ry. Co. v. Commonwealth,** 39 N.E.2d 87, 310 Mass 528 (1942), the court upheld cancellation of a part of the franchise because the railway company had failed to use a portion of its railroad lines. The franchise may be terminated for breach of implied conditions as well as for *{*7}* breach of conditions expressly included in the contract. **Commission v. Havemeyer, supra.**

There are two basic methods for terminated of a franchise -- revocation, or repeal, and forfeiture, or cancellation. The United States Supreme Court has defined these methods as follows:

"The reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the legislature or other authority in which the power to repeal is vested . . . That power is plainly distinguishable from the power to cancel for violation of the terms of the grant. In the absence of constitutional, legislative or contractual restriction, the exertion of the first mentioned power requires nothing more than an appropriate declaration of the repeal. . . . But, without consent of the holder, valid cancellation for condition broken cannot be accomplished without giving to the holder an opportunity to have the asserted default judicially determined," **Commission v. Havemeyer, supra.**

The power to revoke or repeal must be expressly reserved by the municipality in the contract or it cannot be exercised. **Winter v. Mack,** 194 So. 225, 142 Fla. 1 (1940). The power to cancel a franchise need not be expressly reserved; it is available any time the franchisee breaches a condition of the franchise. **Commissioner v. Havemeyer, supra; Farmers' Loan and Trust Co. v. Galesburg, supra.**

In summary, a municipality may revoke a franchise at its pleasure if it has expressly reserved the power to do so. The franchisee cannot appeal a revocation. A municipality may cancel a franchise if the franchisee breaches the contract, but the franchisee has the right to have the breach determined by the courts.

The municipality has considerable latitude in choosing the means by which it will cancel a franchise. The United States Supreme Court in the **Havemeyer** case said that a franchise,

". . . may be canceled or withdrawn by any procedure that is not repugnant to the established principles of justice. The initial step need not be a suit for mandamus, **quo warranto,** injunction or the like. Essential requirements are satisfied if the withdrawal of the privilege, declared by legislative or executive authority, may be followed by appeal to a court of competent jurisdiction in which the rights of the holders may be determined. . . ." **Commission v. Havemeyer, supra.**

The municipality may rescind the contract and go to court itself to enforce the rescission, or it may simply withdraw the franchise by repealing the ordinance and let the franchisee go to court.

Section 23-1-5, NMSA, 1953, provides a limitation on actions to challenge the validity of a franchise. That section does not, however, limit actions to establish a cancellation or forfeiture for default. The New Mexico Supreme Court has distinguished between actions to challenge the validity of a franchise and actions to determine the existence of a breach of the franchise's conditions. In **Agua Pura Co. v. Mayor and Board of Aldermen,** 10 N.M. 6, 60 P. 208 (1900), the Supreme Court discussed the effect of Section 23-1-25 on the franchise held by a water company. It said:

". . . In holding that the contract was valid and subsisting at the time of the commencement of this action, . . . we do not wish to be understood as holding that the water company is thereby relieved of any of its obligations under said contract. On the contrary, it holds the contract subject to all the burdens with which it was originally made or accepted. **Agua Pura Co. v. Mayor and Board of Alderman, supra.**

The court went on to say that if the water company defaulted on its contract with the city, the city could appeal to the courts for appropriate assistance. The court did not define "validity," and we find no relevant authority which does. We infer from the distinction made in the **Agua Pura** case that the term "validity" refers to the lawfulness of the procedures by which the franchise is granted.

*{*8}* Section 14-43-1, NMSA, 1953, is the exclusive means by which the electors of a municipality can challenge the validity of a franchise or the right of the franchisee to continue to operate. There are no other statutory provisions, and it is the general rule at common law that only the state or its political subdivisions granting the franchise can challenge the validity of a franchise or the right of the franchisee to exercise its rights under the franchise. **Atlantic Coast Line R. C. v. Southern Railway Co.,** 214 Ga. 178, 104 S.E.2d 77 (1958). An elector of the municipality might be able to challenge the validity of the franchise on the grounds the provisions of Section 14-43-1 were violated, but this action would have to be brought within the six year time limit established by Section 23-1-25, **supra.**

In conclusion, a municipality may repeal a franchise at its pleasure if it has reserved the power to do so in the contract with the franchisee. A municipality may cancel a franchise if the franchisee breaches express or implied conditions of the franchise. The franchisee has a right to have its default judicially determined in that case. Aside from an action challenging a franchise on the grounds that provisions of Section 14-43-1 were violated, that statute is the sole means by which the electors of a municipality may challenge a franchise.