Opinion No. 65-69

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BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. Anthony A. Lucero, State Representative, Bernalillo County, 2010 Rio Grande N.W., Albuquerque, New Mexico

QUESTION

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1. Are "home rule" municipalities permissible under the Laws of New Mexico?

2. If a municipality is chartered, does its charter provisions prevail over general laws of the state?

3. Do the provisions of Chapter 121, Laws of 1919 (Sections 14-10-1 et seq., N.M.S.A., 1953 Comp.) apply to the City of Albuquerque?

CONCLUSIONS

1. No.

2. See Analysis.

3. Yes.

OPINION

*{*117}* ANALYSIS

"Home rule" is a right emanating from constitutional or statutory authority which grants a local municipality the authority to frame and adopt their own form and nature of self government. It is usually a creature of the constitution but in the absence of such provision is necessarily authorized by statute. See **McQuillan, Municipal Corporations,** (3rd Ed.) Vol. 1, pps. 340-346, Section 1.93.

It is usually considered that a municipality legitimately exercising its "home rule" rights is protected *{*118}* from legislative interferences with its legislative functions. Municipal corporations incorporated under a "home rule" charter are of a separate and distant classification than those created under general or special laws for the creation of a municipality.

New Mexico has no constitutional provision authorizing the formation of a "home rule" municipality. It likewise has no specific legislative authorization. It necessarily follows that this is not a "home rule" state, and that it is not permissible for any "home rule" municipality to be formed. The answer to the first question is in the negative.

The second question involves a determination of the phrase "state general laws." Our statutes permit a municipality to adopt a charter. Within the statutory framework a municipality may exercise municipal powers for public purposes. However, this is a matter of legislative grant expressly or impliedly authorized by the constitution. The state, through its legislature, delegates some of its sovereign power to provide for the protection of property, health, comfort and welfare of its citizens to its municipalities. Such delegation is in such measure as seems desirable for the advancement of such objects and may, likewise, be withdrawn by the legislature. Absent such delegation of power, expressly or **by necessary** implication granted, the municipal corporation has no authority. See **McQuillan Municipal Corporations,** (3rd Ed.) Vol. 2, pps. 463-464, Section 9.01.

It follows that a municipal charter, absent "home rule" authority, may only operate within the general outline of authority delegated by the state. As such it may provide the specific details lacking in the "general laws" concerning municipal organization and power. However, such charter authority is able to be exercised only by reason of the existence by such "general laws" so being implemented and the broad legislative authorization may be withdrawn or modified at any time by the legislature. There is no contractual right created by the adoption of charter provisions within the legislative authority. Neither is there any constitutional bar to a revocation or modification of such legislative authorization, so long as the same does not purport to modify or destroy rights otherwise constitutionally created and protected. There is no such protection afforded to a particular type of municipal organization or authority granted thereto by means of legitimate charter provisions. In this sense a state general law prevails over a charter granted to a municipality. In the sense that a municipality may, by charter, implement general legislative authorization to provide for the specific acts, the charter prevails. It is emphasized that the word "prevails", as used in this sense, is restricted to meaning "implementation" or fitting in the necessary details implied by the general state laws.

The third question deals specifically with Albuquerque and the application to it of our statutes governing the organization of cities with a population of 10,000 or more as set forth in Laws of 1919, Chapter 121. The City of Albuquerque was incorporated under the provisions of this act. **Bowers vs. City of Albuquerque,** 27 N.M. 291; **State ex rel Burg vs. City of Albuquerque,** 31 N.M. 576. Under the authority of these cases the provisions of such law does apply to the City of Albuquerque. Once so established a city must comply with the provisions of the act. **Stout vs. City of Clovis,** 37 N.M. 30.

Our general state laws pertaining to municipalities contain two statutes that are applicable. The first is contained in Laws of 1919, Chapter 121 concerning the form of government of cities with a population greater than 10,000. The second is contained in

the Laws of 1921, Chapter 21, as amended by Laws 1955, Chapter 92, concerning the form of government *{*119}* of cities having a population of 3,000 to 10,000. However this later enactment specifically provides that cities with a population of over 10,000 shall be governed by the commission-manager form of government applicable to the class of cities having a population of over 10,000, if the eligible voters therein so choose, i.e., the provisions of Laws of 1919, Chapter 121. Under these laws the eligible voters of the city must choose whether they desire a commission-manager form of government. If they so choose, and in the case of Albuquerque they did so choose, then the city is governed by the provisions of the Laws of 1919, Chapter 121. See also Opinion No. 59-25, Report of the Attorney General, 1959-1960, appearing at page 35. The answer to the third question is in the affirmative.