Opinion No. 67-35

March 3, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Albert O. Lebeck, Jr. City Attorney P. O. Box 1270 Gallup, New Mexico

QUESTION

FACTS

The City Charter of Gallup, New Mexico was enacted prior to the adoption of the Municipal Code. The City Charter and the Municipal Code differ in various respects concerning municipal elections.

QUESTION

If a city charter conflicts with the Municipal Code pertaining to an identical issue, which controls?

CONCLUSION

The Municipal Code controls.

OPINION

*{*45}* **ANALYSIS**

The beginning point of any discussion on whether the city charter or a general statute prevails must be the State Constitution. The pertinent section to this issue reads:

"(c) No city or county government existing outside the territorial limits of such city and county shall exercise any police, taxation or other powers within the territorial limits of such city and county, but all such powers shall be exercised by the city and county and the officers thereof, **subject to such constitutional provisions and general laws as apply to either cities or counties."** (Art. X, Section 4(c) Constitution of the State of New Mexico, (emphasis supplied).

It is the opinion of this office that under this provision, the provisions in the Gallup City Charter are subject to alteration or modification under the Municipal Code. This interpretation reflects the apparent intent of the legislature. The savings clause of the Municipal Code reads:

"Any ordinance in effect on the effective date of the Municipal Code shall continue in effect **except as the ordinance is modified or altered by the provisions of the**

Municipal Code. Any municipal charter whether granted by general or special act or adopted pursuant to any general or special act shall continue in effect." (Laws 1965, Chapter 300, Section 592, (emphasis supplied).

Under the authority of these provisions, it is the opinion of this office that the Municipal Code provisions prevail over City Charter provisions. This opinion reflects the general law on the subject.

It is fundamental that a municipality gains its powers through a delegation by the state. The delegation of power is to secure such goals as health and comfort for the municipality citizens. Once given, such a delegation of power may be withdrawn by the state, McQuillan, **Municipal Corporations,** (3rd Ed.), Vol. 2 pps. 463-464, Section 9:01. In the absence of constitutional restriction, the legislature may alter, modify, or destroy the political powers conferred upon municipalities, **State v. Minneapolis-St. Paul Metropolitan Airports Commission,** 248 Minn. 134, 78 N.W. 2d 722 (1956); **State v. Boca Raton,** (Fla.), 172 So. 2d 230 (1965). Further, an abundance of authority exists for the proposition that when the state constitution subjects the municipal charters to general laws, any conflict between the two must be resolved in favor of the general law, **Davies v. Los Angeles,** 86 Cal. 37, *{*46}* 24 Pac. 771 (1890); **In Re Cloherty,** 2 Wash. 137 27 Pac. 1064 (1891); **Mansfield v. O'Brien,** 274 Mass. 515, 171 N.E. 487 (1930); **Oakwood Co. v. Tacoma Mausoleum Ass'n,** 22 Wash. 2d 692, 157 P.2d 595, 161 P.2d 193 (1945).

The one exception to this general rule pertaining to your question is found at 14-18-3, N.M.S.A., 1953 Compilation. That exception is restricted to time of the election and should not be interpreted in any broader sense. As to the applicability of Section 14-14-11, N.M.S.A., 1953 Compilation, I refer you to Opinion of the Attorney General No. 65-69, dated April 28, 1965. That opinion dealt with the validity of home rule statutes in the absence of constitutional authority for home rule municipalities.

One further point should be made here. The Municipal Code's provisions seem to be an attempt by the state to set up a uniform or near uniform election procedure for municipalities. That is, the legislature made municipal elections a matter of state interest under the code. When a municipal charter and a general statute conflict over a matter of state interest, the general statute prevails, **Axberg v. Lincoln,** 141 Neb. 55, 2 N.W. 2d 613 (1942).

By: Donald W. Miller

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