

Opinion No. 70-41

April 16, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

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QUESTIONS

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May the City of Gallup provide in its charter for the compensation of its mayor and councilmen at a rate higher than that provided in Section 14-9-3, N.M.S.A., 1953 Comp.?

CONCLUSION

Yes.

OPINION

{*71} ANALYSIS

It is fundamental to the correct analysis of this problem that an understanding of the nature and source of municipal authority be achieved and borne in mind. For this reason, and in the hope that some clarification of the law may be effected, this opinion will explore the subject in some detail.

Though the principle of "home rule" takes varying form in almost every state where it prevails, it may be generally understood as a plan of government by which municipal organizations are freed of state regulation and control in the government of their respective jurisdictions, and are granted plenary power to govern persons and things in all or most matters of local interest. **People ex rel. Attorney General v. Johnson**, 34 Colo. 143, 86 P. 233 (1905). This office has observed that, under the constitution and laws of New Mexico, municipal organizations in this state do not enjoy the privilege of "home rule." Attorney General Opinion No. 65-69, issued April 28, 1965.

Whether a "home rule" jurisdiction or not, no state allows cities and towns to exercise plenary power in the absence of a valid grant of that power from the state. Whatever authority municipalities may correctly invoke must have been transferred to them explicitly or by necessary implication from an explicit grant. Many other states have done this, and have accomplished the transfer by both statutory and constitutional provisions; New Mexico, however, has not seen fit to invest its municipalities with such plenary power, and adheres to the traditional doctrine that cities and towns may govern

and regulate only in a manner determined by the legislature, and only with respect to areas of legislation specifically authorized to them by statute. The nature and scope of a municipality's authority to govern independently is examined in Attorney General Opinion No. 65-69, **supra**:

"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. I, pp. 340-346, Section 1.93.

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New Mexico has no constitutional provisions authorizing the formation of a "home rule" municipality. It likewise has not 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.

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. . . 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 {*72} 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. II, pp. 463-464, Section 9.01.

An examination of the state's Municipal Code, Sections 14-1-1 through 14-59-2, N.M.S.A., 1953 Compilation, will aid in understanding the limits of state and municipal authority in local government. It should be observed that the Code makes specific, detailed provisions for the **exercise** of governmental authority by the cities and towns, but generally leaves the implementation of this authority to local discretion. Thus, as earlier opinions of this office have pointed out, local government must proceed within the limits on its authority established by the Municipal Code: any attempt to regulate conduct or to ordain rules not based on authority granted by the Code is a nullity.

The Code does not, however, require all municipalities to organize their governments along identical lines. Sections 14-10-1 through 14-10-7, **supra**, provide for the adoption by certain eligible cities of a mayor-council form of government; Sections 14-13-1 through 14-13-19 establish, as an alternative available to most cities, the commission-manager form of government. Additionally, Sections 14-14-1 through 14-14-14 permit any municipality to establish by charter its own form of government, and specifically allow the municipality to structure that government as it wishes. Section 14-14-5, **supra**, declares:

"The charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality; Provided, that the charter shall not be inconsistent with the Constitution of New Mexico, shall not authorize the levy of any tax not specifically authorized by the laws of the state and shall not authorize the expenditure of public funds for other than public purposes. All bylaws, ordinances and resolutions lawfully passed and in force in the municipality before the adoption of the charter shall remain in force until amended or repealed."

It is of paramount importance that certain distinctions be recognized between the various powers and authorities heretofore discussed. If these distinct powers be characterized on the one hand as **governmental** and on the other as **organizational**, the importance of this distinction will be appreciated. The Municipal Code will be correctly seen as comprising the entire range of municipal **governmental** authority. In the absence of "home rule" provisions in New Mexico law, the Municipal Code is an exhaustive list of the governing powers of the municipalities, regardless of the form their governing organizations may take. The limits of the governing power are not subject to alteration by the actions of the cities and towns; no municipality may, by charter or otherwise, extend or enlarge its governmental powers beyond those enumerated in the Municipal Code.

The organization of municipal government, however, is not so closely prescribed as are its powers. Though cities are subject to all the provisions of the Municipal Code, there are sections of the Code which grant the cities a relatively free hand in organizing their governing bodies. Article 14 of the Code provides a method whereby the cities may choose whatever scheme of organization they may feel proper, but it does not operate to alter the governing powers residing in the organization itself. Only the organization of the municipality is affected, and then only in terms of matters principally of local interest; the charter must not conflict with the Constitution of New Mexico and must not attempt to extend the city's taxing power. It is axiomatic that a municipal charter, being itself a limited grant of authority, cannot be so employed by the municipality as to enlarge its governing powers. As a consequence, charter provisions control inconsistent Municipal Code provisions only when the charter provisions involve organizational {*73} matters. Thus, for example, municipalities organized by charter may conduct elections at times other than those set forth in the Municipal Code, Section 14-8-3, **supra**, but are otherwise subject to the general governmental provisions of the Code dealing with elections.

It would therefore appear that upon the adoption of a municipal charter, the city organization may exist in the form desired by the electors of that city. Having chosen to organize its government in a fashion other than that described in Section 14-9-3, **supra**, it would appear to be consistent with the municipality's power to organize itself to provide compensation for its officials as it sees fit. The salary-fixing provisions of the Municipal Code should be understood as having reference only to municipalities organized directly under a Code-established plan. **Gildersleeve v. Lamont**, 331 Mich.

8, 49 N.W.2d 36 (1951); **Brimmer v. Village of Elk Rapids**, 365 Mich. 6, N.W.2d 222 (1961).

By: Gary O'Dowd

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