Opinion No. 71-74

June 9, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Vernon Kerr New Mexico Representative 113 Sherwood Blvd. Los Alamos, N.M. 87544

QUESTIONS

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Does Chapter 311, New Mexico Laws of 1971 violate the New Mexico Constitution's prohibition against "special legislation" contained in Art. IV, Section 24 or the prohibition against appropriations made for charitable, educational or benevolent purposes to organizations over which the state does not have absolute control, contained in Art. IV. Section 31?

CONCLUSION

No.

OPINION

*{*106}* **ANALYSIS**

Chapter 311 NMSA 1971 (Senate Bill 390 approved April 8, 1971) contains an appropriation of $ 125,000 to the State Park and Recreation Commission for the following purposes:

"(1) to contract, lease or purchase lands within the city of Albuquerque or the county of Bernalillo for the purpose of constructing and equipping parks for recreational uses;

(2) to obtain the necessary playground equipment; and

(3) to construct and equip mini-parks in cooperation with the Albuquerque parks and recreation department and the board of county commissioners of Bernalillo County at or near the following locations:

(a) Adobe Acres Elementary School;

(b) Armijo Elementary School;

(c) Atrisco Elementary School;

(d) Barcelona Elementary School;

(e) Carlos Rey Elementary School;

(f) Ernie Pyle Junior High School;

(g) Five Points Elementary School;

(h) Larrazola Elementary School;

(i) Los Padillas Elementary School;

(j) Navajo Elementary School;

(k) Pajarito Elementary School;

(l) Rio Grande High School;

(m) River View Elementary School; and

(n) Valle Vista Elementary School;

(4) to expend the sum of five thousand dollars ($ 5,000) for the repair and improvement of the park on Martin Road at Adobe Acres in the southwestern area of Bernalillo County; and

(5) any balances remaining to be used in repairing and improving the South Side Community Center in the city of Albuquerque.

B. Upon the completion of the construction, equipping, repair and improvement of the above enumerated projects, the state park and recreation commission shall arrange with the city of Albuquerque and the board of commissioners of Bernalillo County to have *{*107}* each of the projects maintained and operated at the expense and under the control of the Albuquerque parks and recreation department and the board of commissioners of Bernalillo County . . ."

The question you have posed must be broken into two distinct parts with an affirmative answer to either part requiring that the statute be declared unconstitutional.

The first question involves N.M. Const. Art. IV, § 24, which reads, in pertinent part, as follows:

"The legislature shall not pass local or special laws in any of the following cases: . . . In every other case where a general law can be made applicable, no special law shall be enacted."

This constitutional provision has been interpreted many times by our Supreme Court. Basically, a general law is one that relates to a subject of a general nature or that affects all the people of the state, or all of a particular class. **State v. Atchison, T. & S.F.R. Co.,** 20 N.M. 562, 151 P. 305 (1915). A "special" law, however, is one made for individual cases, or for less than a class requiring law appropriate to its peculiar condition and circumstances. **Lucero v. New Mexico State Highway Dept.,** 55 N.M. 157, 288 P.2d 945 (1951). It is a law relating to particular persons or things within a larger class. **Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne,** 74 N.M. 487, 394 P.2d 998 (1964).

There can be no doubt that the statute in question here is a "special law," since it specifically names the locations where parks shall be constructed and those named locations are all within the City of Albuquerque or Bernalillo County. But the constitution does not forbid special laws; it states that no special laws shall be enacted **where a general law can be made applicable.** The question thus becomes: could a general law have been made applicable?

Several New Mexico cases have involved this very question. In **Scarbrough v. Wotten,** 23 N.M. 616, 170 P. 743 (1918), our Supreme Court held the statute there in question to be a special law, but not to contravene the constitutional prohibition since a general law could not be made applicable. The case contains a discussion as to the legislative determination that no general law could be made applicable, and concludes that it is within the legislature's discretion to make such a determination, and that such a determination is final. The implication is clear that if the legislature chooses to pass such a law, the courts will treat this as a determination that no general law could be made applicable, and will not inquire further, the legislative determination being treated as final.

In **Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne, supra,** the court, in discussing the law on this subject, said:

"What the Oklahoma court, in Chickasha Cotton Oil Co. v. Lamb & Tyner, 28 Olk. 275, 114 P. 333, characterized as the weight of the decided cases is that the judgment of the legislature, as indicated by the enactment of a special law, is conclusive that a general law cannot be made applicable and that such legislative determination is not subject to judicial review. The territorial Supreme Court in Sears V. Fewson, 15 N.M. 132, 103 P. 268, construing the Act of Congress commonly known as the "Springer Act," which limited the legislature, as does the constitutional provision supra, said that the judgment of the legislature as to whether a general law could be made applicable is final and not subject to judicial review, citing Guthrie Nat. Bank v. City of Guthrie, 173 U.S. 528, 19 S. Ct. 513, 43 L. Ed. 796 . . . Also, cases which arrived at the same result, at least in the absence of a clear abuse of discretion by the legislature, include McClain v. People, 111 Colo. 271, 141 P. 2d 685; State v. Carter, 30 Wyo. 22, 215 P. 477, 28 A.L.R. 1089. In Scarborough v. Wooten, supra, this court cited Sears v. Fewson, supra, and quoted the rule there announced. It did in fact determine that the legislation there being reviewed was a proper special act since a general act could not be made applicable.

*{*108}* "Many states, recognizing that the question is one for the legislature in the first instance, permit judicial review of the legislative decision if the disregard of the constitutional requirement is clear and palpable so that the court can see from the face of the act or from facts of which it takes judicial cognizance that enactment of a special law is unnecessary. Ventura County Harbor Dist. v. Bd. of Sup'rs, 211 Cal. 271, 295 P. 6; Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923. Also, see Richman v. Bd. of Sup'rs, 77 Iowa 513, 42 N.W. 422, 4 L.R.A. 445, 14 Am.St.Rep. 308. Some states formerly following the general rule now permit judicial review if there is a palpable abuse of discretion by the legislature. Heckler v. Conter, 206 Ind. 376, 187 N.E. 878; Ford v. State, 193 Okl. 386, 82 P.2d 1045. Arkansas and Kansas, formerly committed to the rule that the legislature is the exclusive judge of whether a general law is possible, have adopted constitutional amendments, in Arkansas expressly forbidding any local or special law, Simpson v. Matthews, 194 Ark. 213, 40 S.W. 2d 991, and in Kansas making it the duty of the courts to determine the constitutionality of acts without reference to a legislative declaration. Water Dist. No. 1 of Johnson County v. Robb, supra."

74 N.M. at 491, 492.

The court went on to review the facts which demonstrated that the Albuquerque flood control situation was unique and could not have been covered by a general law.

The **Albuquerque Flood** case would seem to allow our courts to make a deeper investigation into the background of a statute in determining whether or not a general law would suffice precluding a special law, than did the earlier **Scarbrough** case. But this office cannot say whether the courts would find the requisite "special local conditions," since to do so would be to "second guess" the courts. We would merely invoke the universally recognized legal axiom that courts are loath to find legislative enactments unconstitutional and will resolve all doubt in favor of constitutionality; this approach, plus the court's reluctance to "second guess" the legislature on the need for a special law would probably result in a holding that this statute is constitutional, even though it is of very narrow special interest and effect.

The second question is whether the statute in question violates New Mexico Constitution, Article IV, § 31, which reads:

"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine."

The case law on this provision is minimal, and not the least helpful in evaluating the present situation. See **Harrington v. Atteberry,** 21 N.M. 50, 153 P. 1041 (1915); **In re Gibson,** 35 N.M. 550, 4 P.2d 643 (1931); **State ex rel Hudgins v. Public Employees**

Retirement Board, 58 N.M. 543, 273 P.2d 743 (1954); and **State v. Reynolds,** 71 N.M. 389, 378 P.2d 622 (1963).

Therefore, we are forced to use a common-sense analysis of the statute in question with regard to its constitutionality under the above-quoted provision.

Article IV, § 31, forbids appropriations for charitable, educational or other benevolent purposes to be made to groups not under the absolute control of the State. Chapter 311 makes an appropriation to a state executive body, the park and recreation commission. It cannot be argued that the commission is not under the "absolute control" of the State. Therefore, the appropriation is not unconstitutional.

In **State v. Reynolds, supra,** the argument was made, as it might be here, that groups not under absolute state control got the benefit of the appropriation. The Court rejected this argument, saying that such a *{*109}* consideration is irrelevant so long as the appropriation is placed in the hands and under the control of a state official. The same reasoning applies in this case.

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