

## Opinion No. 74-08

February 12, 1974

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mrs. Inez B. Gill Staff Assistant Local Government Needs Committee New Mexico State Legislature Legislative Executive Building Santa Fe, New Mexico 87501

### QUESTIONS

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1. Can the legislature constitutionally grant to **all** incorporated municipalities the power "to impose any tax not otherwise prohibited by law" as proposed in the bill draft?
2. Can the legislature constitutionally grant to **only those municipalities which have adopted a "home-rule" charter** the power "to impose any tax not otherwise prohibited by law?"
3. What, for the purposes of granting taxing powers, is a "home-rule municipality?" Only those which have adopted charters under the provisions of Article X, Section 6? Those operating under a pre-statehood charter such as Silver City? Incorporated counties operating under a charter authorized in Article X, Section 5? Others?

#### CONCLUSIONS

1. No.
2. Yes.
3. See analysis.

### OPINION

#### {\*14} ANALYSIS

The 31st Legislature, Second Session (1974), has proposed the following legislation relating to municipalities:

"72-4-1.1. [ **NEW MATERIAL** ] MUNICIPAL POWER TO IMPOSE TAXES. -- The governing body of a municipality may impose any tax not otherwise prohibited by law."

Your questions involve a determination of whether this bill, if enacted into law, is a constitutionally permissible delegation of power to the municipalities.

Article IX, Section 12, of the New Mexico Constitution provides that no municipal debt can be incurred for any purpose except by irrevocable ordinance specifying the purposes for which the funds raised shall be applied and providing for a levy of a tax, not exceeding twelve [12] mills, on all taxable property within such municipality, sufficient to pay the interest on, and to extinguish the principal of such debt within fifty years. **Henning v. Town of Hot Springs**, 44 N.M. 321, 102 P.2d 25 (1939). This section and Article IX, Section 13, allowing municipalities to incur debts for water or sewer systems without elections, are not self-executing in that they do not confer power upon municipalities to contract indebtedness, independent of legislative authorization. **Lanigan v. Town of Gallup**, 17 N.M. 627, 131 P. 997 (1913). See **City of Clovis v. Crain**, 68 N.M. 10, 357 P.2d 667, 88 A.L.R.2d 1243 (1961).

"Section 12 of article 9 of the State Constitution confers no powers on the city, or does it contain a grant of power to 'qualified electors thereof as have paid a property tax therein during the preceding year'. It provides what shall not be done, not what may or can be done. It does not authorize municipalities to issue bonds, but prohibits their issuance unless certain conditions precedent are performed." **Varney v. City of Albuquerque**, 40 N.M. 90, 55 P.2d 40 (1936).

However, the "home-rule" amendment, Article X, Section 6, of the New Mexico Constitution adopted in 1970 does allow for "maximum local self-government," {15} by allowing a municipality "which adopts a charter" to "exercise all legislative powers and perform all functions not expressly denied by general law or charter." This provision, like Article IX, Section 12, requires voter approval of taxes imposed by the governing body. Article X, Section 6 (D). **State v. City of Aztec**, 77 N.M. 524, 424 P.2d 801 (1967); **Lanigan v. Town of Gallup, supra**. To implement Article X, Section 6, the legislature has enacted the "Municipal Charter Act," Sections 14-14-1 through 14-14-14, NMSA, 1953 Comp. (1973 P.S.). This Act provides the method whereby the qualified electors of a municipality can "adopt a charter" thereby expressing their desire "to be governed pursuant to Article 10 [sic], Section 6 of the Constitution of New Mexico."

In the law of municipal corporations, it is settled that a municipality derives its existence and powers from the constitution and legislation, and possesses as a public entity, no inherent powers, except where the municipality qualifies under the home rule provisions of a state constitution. **Village of River Forest v. Midwest Bank & Trust Co.**, 12 Ill. App.3d 136, 297 N.E.2d 775 (1973); **City of St. Paul v. Whidby**, 203 N.W.2d 823 (Minn. 1972).

While it has been held that the possession by a municipality of all powers of local self-government is not dependent upon its adoption of a charter, **Village of Perrysburg v. Ridgeway**, 108 Ohio St. 245, 140 N.E. 595 (1923), such a holding can only be found where a constitutional grant of power to municipalities is "self-executing." See **State ex rel. McClure v. Hagerman**, 155 Ohio St. 320, 98 N.E.2d 835 (1951). It is clear that under the New Mexico Constitution, the constitutional grant of powers to municipalities is not self-executing. **Lanigan v. Town of Gallup, supra**.

Thus, in our opinion, where the constitution requires voter adoption of a charter prior to a municipality becoming a home rule city, only cities having complied with Article X, Section 6, may "impose any tax not otherwise prohibited by law." To conclude otherwise would render the home rule amendment meaningless. See **Froelich v. Cleveland**, 99 Ohio St. 376, 124 N.E. 212 (1919).

Your last question involves a determination of which municipalities, for the purposes of granting taxing powers, are "home rule municipalities." Article X, Section 6, provides in pertinent part that "[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." Prior to the adoption of this provision the Supreme Court held that the power of taxation is to be exercised only by the state legislature and not by municipalities. **Lanigan v. Town of Gallup, supra**. Neither Article X, Section 5 nor Article IX, Section 12, of the New Mexico Constitution specifically authorize municipalities to levy taxes. As stated above, the power of the legislature to prescribe conditions under which municipalities may issue bonds is only limited by this section, but otherwise controlled. **Varney v. City of Albuquerque, supra**. Plainly, Article X, Section 6, has no application to incorporated counties chartered under Article X, Section 5, municipalities chartered under Article IX, Section 12 or municipalities operating under pre-state-hood charters. See **Home Builders Ass'n of Central Arizona, Inc. v. Riddle**, 109 Ariz. 404, 510 P.2d 376 (1973).

In New Mexico, like most states, power in respect of municipal taxation has been reserved in the legislature, except where it has been taken from that body by the constitution or by statutes and charters framed thereunder. In our opinion, the only grant of such power under the New Mexico Constitution is that of Article X, Section 6, and the Charter of the Town of Silver City as interpreted by the Supreme Court in **Atchison, T. & S.F. Ry. Co. v. Town of Silver City**, 40 N.M. 305, 59 P.2d 351 (1936). However, this authority is narrowly defined to uphold the right of the town to tax property within its corporate limits, as respects railway company property therein. See **Patten v. Corbin, et al.**, 42 N.M. 561, 82 P.2d 789 {\*16} (1938); **Sprunk v. Ward**, 51 N.M. 403, 186 P.2d 382 (1947). Therefore power in respect of municipal taxation is reserved in the legislature, except in the narrow situation of Silver City, and cannot be delegated, except by statutes or charters framed pursuant to Article X, Section 6. See Anno. 106 A.L.R. 1202.

By: Leila Andrews

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