Opinion No. 81-24

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OPINION OF: Jeff Bingaman, Attorney General

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MUNICIPALITIES; CRIMINAL OFFENSES

Synopsis: Where an offense is identified as a felony under state law, a municipality may not enact an ordinance which purports to punish the same offense and sets a lesser penalty therefor. Such an ordinance is "inconsistent with the laws of New Mexico" and is therefore an improper and invalid exercise of municipal authority.

QUESTIONS

Is a municipal ordinance inconsistent with state law if it provides a lesser penalty for an offense identified by state law as a felony?

CONCLUSIONS

Yes.

ANALYSIS

The municipality is subordinate to the state and possesses only such authority as may be granted by the state. This includes the authority of the municipality to enact and enforce local ordinances touching a matter upon which state law exists.

OPINION

In New Mexico, the source for the legislative authority of a municipality is found in Section 3-17-1 NMSA 1978. That law permits a municipality to adopt ordinances ". . . not inconsistent with the laws of New Mexico. . ." and limits the penalty for ordinance violations to 90 days imprisonment or $300 fine, or both. Compare Article X, Section 6 of the New Mexico Constitution for a similar provision reaching "home rule" municipalities.

Where the municipal ordinance is inconsistent with state law, the state law prevails. **City of Hobbs v. Biswell,** 81 N.M. 778, 473 P.2d 917 (Ct. App. 1970); 5 McQuillin, Municipal Corporations, Section 15.20 (3d Ed. Rev. 1969).

To determine whether a municipal ordinance conflicts with existing state law, several theories have evolved to define the relationship between the sovereign state and its municipal subordinate.

Some states rely upon a theory of pre-emption. This theory holds that where the State has expressly reserved an area for exclusive state legislative action, a municipal ordinance in this area is necessarily conflicting and therefore void. See, for example, Section 66-7-8 NMSA 1978 which bars local legislation upon certain traffic matters. In this narrow area of the law, the state of New Mexico can be said to have pre-empted the field.

Pre-emption may also appear by implication, as where the legislation upon the subject by the state is so comprehensive as to lead naturally to the conclusion that the state intended to occupy the field *{*264}* to the exclusion of local authorities. See **In Re Lane,** 58 Cal.2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962), a leading case on pre-emption by implication or occupation.

A related theory, similarly based upon notions of uniformity, is that of general law versus local law. Under this theory, matters which are of statewide importance are reserved for regulation by the state, whereas matters of local concern are susceptible to local legislation. What marks the boundary between state and local matters is a matter of much litigation across the nation and there are few clear guideposts. Some states have further blurred this distinction by permitting local legislation on subjects of "mixed" state and local concern. See, for example, **City of Aurora v. Martin,** 181 Col. 72, 507 P.2d 868 (1973).

New Mexico has developed at least two clear guidelines for evaluating the validity of a local ordinance in light of state law. First, a municipality may enact ordinances upon matters for which state law already exists. In fact, a municipality may enact ordinances which duplicate or complement existing statutory regulation without necessarily creating a conflict. See **State ex rel. Coffin v. McCall,** 58 N.M. 534, 273 P.2d 642 (1954); **Mares v. Kool,** 51 N.M. 36, 177 P.2d 532 (1946); **City of Clovis v. Dendy,** 35 N.M. 347, 297 P. 141 (1931).

Second, a municipality may enact an ordinance which sets greater restrictions or higher standards than those set by state law without necessarily creating a conflict. See **City of Hobbs, supra;** 6 McQuillin, Municipal Corporations Section 23.07 (3d Ed. Rev. 1969).

A municipality may fix a penalty **greater** than that fixed by state law for the same offense so long as the penalty is not in excess of 90 days imprisonment or $300 fine, or both, for violation of an ordinance. Section 3-17-1C, cf. Article X, Section 6, New Mexico Constitution. A municipality may fix a penalty for ordinance violation which is **lesser** than a penalty fixed by state law for the same offense unless the offense is one which state law identifies as a felony. The basis for this review is as follows.

Although the question of a municipal ordinance similar to a state law but with lesser penalties has not been addressed in New Mexico, the courts of Colorado resolved this issue as a matter of criminal jurisdiction. See **Quintana v. Edgewater Municipal Court,** 179 Col. 90, 498 P.2d 931 (1972), where the Colorado Supreme Court examined a municipal ordinance punishing the offense of shoplifting.

The state statute prohibited larceny but distinguished between larceny of an article valued up to $100 and larceny of an article valued in excess of $100. The former was deemed a misdemeanor while the latter was designated a felony under state law. (Compare Section 30-16-1 NMSA 1978.) However, the municipal ordinance outlawed all shoplifting without regard to value.

The Colorado Supreme Court held that because the municipality did not limit its ban on shoplifting to goods, wares, and merchandise with a value not exceeding $100, it entered the felony category, which was exclusively within the jurisdiction of the district courts. The definition of a crime as a felony under state law rendered municipal action void for lack of jurisdiction and it necessarily placed the matter beyond *{*265}* the power of municipalities to enact ordinances concerning "local" matters.

The New Mexico Constitution, Article VI, Section 13, vests the district court with jurisdiction over all matters and causes not vested otherwise by the Constitution or law. This provision of the Constitution has been interpreted as vesting sole and exclusive jurisdiction for trial of felony cases in the district courts. **State v. Garcia,** 93 N.M. 51, 596 P.2d 264 (1979); **State v. McKinley,** 53 N.M. 106, 202 P.2d 964 (1949).

Because New Mexico possesses a similar constitutional and statutory scheme for the distribution of jurisdiction over crimes, the Colorado case would compel a like result in New Mexico. While New Mexico has not yet done so, the theories of pre-emption, occupation, or uniformity may be used to place similar limitations upon the authority of municipalities. Finally, the penalty limitation set forth in Section 3-17-1 fixes a statutory boundary for the exercise of a municipality's legislative power.

For these reasons, the Attorney General concludes that where an offense is identified as a felony under state law, a municipality may not enact an ordinance which purports to punish the same offense and sets a lesser penalty therefor. Such an ordinance is "inconsistent with the laws of New Mexico" and is therefore an improper and invalid exercise of municipal authority.

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