

Opinion No. 83-06

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OPINION OF: Paul Bardacke, Attorney General

BY: Anita Miller, Assistant Attorney General

TO: Gary O'Dowd, City Attorney, City of Albuquerque

FACTS

The Paradise Hills Special Zoning District was formed in 1979 pursuant to the provisions of Section 3-21-15, **et seq.**, NMSA 1978. The boundaries of the special district include not only the developed portion of the Paradise Hills Subdivision, Northwest of the City of Albuquerque, but also a considerable area of surrounding undeveloped land.

The owners of several hundred acres of vacant land adjoining the developed portion of Paradise Hills and located within the boundaries of the Paradise Hills Special Zoning District have filed petitions for the annexation of their property to the City of Albuquerque, pursuant to Section 3-7-17, NMSA 1978. These petitions are currently pending before the Albuquerque City Council. The City Council has asked whether the Paradise Hills Special Zoning District Commission would continue to exercise concurrent zoning jurisdiction over the territory included within these petitions if the petitions are granted and the territory is annexed to the City of Albuquerque.

QUESTIONS

Does a Special Zoning District Commission continue to exercise concurrent zoning jurisdiction with a municipality after a portion of the territory in the special zoning district is annexed into a municipality?

CONCLUSIONS

No.

ANALYSIS

Sections 3-21-15 to 3-21-26 NMSA 1978, comprise the "Special Zoning District Act". Pursuant to Section 3-21-16, the purpose of the Special Zoning District Act is to "promote the health, safety, morals and general welfare of persons residing at areas **outside the boundary limits of** incorporated **municipalities** (emphasis added). Section 3-21-18 states as follows:

"3-21-18. Special Zoning District.

A special zoning district is created in an area **outside the boundary limits of an incorporated municipality** when (a) there are at least one hundred fifty single family dwellings within the area; (b) at least fifty-one percent of the registered electors residing in the area sign a petition requesting a special zoning district; and (c) the signed petition along with the plat of the area included within the district, is filed in the Office of the County Clerk of the county or counties in which the areas is situated." (Emphasis added).

Thus a special zoning district can only exist **outside** the boundary limits of an incorporated municipality. The Special Zoning District Act makes no mention of the effect of annexation into a municipality of territory previously within a special zoning district.

Section 3-21-1A NMSA 1978 of the municipal zoning statute provides that

". . . a county of municipality is a zoning authority and may regulate and restrict **within its jurisdiction**. . ." (Emphasis added.)

Section 3-21-2B NMSA 1978, of the municipal zoning statute, provides that a municipal zoning authority.

". . . May adopt a zoning ordinance applicable to the territory **within the municipal boundaries** and may adopt and submit a zoning ordinance to an extraterritorial zoning commission as provided in Section 3-21-2 NMSA 1978, which ordinance is applicable to all or any portion of the territory within its zoning jurisdiction. . ." (Emphasis added.)

No mention is made of a special zoning district having any jurisdiction over land within the municipal boundary.

The annexation of territory by a municipality is specifically authorized by the Legislature pursuant to 3-7-1, **et seq.**, NMSA 1978 sets forth the method of annexation which is at issue in the present case. It reads as follows:

"(a) Whenever a petition:

1. seeks the annexation of territory contiguous to a municipality;
2. is signed by the owners of a majority of the number of acres in the contiguous territory;
3. is accompanied by a map which shall show the external boundary of the territory proposed to be annexed and the relationship of the territory proposed to be annexed to the existing boundary of the municipality;
4. is presented to the governing body, the governing body shall by ordinance express the consent to rejection to the annexation of such contiguous territory."

The statute continues:

"b. if the ordinance consents to the annexation of the contiguous territory, a copy of the ordinance, with the copy of the plat of the territory so annexed, shall be filed in the Office of the County Clerk. **After the filing, the contiguous territory is part of the municipality. . .**" (Emphasis added.)

Note that there is nothing in the statute that makes an exception to any part of the territory which is within a special district of any kind, including all of the "contiguous territory" as "part of the municipality."

The City of Albuquerque Comprehensive City Zoning Code, Article XIV, Chapter 7 of Revised Ordinances of Albuquerque, New Mexico, 1974, provides at Section 41 A.6. as follows:

"Application for zoning of an area to be annexed to the City is an application for a map amendment and must be filed and processed concurrently with the annexation action."

Albuquerque treats the zoning of land being annexed as an amendment to the zoning map, and does not let land into City unzoned.

The annexation of property to a municipal corporation is an act of the state, and such property stands thereafter subject to the same burdens and is entitled to the same benefits as any other property within the corporation, all contracts and ordinances of the municipality being extended to the newly added property. Annot., **What Zoning Regulations are Applicable to Territory Annexed to a Municipality**, 41 A.L.R.2d 1463.

The general rule in connection with special districts is that when the territory of a public corporation of limited powers is annexed to and entirely contained within the boundaries of a municipal corporation which has power to exercise the same functions as well as others essential to municipal government, the public corporation of limited powers, in the absence of a specific legislative enactment revealing an intention that it should continue its existence, of necessity automatically merges with the municipal corporation and ceases to exist. **People ex rel. City of Downey v. Downey County Water District**, 21 Cal. Rptr. 370 (1962). Otherwise, two distinct local governmental bodies claiming to exercise the same authority, powers and franchise simultaneously over the same territory would "produce intolerable confusion, if not constant conflict." **Petition of East Fruitvale Sanitary District**, 158 Cal 453, 459, 111 P. 368, 371 (1910)

Zoning is merely **one** of many powers granted to a chartered municipality, such as Albuquerque, pursuant to the New Mexico Constitution, Article X, Section 6 and Sections 3-18-1 to 3-18-29 NMSA 1978. However, the only power of a Special Zoning District is to exercise the police power of zoning property in areas outside the boundary limits of incorporated municipalities. Thus, under the rule in **Downey, supra** the zoning

powers of the Special District should cease to exist in the territory annexed to the City, a general municipal corporation.

Cases involving the question of the zoning regulations applicable to annexed territory are in accord with the general rule stated above. 41 A.L.R.2d 1463. Once territory has been annexed by a municipality, the municipal authorities have control of the regulation of zoning in such territory. It is the majority rule that regulations in effect in the area to which the annexed territory formerly belonged are no longer effective in any degree over the territory, unless made so by municipal ordinance. **Id.** See 2 Rathkopf, *The Law of Planning and Zoning*, Section 25.03. The only question which may arise is the status of the newly annexed territory if it is not zoned by the City concurrently with annexation. **Id.**, Notes 3-5. As stated above, property which is annexed to the City of Albuquerque is zoned at the time of annexation, so this question is inapplicable in the present case.

There is no question as to the effect of the annexation of an **entire** special district into a municipality. The cases are clear that the jurisdiction of a special purpose district terminates if the service that it is providing is also one that the municipality is authorized to provide. See **People ex rel. City of Downey v. Downey County Water District**, *supra*, Sands and Libonati, **Local Government Cases**, Section 8.33, Note 2 and 3; **Municipal Corporation Law**, and McQuillen, **Municipal Corporations** Section 7.46, Note 19.

On the other hand, when only a part of a special purpose district is annexed, conflicting rules have developed about whether the district's power terminates within the annexed area. For examples of cases where the districts' powers were held to terminate, See **Cox v. Otay Municipal Water District**, 19 Cal. Rptr. 595 (1962) and **Garden Home v. City Denver**, 177 P.2d 546 (Colorado). The factors which are important are whether the statutes indicate legislative intent that the service was intended to terminate upon annexation and also whether it would be disruptive to have two different overlapping jurisdictions in the same area.

The New Mexico Special Zoning District Act, by providing that a special zoning district may be created only outside the boundaries of an incorporated municipality, establishes a legislative intent that the district's authority could not extend within a municipality. That a municipality may zone all territory within its boundaries, pursuant to Sections 3-21-1 and 3-21-2 NMSA 1978 is further proof of exclusive municipal zoning authority within municipal limits as a matter of law.

It would be disruptive to have two overlapping zoning jurisdictions in an area. Also, owners of a majority of acres seeking to be annexed want to be subject to the entire panoply of City benefits and burdens, including City zoning. All that the Special Zoning District can do is offer zoning authority.

Taylor v. Bowen, 158 SE.2d 837 (N.C. 1968), is on point. In that case, the North Carolina legislature expressly authorized a county to exercise zoning power over a small tract of land which was described by metes and bounds in the statute, which can

be considered analogous to a Special Zoning District containing specifically described property. As in the present case, **part** of the described land was annexed by the City of Fayetteville. The county insisted that it still had zoning jurisdiction because the statute specifically described the area to be zoned by the county. The Supreme Court of North Carolina ruled to the contrary and held that "the zoning power of the County Board of Commissioners over the land annexed by the City does not survive the annexation." **Id.** at 839. The Court relied on the principle that:

"when a municipal corporation is established, it takes control of the territory and affairs over which it is given authority to the exclusion of **other governmental agencies**". **Id.** (Emphasis added).

"where land was previously zoned as part of the municipality * * * in which it lay, the prior zoning becomes ineffective immediately upon such incorporation or annexation since it is a well recognized rule that two municipal corporations do not have co-extensive power of government over the same area and that municipal power may only be exercised within the limits of the municipality." **Id.**

Thus, under the rule in **Taylor**, it is immaterial that only part of the District was annexed. What is relevant is that a City has exclusive zoning power within its city limits. This is the case in Albuquerque. Therefore, the factors relied upon by the court in **Taylor** are applicable in the present case.

CONCLUSIONS

The Paradise Hills Special Zoning District Commission loses its jurisdiction to zone territory annexed by the City of Albuquerque upon annexation, and the City of Albuquerque then has exclusive zoning jurisdiction over this territory.

ATTORNEY GENERAL

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