

## **Opinion No. 92-05**

May 28, 1992

**OPINION OF:** TOM UDALL, Attorney General

**BY:** David M. Kaufman, Assistant Attorney General

**TO:** Senator John Arthur Smith, 1202 Allen Street Deming, NM 88030 James W. Catron, Deputy District Attorney, P.O. Box 1099 Socorro, NM 87801

### **QUESTIONS**

Whether the Sierra County commission has authority to reduce the salaries of elected county officers in light of NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991).

### **CONCLUSIONS**

Yes. Despite the legislature's statement of intent in NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991), the Sierra County commission has authority to reduce the salaries of elected county officers.

### **FACTS**

Sierra County is currently classified as a class "B" county with an assessed valuation of more than \$75,000,000 but less than \$300,000,000. See NMSA 1978, § 4-44-5 (Cum. Supp. 1991). In 1986, the legislature enacted N.M. Laws 1986, ch. 67 which provided, inter alia, maximum annual salaries for class "B" county officers. The law provided that officers' salaries "shall not exceed" the following: commissioner, \$8,700; treasurer \$26,200; assessor, \$26,200; sheriff, \$27,400; clerk, \$26,200; and, probate judge, \$6,100. According to records of the Sierra County clerk's office, with the exception of county commissioners' salaries, the salaries of the Sierra County officers for the 1989/1990 fiscal year were equal to the statutory maximum.<sup>1</sup> The Sierra County clerk office records indicate that the salary for the office of county commissioner for that year was \$8,734, that is, \$34 more than the statutory maximum.

In 1990, the legislature enacted a new law permitting an increase in salaries of county officers, including the salaries of officers of class "B" counties. 1990 N.M. Laws, ch. 82 (codified as amended in scattered sections of NMSA 1978, § 4-44-1 to -45 (Cum. Supp. 1991)). That legislation set the maximum annual salaries for officers of class "B" counties, effective January 1, 1991, as follows: commissioner, \$10,500; treasurer \$30,130; assessor, \$30,130; sheriff, \$31,510; clerk, \$30,130; and, probate judge, \$7,015. NMSA 1978, § 4-44-5 (Cum. Supp. 1991).

At its May 2, 1990 commission meeting, the Sierra County commissioners voted to decrease the salaries of that county's elected officers, effective January 1, 1991. The

minutes of the meeting reflect the statements of the commissioners that the reduction was to reverse tax increases and to narrow the gap between salaries of elected officers and other county employees. Minutes, Board of Comm'rs of Sierra County, New Mexico, 2 (May 2, 1990). Another commissioner commented that salary increases approved in Santa Fe were out of line for Sierra County. *Id.* According to the Sierra County clerk's office, the annual salaries subsequently budgeted by the Sierra County commissioners and currently in effect are: commissioner, \$8,000; treasurer \$24,000; assessor, \$24,000; sheriff, \$25,100; clerk, \$24,000; and, probate judge, \$5,588. The salary decreases were approved by the local government division of the Department of Finance and Administration ("DFA") as part of the Sierra County budget on August 15, 1990. All officers effected by the decrease assumed office on January 1, 1991.<sup>2</sup>

## ANALYSIS

Article X, § 1 of the New Mexico Constitution provides for the salaries of county officers. That article states:

The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county.

N.M. Const. art. X, § 1. The legislature fulfilled its constitutional duty to classify the various counties and set salaries in NMSA 1978, §§ 4-44-1 to -45 (Repl. Pamp. 1884 & Cum. Supp. 1991). Under the current statutory scheme, the legislature has, in effect, set salary caps for officers in the various counties, but has delegated to county commissions the discretion to set the specific amount of such salaries at or at some point below the caps.<sup>3</sup> As amended in 1990, NM 1978, § 4-4-5 (Cum. Supp. 1991) does not include mandatory language that salaries of officers of Class "B" counties be raised from prior levels.<sup>4</sup> In addition, NMSA 1978, § 4 (Cum. Supp. 1991) is silent as to salary decreases for officers of Class "B" counties; decreases are not expressly permitted or prohibited.

The specific question we have been asked to consider is whether NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991) prohibits the decrease in county officers' salaries voted by the Sierra County commission. That section, entitled "Legislative Intent; Purpose," provides that:

It is the legislative intent that the salaries of county officials be raised by this 1990 act and be effective on January 1, 1991. It is further intended that a county shall make a budget that includes either the maximum salary raise allowed herein or a percentage thereof, and, when a local government division of the department of finance and administration certifies that a county has done so, no further ministerial action need be taken to effectuate the purposes of this 1990 act.

(emphasis added).

It is a rule of statutory construction in New Mexico that courts are bound to enforce the plain and literal meaning of a statute. Legislative intent is primarily derived from the language actually employed in a statute. *State v. Ellenberger*, 96 N.M. 287, 288, 629 P.2d 1216, 1217 (1981); *Southern Union Gas Co. v. Pub. Serv. Comm'n*, 82 N.M. 405, 407, 482 P.2d 913, 915 (1971); *Sunset Package Store, Inc. v. City of Carlsbad*, 79 N.M. 260, 262, 442 P.2d 572, 574 (1968). A court will not consider other evidence to determine legislative intent, unless it determines a statute to be vague or ambiguous.

NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991) is a policy section stating legislative intent and the purpose of the act. Policy sections setting forth legislative intent, like preambles, state the general objectives of acts so that administrators and courts may know their purposes. 1A N. Singer, *Sutherland Statutory Construction* § 20.12 (4th ed. 1985); 2A N. Singer, *Sutherland Statutory Construction* § 47.04 (4th ed. 1985). Policy sections are available for the clarification of ambiguous provisions of statutes, but may not be used to create ambiguity.<sup>5</sup> *Block v. Hirsch*, 256 U.S. 135, 154 (1921). The declaration of policy is not part of the substantive portion of the statute. *Illinois Independent Tel. Ass'n v. Illinois Commerce Comm'n*, 539 N.E.2d 717, 725 (Ill. Ct. App. 1989). A section of a statute declaring its purpose does not constitute an "operative section" of a statute that would be capable of overriding other "specific provisions" in the act. Such policy language is more in the nature of a prayer, request, or entreaty conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction. *Black's Law Dictionary* 1059 (5th ed. 1979). See also, *Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246-7 (D.C. Cir. 1973); *Thillins, Inc. v. Fryzel*, 712 F. Supp. 1319, 1323-4 (N.D. Ill. 1989); *Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449, 453 (D. Haw. 1984); *Triple A Services v. Rice*, 545 N.E.2d 706, 709-10 (Ill. 1989).

Thus, according to the rules of statutory construction, the statement of legislative intent in NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991) should only be considered if the operative portion of the statute, NMSA 1978, § 4-44-5 (Cum. Supp. 1991), is vague or ambiguous on its own. Because we do not believe NMSA 1978, § 4-44-5 (Cum. Supp. 1991) is vague or ambiguous, we do not look to the policy statement in NMSA 1978, § 4-44-12.2 (Cum. Supp. 1991) to aid in its interpretation.<sup>6</sup> We conclude that, because the operative provisions of the statute do not expressly mandate salary increases or prohibit salary decreases, salary decreases are permitted.

In another section, NMSA 1978, § 4-44-12.1 (Repl. Pamp. 1984), the legislature has provided that if any one officer's salary is increased, all officers of that county must also receive an increase of the same percentage.<sup>7</sup> In addition 1991, the legislature enacted legislation providing for uniform salary changes for county officers. 1991 N.M. Laws, ch. 91 (codified at NMSA 1978, § 4-44-12.3 (Cum. Supp. 1991)).<sup>8</sup> In that provision, the legislature stated its intent that salary increases be equitable. None of these provisions, however, prohibit the decrease, as in this case, of the salaries of officers starting a new term of office.

Furthermore, while the legislature has set a salary cap, the funds to pay the salaries come, not from the state, but from the counties themselves. The Bateman Act, NMSA 1978, § 6-6-11 (Repl. Pamp. 1987), requires that counties limit their expenses to their respective incomes. *Johnston v. Board of County Comm'rs*, 12 N.M. 237, 241, 78 P. 43, 44 (1904). In the event a county is unable to pay budgeted salaries, the state government does not make up the shortfall. If there are insufficient funds to pay the salaries budgeted for county officers, such salaries are to be reduced and each officer is to receive his or her pro rata share of the funds collected. NMSA 1978, §§ 6-6-13 and - 14 (Repl. Pamp. 1987). It would appear reasonable then for the legislature to have delegated the authority to set county officers salaries to the county commissions responsible for determining their counties' budgets.

Finally, the decision to decrease salaries of elected county officers for the reasons stated by the Sierra County commissioners, that the reduction was to reverse tax increases, narrow the gap between salaries of elected officers and other county employees and that salary increases approved in Santa Fe were out of line with Sierra County (Minutes, Board of Comm'rs of Sierra County, New Mexico, 2 (May 2, 1990)), does not appear to involve the sort of improper motivation for salary changes that restrictions on such changes in other provisions of law have been adopted to prevent. Cf. *State ex rel. Gilbert v. Board of Comm'rs*, 29 N.M. 209, 218-19, 222 P. 654, 657 (1924) (the policy of N.M. Const. art. IV, § 27 is to protect certain officers from interference by way of retaliation or revenge from members of the legislature, to prevent the legislature and other authorities from influencing officers by being able to increase or diminish salaries and to prevent incumbents from using their influence to increase their salaries).<sup>9</sup>

## **ATTORNEY GENERAL**

TOM UDALL Attorney General

## **GENERAL FOOTNOTES**

[n1](#) The law also provided the salary for county surveyor was to be a reasonable rate of compensation as determined by the board of county commissioners. However, we understand there is no office of county surveyor in Sierra County.

[n2](#) Because the salary changes were effective at the time new terms of office began, no issue is raised under the constitutional provision prohibiting certain salary changes during an officer's term of office. See N.M. Const. art. IV, § 27.

[n3](#) Formerly, the legislature set the specific amounts of county officers' salaries and county commissioners had no discretion with respect to the setting of such salaries. AG Op. No. 1649 (1937).

[n4](#) NMSA 1978, 4-44-5 (Cum. Supp. 1991) provides:

The annual salaries of elected officers of class "B" counties with an assessed valuation of over seventy-five million dollars (\$75,000,000) but under three hundred million dollars (\$300,000,000) shall not exceed:

A. county commissioners, ten thousand five dollars (\$10,005.00) each; B. treasurer, thirty thousand one hundred thirty dollars (\$30,130.00); C. county assessor, thirty thousand one hundred thirty dollars (\$30,130.00); D. county sheriff, thirty-one thousand five hundred ten dollars (\$31,510.00); E. county clerk, thirty thousand one hundred thirty dollars (\$30,130.00); F. probate judge, seven thousand fifteen dollars (\$7,015); and G. county surveyor, a reasonable rate of compensation as determined by the board of county commissioners.

[n5](#) A preamble is a declaration by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities within the statute to which it is prefixed. *Griffith v. New Mexico Public Service Comm'n*, 86 N.M. 113, 115, 520 P.2d 269, 271 (1974).

[n6](#) We also considered whether the title of N.M. Laws 1990, ch. 82 creates an ambiguity in the statute which would allow the consideration of the policy section to aid in interpretation. The title to the act is: "Relating to Counties; Increasing the Salaries of Certain Elected Officers; Amending and Repealing Certain Sections of the NMSA 1978." But see *State v. Ellenberger*, 96 N.M. 287, 288, 629 P.2d 1216, 1217 (1981) (the title represents little more than a convenient tag to an organizational grouping of statutes and cannot be used to create an ambiguity in an otherwise clear expression of the legislature). Even if the title was considered in interpreting the act, the title does not contradict our interpretation and prohibit salary decreases. While the title could be read to suggest that the legislature intended to increase the salaries of county officers and not decrease them, it could also be read to permit a salary increase for certain elected officers, but not mandate one.

[n7](#) Although that provision and no similar statutory provision would appear to pertain to salary decreases, the salary decreases for elected officers budgeted by the Sierra County commissioners were an across-the-board 8.4%.

[n8](#) 1991 N.M. Laws, ch. 91 (codified at NMSA 1978, § 4-44-12.3 (Cum. Supp. 1991)) provides:

A. The intent of the legislature, when enacting salary increases for elected county officials, is to provide for equitable salary increases.

B. In accordance with Sections 4-44-3 through 4-44-8 NMSA 1978, the majority of a board of county commissioners may provide for salary increases for elected county officials; provided, however, that no salary increase shall take effect until the first day of the term of the first elected county official who takes office after the date that salary increase is approved, at which time the salary increase shall take effect for all county-elected officials.

[n9](#) See footnote 2, above.