

## **April 17, 2006 City of Española Voting Procedures—Opinion Request**

April 17, 2006  
Honorable Rebecca Vigil-Giron  
Secretary of State  
325 Don Gaspar  
Suite 300  
Santa Fe, NM 87503

**Re: City of Española Voting Procedures--Opinion Request**

Dear Madam Secretary Vigil-Giron:

You have requested our opinion whether the City of Española's "ward" system of electing city councilors is legal. The system, described in greater detail below, appears to be a hybrid between a single district voting system and an at-large voting system. New Mexico municipalities have employed a variety of voting systems since statehood. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we believe that there is no clear answer whether Española's system is legal. We believe, however, that without further authorization from the Legislature respecting the permissible use of its procedures, the City of Española may have difficulty, as a non-home rule municipality, establishing the requisite statutory authority for its procedures in the event of litigation.

According to our information, these are the facts pertinent to the question: The City of Española is not a "home rule" municipality. The City of Española is organized under a mayor-council form of government provided for in NMSA 1978, § 3-11-1 to -7 (1965). Because the city's population is less than 10,000, the city's council members are not required to reside in and be elected from districts. There are eight city councilors in the City of Española. The city elects its council members by a "ward" system. Under this system, the city is divided into four election wards for purposes of electing members to the city council. Each ward is served by two city councilors. During each election cycle, one seat from each ward is open for election. When a candidate declares his/her intention to run for a seat, that candidate must file a declaration of candidacy form declaring the particular ward for which the candidate is running. There is no requirement, however, that the candidate reside in that particular ward.

Election ballots group candidates according to the wards from which they have chosen to run. The public votes for candidates "at large," meaning that all city voters may vote for one candidate from each of the four wards, regardless of the residence of the voter. Winners are determined by ward. In each ward, the candidate who receives the most votes wins a seat on the council. Thus, the winners are not necessarily those four candidates, in descending order, who received the greatest number of votes overall.

Since the City of Española is not a home rule municipality, the city requires express or implied authority in state law to regulate and conduct its elections in the manner it has

done. See State ex. rel Haynes v. Bonem, 114 N.M. 627, 630, 845 P.2d 150, 153 (1992) (Observing that, before the advent of "home rule," which is now constitutionally authorized by N.M. Const. art. X, § 6 by adoption of a charter, "all municipalities in the state depended on the state legislature for their power to act. They looked to state statutes for express or implied grants of authority, and if they did not find such authority, they could not act").

Single member districts for city governing body elections are provided for at NMSA 1978, Section 3-12-1.1 (1992). The City of Española is not required to, but may, provide for single-member district elections. That section provides, in part:

Except as provided in Section 3-12-2 NMSA 1978, members of governing bodies, excluding mayors, of municipalities having a population in excess of ten thousand shall reside in and be elected from single-member districts. If any member of the governing body permanently removes his residence from or maintains no residence in the district from which he was elected, he shall be deemed to have resigned.... [P]rovided that the governing body of H class counties and of any municipality having a population of ten thousand or less may provide for single-member districts as provided in this section.

Providing for the election of city councilors from "wards or districts," NMSA 1978, Section 3-12-2 (2003) provides, in part:

D. The governing body of a municipality having a mayor-council form of government is the council or board of trustees whose members are the mayor and not less than four or more than ten councilmen or trustees. Any governing body of more than six councilmen or trustees may provide by ordinance for the election of two councilmen or trustees for each ward or district or create or abolish wards or districts or alter the boundary of existing wards or districts; provided that only one councilman or trustee shall be elected from a ward or district at any one election.

...

F. The governing body of a municipality may redistrict the municipality whenever redistricting is warranted. Upon petition [meeting certain requirements], the governing body of the municipality shall redistrict the municipality.

Section 3-12-2 was originally enacted in 1965, as part of a major overhaul of the laws relating to municipalities, repealing numerous existing laws. See 1965 N.M. Laws, Ch. 300. In that 1965 law, the part pertaining to Section 3-12-2 merely provided: "The governing body may provide by ordinance for the election of one or two councilmen or trustees for each ward, or create or abolish wards, alter the boundary of existing wards, or provide for the election of councilmen or trustees on an at-large basis."

1985 N.M. Laws, Ch. 203 enacted Section 3-12-1.1, requiring and allowing single-member districted elections, and also amended Section 3-12-2 to add language allowing the city to re-district. It also made changes to subsection D, which included deleting the language pertaining to "at large" elections. In 1992, the Legislature amended Section 3-12-2 to add the language "or district" following "ward" in Section 3-12-2. See 1992 N.M. Laws, Ch. 6, § 2.

State law specifically provides for the election of city councilors for or from "wards" or "districts." State law does not define "ward" or regulate the manner of voting for candidates for or from wards or the qualifications for becoming a candidate for or from a ward. Under the city's procedures, residency within a "ward" is not a requirement for being an Española city councilor candidate for a particular "ward," and, to the extent "ward" is different from "district," a "ward" residency requirement constitutionally could not be imposed. See Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924) (holding that "ward" residency constitutionally could not be required of a city council office holder).<sup>1</sup>

State law specifically provides for "districting" of municipal elections. State law also requires "within district residency" for office holders who are elected from "districts" and for voters who vote in districted elections. To the extent "ward" means the same thing as "district," then Española's method of electing city councilors is not consistent with the law. Article V, Section 13, requires candidate residency within a particular district.<sup>2</sup>

As defined by the dictionary, the terms "ward" and "district" are similar, but not exact. "Ward" is defined as "an administrative division of a city or borough, typically represented by a councilor or councilors." Concise Oxford English Dictionary 1614 (10th ed., revised, 2002). "District" is defined as "a division of a county or region that elects its own councilors." Concise Oxford English Dictionary 416 (10th ed., revised, 2002).

The municipal election statute pertaining to declaring candidacy mentions "district" but not ward, yet the statute pertaining to ballot, embraces more than a "district," in denoting positions to be filled by election. Pertaining to declaration of candidacy, NMSA 1978, Section 3-8-27 (2001) (emphasis added) provides, in part:

D. The municipal clerk shall provide a form for the declaration of candidacy and shall accept only those declarations of candidacy which contain:

...

(2) the office and term to which the candidate seeks election and district designation, if appropriate;  
Pertaining to ballots, NMSA 1978, Section 3-8-29 (1999) (emphasis added) provides, in part:

B. ... For each office to be filled, the ballot shall contain:

...

(4) any necessary reference to districts, positions or other similar official designation for office.

Regarding winners, Article VII, Section 5 (C) of the New Mexico Constitution provides: "In a municipal election, the candidate that receives the most votes for an office shall be declared elected to that office..." NMSA 1978, Section 3-8-32 (1987) (emphasis added) provides, in part:

A. The candidate who receives a plurality of the votes cast for a designated office and term and who is qualified to hold office shall be elected to the office for the term designated.

B. If more than one candidate is to be elected to an office ... the candidates, in the number to be elected, receiving the largest pluralities shall be elected.

Subsection (A) contemplates election to "an office," singular, such as a districted race in which one or more candidates are running. Subsection (B) contemplates multiple office holders of "an office," such as city councilor, generically and without a district restriction, for which multiple candidates are running.

Thus, state law specifies how winners of elections are determined. Yet, these provisions depend on the meaning of the term "office" for voting purposes, an ambiguous term in the context of districted elections, involving one office from a district to be filled, and "at large" elections, involving multiple candidates for an office, such as city council member, generally, where there are several seats open during a single race.

The difficulty lies in determining whether a "ward" designation invokes subsection (A), similar to a "division" designation in a magistrate judge race, or whether the "ward" designation is meaningless because the electorate is "at large" and because there are no specific provisions of law addressing the manner of voting for candidates for or from "wards," in which case, subsection (B) would apply. The City of Española evidently applies subsection (A), in allowing separate candidate competitions for specific wards. Yet without statutory authorization similar to that applicable to magistrate judge races,<sup>3</sup> it could be argued that "wards" are not "divisions" for which individual candidate competitions are permitted. Hence, subsection (B) should apply, and those candidates receiving the largest pluralities should be elected to the open posts, regardless of the result within specific wards.

Given the absence of statutory rules pertaining to "ward" elections, it could be argued that a "ward" is not substantially different from "district," that the two terms are not mutually exclusive, and that the Legislature intended that the same rules would apply to the creation of wards and to ward races as those that apply to districted races. However, the phrase "ward or district," as used in Section 3-12-2 (D), uses the term "or." "As a rule of construction, the word 'or' should be given its normal disjunctive meaning unless the context of a statute demands otherwise." Wilson v. Denver, 125 N.M. 308, 314, 961 P.2d 153, 159 (quoting Hale v. Basin Motor Co., 110 N.M. 314, 318,

795 P.2d 1006, 1010 (1990). A "disjunctive" meaning is one in which "both words have independent significance." Id. On the other hand, "the popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments." California First State Bank v. State, 111 N.M. 64, 72, 801 P.2d 646, 654 (1990) (quoting State ex rel. Bd. of Comm'rs v. Bergeron, 235 La. 879, 898, 106 So. 2d 295, 302 (1958)). "We will not blindly apply a conjunctive meaning to 'and,' or a disjunctive meaning to 'or,' when the context of the statute demands otherwise... Although we do not treat these terms as interchangeable, we note that their strict sense is more readily departed from than that of other words." Id. According to the dictionary, the word "or" can be used to link alternatives or to introduce a synonym or explanation of a preceding word. Concise Oxford English Dictionary 1001 (10th ed., revised, 2002). Consequently, neither the dictionary nor statutory construction rules are dispositive in understanding the precise legislative intent to the use of the phrase "ward or district."

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to use, we believe that there is no clear answer in this matter. The legislative history to the pertinent statute, § 3-12-2, is not particularly helpful in answering the question. The term "ward" was retained when that statute was amended in 1992, and it is used, arguably, in the disjunctive to mean alternatives. As an alternative, therefore, a "ward" would not be subject to the same rules as a "district." The term "ward" arguably does have a somewhat different meaning from "district." However, it could also be argued that "ward" and "district" are intended to be synonyms in the context of that statute. In addition, the fact that Gibbany is still good law and the ambiguities in the meaning of the term "office," as used in Section 3-8-21 (A) and (B) in the context of the question presented, also make it difficult to give a clear answer to the question.

We believe, however, that without further authorization from the Legislature respecting the permissible use of its procedures, the City of Española may have difficulty, as a non-home rule municipality, establishing the requisite statutory authority for its procedures in the event of litigation. New Mexico municipalities and counties have been challenged on these matters. See Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987) (since Gallup's population was greater than 10,000 it had to have single-districts); Montano v. Los Alamos, 122 N.M. 454, 926 P.2d 307 (Ct. App. 1996) (class H counties and municipalities under 10,000 have the option to set up single-districts). Our office has traditionally cautioned entities to be aware of constitutional, federal and state law in evaluating their voting systems. See N.M. Att'y Gen. Advisory Letter to Representative Gene Samberson from Assistant Attorney General Scott Spencer (Nov. 14, 1988) (school districts should be aware of restrictions imposed on elections under federal constitutional and statutory law); Correspondence letter to Union County Commissioner Chairman Fred Miller from Assistant Attorney General Al Lama (July 27, 2000) (county should act in accordance with NMSA 1978, Section 4-38-3 for single districting process).

In closing, the most prudent course of action for Española, to protect itself fully from litigation challenging its current system, would appear to be (a) to change to a single

member district system with residency required within the district, pursuant to Section 3-12-1.1 for both the candidate and the voter; or (b) to obtain clearer legislative authority to confirm the current practice, which allows voters from outside a ward's geographic boundary to elect a candidate who also is not a resident in the ward's boundaries.

These concerns were alluded to in the recent municipal election lawsuit of Lujan v. Beesley, D-101-CV-200600114. The case focused on whether certain Espanola city councilor candidates should have their names placed on the ballot. However, Judge Michael Vigil did orally raise substantial questions about the use of the ward system in future elections. It is our understanding that he did not issue a decision on this point, but we believe his serious concerns, as reflected in this letter, have merit.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Zachary Shandler  
Andrea Buzzard  
Assistant Attorneys General

cc: Stuart Bluestone, Chief Deputy Attorney General  
Joseph Maestas, Mayor of Espanola

[1] The Gibbany opinion clearly would not preclude "district" residency, in view of Article V, Section 13 of the New Mexico Constitution, which provides, in part: "All district and municipal officers, county commissioners, school board members and municipal governing body members shall be residents of the political subdivision or district from which they are elected or for which they are appointed." At the time of Gibbany, this provision read: "All district, county, precinct and municipal officers, shall be residents of the political subdivision for they are elected or appointed." Thus, at the time of Gibbany, the only residency requirement, which constitutionally could be required, was residency within the political subdivision, which was a city in that case.

[2] Article V, Section 13 provides, in part: "All district and municipal officers, county commissioners, school board members and municipal governing body members shall be residents of the political subdivision or district from which they are elected or for which they are appointed."

[3] Magistrate judge elections are partisan races, involve several magistrate judge positions, which are designated by division, involve head-to-head contests to those individual division positions and are, generally, "at large" elections, meaning that the

entire electorate within that magistrate district may vote for the several positions. See NMSA, Section 35-1-3 (2000), which provides:

Except as otherwise provided by law, magistrates shall be nominated and elected at large within each magistrate district at the primary and general elections. In magistrate districts having more than one magistrate, the separate offices shall be designated by division and, in all appointments to fill vacancies and in all nominations and elections to these offices, candidates shall be designated as appointed or elected to the office of magistrate of a specific division...