

February 7, 2017 Advisory Letter – Opinion Request – Regulation of Gambling in the Town of Silver City

The Honorable Howie C. Morales
New Mexico State Senator
4285 North Swan Street
Silver City, New Mexico 88061

Re: Opinion Request – Regulation of Gambling in the Town of Silver City

Dear Senator Morales:

You requested our advice regarding whether the Charter of the Town of Silver City (“Town”) authorizes the Town to regulate gambling^[1] within the Town limits. As discussed below, based on our review of the applicable law, we conclude that the legislature intended current state law to cover the entire subject of gambling oversight and regulation in New Mexico and impliedly repeals the Town’s authority under its Charter to regulate gambling.

The Town’s current Charter was enacted by the territorial legislature in 1878. See An Act to Incorporate the Town of Silver City in the County of Grant, N.M. Territory Session Laws 1878, ch. 38. The Town is the only municipality in the state that still operates under its pre-statehood charter.^[2] In pertinent part, the Charter provides that the Town Council “shall have power... to tax, regulate and restrain, prohibit and suppress ... gambling ... to the distance of one mile from the corporate limits of the town.” Charter, art. IV, § 10.

According to your request, the Town Council is considering whether to permit and regulate gambling within the Town under Article IV, Section 10 of the Charter. The request states that the Council “will likely consider an ordinance that will permit a certain degree of gambling under stringent regulations and bring the matter before its citizens and to vote on whether to permit regulated gambling with the Town.”

As noted above, the Town was incorporated under a special act of the territorial legislature. When New Mexico became a state, the state constitution included a provision addressing the continuing validity of territorial laws. See N.M. Const. art. XXII, § 4. That provision provides:

All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed....

Article XXII, Section 4 “continues the territorial laws only until they shall be altered or repealed, and the Legislature has full power to repeal all or any of them.” *Herd v. State Tax Comm’n*, 1925-NMSC-042, ¶ 5, 240 P. 988, 989.

As a territorial law, the provisions of the Town's Charter continue in effect as state law under Article XXII, Section 4 until they are altered or repealed by the legislature. See *Atchison v. Town of Silver City*, 1936-NMSC-036, ¶ 2, 59 P.2d 351, 352 (acknowledging the legislature's authority to amend or repeal the Town's Charter). It does not appear that the legislature has expressly repealed the provisions of the Town's Charter authorizing it to regulate gambling. Under the applicable rules of statutory construction:

Repeals by implication are not favored and will not be resorted to unless necessary to give effect to an obvious legislative intent[.] [T]he enactment of a new and comprehensive law covering the whole subject matter which is inconsistent with and repugnant to the prior law manifests legislative intent to repeal the earlier statute, or so much thereof as may be in conflict with the later one.

Buresh v. City of Las Vegas, 1969-NMSC-171, ¶ 7, 463 P.2d 513, 514. In particular, “[a] general statute will not impliedly repeal a prior local law or special statute or charter unless there is such a positive repugnance between the two that they cannot stand together or be consistently reconciled.” *Atchison*, 1936-NMSC-036, ¶ 12, 59 P.2d at 353.

In the decades since the Town's Charter was enacted, the legislature has passed laws that, with some exceptions, make gambling a crime, see NMSA 1978, §§ 30-19-1 to -15 (1963, as amended through 2009), and subject permissible gambling activities to state regulation and oversight. See *State ex rel. Clark v Johnson*, 1995-NMSC-048, ¶ 37, 904 P.2d 11, 23 (“it is undisputed that New Mexico's legislature possesses the authority to prohibit or regulate all aspects of gambling on non-Indian lands”). The current legislation reflects a public policy that “does not favor the accommodation of gambling.” *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 24, 910 P.2d 281, 287. See also *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 30, 904 P.2d at 21 (“[t]he legislature ... has unequivocally expressed a public policy against unrestricted gaming....”); *Schnoor v. Griffin*, 1968-NMSC-067, ¶ 27, 439 P.2d 922, 927 (“[e]xcept in very limited circumstances, the public policy of this state is to restrain and discourage gambling”).

As expressed in the Gaming Control Act, NMSA 1978, §§ 60-2E-1 to -62 (1997, as amended through 2010), “the state's policy on gaming” allows “limited gaming activities ... in the state if those activities are strictly regulated to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences[.]” *Id.* § 60-2E-2(A). The Gaming Control Board is responsible for “implement[ing] the state's policy on gaming consistent with the ... Gaming Control Act and the New Mexico Bingo and Raffle Act.” *Id.* § 60-2E-7(A).[3]

Under the Gaming Control Act:

Gaming activity is permitted ... only if it is conducted in compliance with and pursuant to:

A. the Gaming Control Act; or

B. a state or federal law other than the Gaming Control Act that expressly permits the activity or exempts it from the application of the state criminal law, or both.

Id. § 60-2E-4. Currently, the Gaming Control Act permits limited gaming activity only at racetracks and by certain nonprofit organizations. *Id.* § 60-2E-26(l).

The Gaming Control Act regulates all aspects of permissible gaming in the state, including gaming operators, gaming employees, gaming device distributors and manufacturers, and gaming machines. See § 60-2E-14 to -31. The Act authorizes the Gaming Control Board to adopt regulations that, among other things, govern the issuance of licenses and permits, define authorized games and gaming devices, govern the manufacture, distribution and repair of gaming devices, and prescribe accounting and security procedures required of licensees. See NMSA 1978, 60-2E-8(C). The Board also may impose civil fines for violations of the Act, conduct investigations and audits, inspect gaming premises, and is required to monitor all activity under the state's Indian gaming compacts entered into under the federal Indian Gaming Regulatory Act. *Id.* §60-2E-7(C), (D). The Act imposes a gaming tax "in lieu of all state and local gross receipts taxes" on a licensee's gross receipts attributable to gaming activities." *Id.* § 60-2E-47. The Act imposes criminal penalties for violations related to its provisions, *id.* §§ 60-2E-50 to -57, including cheating and underage gaming.

Based on its provisions, we believe there is little question that the legislature intended the Gaming Control Act to cover all aspects of gaming regulation. By its terms, the Act permits only gaming activity that is conducted under the Act's provisions or under another state or federal law that expressly permits the activity or exempts it from the provisions of the state's criminal laws. The Act expressly provides for a gaming tax that excludes similar taxes by local governments. Virtually all aspects of gaming activity permitted in the state are subject to strict regulation and oversight by the Gaming Control Board. In short, the Act constitutes a "comprehensive law" covering the "whole subject matter" of gaming in the state. Because the Gaming Control Act occupies the entire field of gaming regulation, it "is inconsistent with the repugnant to" the provisions of Article IV, Section 10 of the Town's 1878 Charter authorizing it to "tax, regulate and restrain ... gambling" within and up to one mile outside the Town limits. Consequently, we conclude that, under the rules of statutory construction discussed above, the enactment of the Gaming Control Act "manifests the legislature's intent to repeal" those provisions, and the Town has no power to permit, tax or otherwise regulate gambling.[4]

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,

Sally Malavé
Assistant Attorney General

[1] For purposes of this letter, we assume the term “gambling” refers to the same activities as “gaming” under state law. *Compare* NMSA 1978, §§ 30-19-1(B), 30-19-2 (defining “gambling” for purposes of criminal statutes to include “making a bet,” and “bet” as “a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value...”) *with* NMSA 1978, § 60-2E-3(O), (P) (defining “gaming” under the Gaming Control Act as “offering a game for play,” and “game” as “an activity in which, upon payment of consideration, a player receives a prize or other thing of value, the award of which is determined by chance even though accompanied by some skill...”).

[2] Although the Town has a charter, it is not a home rule municipality under Article X, Section 6 of the New Mexico Constitution or the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990). See N.M. Att’y Gen. Op. No. 87-81 (Dec. 30, 1987) (Silver City is not a home rule municipality); N.M. Att’y Gen. Op. No. 75-56 (Oct. 8, 1975) (“Silver City exists pursuant to a state statute ... and it has only the powers granted to it by the statutes creating it and the general provisions applying to municipalities”). Nevertheless, the Municipal Charter Act permits the charter of a municipality adopted by law of the territorial legislature to be amended or repealed in the same manner as the charters of home rule municipalities. See NMSA 1978, § 3-15-16 (1990).

[3] The New Mexico Bingo and Raffle Act, NMSA 1978, §§ 60-2F-1 to -26 (2009, as amended through 2011), “authorize[s] and regulate[s] certain games of chance [bingo, raffles and pull tabs] by licensed nonprofit organizations.” *Id.* § 60-2F-2.

[4] Our conclusion does not affect the Town's authority under its Charter to "prohibit and suppress" gambling. See charter, art, IV, § 10. The same authority is provided to all municipalities under the Municipal Code. See NMSA 1978, § 3-18-17(C)(1) (2009).