

## July 13, 2009 Conflict of Interest & Rio Grande Natural Gas Association

The Honorable Andy Nuñez  
New Mexico State Representative  
686 North Franklin  
Hatch, NM 87937

**Re:** Opinion Request - Conflict of Interest & Rio Grande Natural Gas Association

Dear Representative Nuñez:

You have requested our advice on whether three Las Cruces city councilors have a conflict of interest in serving both as city councilors and as Rio Grande Natural Gas Association (“RGNGA”) commissioners. According to your letter: “RGNGA was established ... [in] May 1969 by the Village of Hatch and the city of Las Cruces as a non-profit municipally owned corporation” to provide a natural gas supply system to the residents of Hatch and Las Cruces and other surrounding towns. The Association’s articles of incorporation permit the Village of Hatch and City of Las Cruces to each appoint three commissioners and it is our understanding that both municipalities have selected three city councilors to serve as commissioners. According to your letter, the three Las Cruces commissioners are “making decisions that benefit the City of Las Cruces to the detriment of RGNGA ... [and the] conflict of interest is evident because the City of Las Cruces serves as operator and fiscal agent for RGNGA.” Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that the Las Cruces city councilors do not have a conflict of interest in serving as councilors and commissioners of the RGNGA.

New Mexico law authorizes the creation of natural gas associations: “[a]ny two ... municipalities ... shall have the power by joint or concurring resolution of the governing body to appoint three ... commissioners who are hereby given authority to organize an association for the purpose of acquiring a ... natural gas supply system.” NMSA 1978, § 3-28-1 (1993). “The ... commissioners [shall] be appointed by and shall serve at the pleasure of the governing body of the municipalities who appoint the commissioners.” *Id.* § 3-28-2 (1990). The law authorizes the hiring of staff as “chosen or appointed in such manner ... as may be provided by the bylaws....” *Id.* § 3-28-9 (1990).

The law requires an association to file a certification of incorporation, but this document may “contain any provision not inconsistent with the law of this state that the incorporators may choose to insert for the regulation and conduct of the affairs of the association....” *Id.* § 3-28-3(G) (1990) (emphasis added). According to RGNGA’s articles of incorporation, at its inception: “The members [commissioners] of the Association shall be the duly elected and acting Mayor and Trustees of the Village of Hatch ... [and] the duly elected and acting Mayor and City Council of the city of Las Cruces and their successors in office.” Certificate of Association, ¶ V (May 13, 1969). The articles of incorporation add: “Any vacancy ... shall be filled by the City Council or

Board of Trustees of the City or Village from which said director was originally elected.” Id. at ¶ VIII. The articles further state: “the location of the principal office of the Association is city hall Las Cruces, New Mexico....” Id. at ¶ III.

A public official has a conflict of interest in holding two positions when: (a) there is functional or physical incompatibility in holding two positions, or (b); there is a specific statute that bars holding the two positions. See Haymaker v. State, 22 N.M. 400, 163 P. 248 (1917); N.M. Att’y Gen. Op. No. 06-01 (2006). Functional incompatibility does not occur “if the functions of the two positions are not inconsistent, as where one is subordinate to the other, or where a ‘contrariety and antagonism would result in the attempt of one person to faithfully and impartially discharge the duties of both.’” N.M. Att’y Gen. Op. No. 06-01 (2006) (quoting Haymaker v. State, 22 N.M. 400, 403-4, 163 P. 248 (1917)). The question is whether one position has “authority to oversee the activities” of the other position, such as the power to “supervise, hire, or discharge” personnel. Id.; See also N.M. Atty. Gen. Op. No. 91-02 (1991) (there is no functional incompatibility because the legislature has no inherent authority to oversee local school boards or to supervise, hire, or discharge school board members.). The Las Cruces city council is authorized to make appointments and fill vacancies of three of the six commissioners, but the statutes give the full RGNGA board the authority to select the location of its office, acquire and dispose of property, hire staff, issue bonds, establish user rates and exercise eminent domain. See NMSA 1978, §§ 3-28-3, -5, -9, -11, -16 & -19 (amended through 1990). The Las Cruces city council members do not have “inherent” authority, or even majority control, over commission business.[1]

There is no physical incompatibility in serving in both positions “so long as the same person can hold both positions without failing for thirty or more successive days to devote his time to the usual and normal extent to the performance of the duties of both positions.” N.M. Att’y Gen. Op. No. 06-01 (2006). Absent additional information regarding the meeting dates and times of the city council and commission meetings, physical incompatibility does not appear to be a relevant consideration in this matter.

According to your letter: “We [Village of Hatch] have had several billings from the [City of Las Cruces staff] operator that have been questioned by our [Village] administrator and the Hatch directors ... [Las Cruces] directors support the operator....” If the legislature had wanted to expressly bar certain city councilors from serving as commissioners, it could have done so when it described the appointment of commissioners in NMSA 1978, Section 3-28-2. See Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971) (when the legislature expressly authorizes a certain act to be done in a prescribed manner, it is limited to be done in that manner and all other modes are excluded). The legislature could have also barred an association from using a municipality’s office space and staff. Instead, the legislature in NMSA 1978, Section 3-28-3 provided that an association’s article of incorporation and by-laws would resolve these types of decisions.[2] Therefore, if the RGNGA believes there is a problem, it has the authority to amend its documents and make any necessary changes.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY A. SHANDLER  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Your letter notes that the Commission's President is a Las Cruces city councilor, but absent further factual information, this does not appear to be a relevant consideration in this matter because the commission is free to select any of its commissioners to be president as: "[t]he officers of the corporation shall be elected annually by the Board...." Association By-Laws, ¶ III (Dec. 1, 1969).

[2] As noted in the text of this letter, it does not appear that the structure and responsibilities of RGNGA necessary preclude a Las Cruces city councilor from impartially performing his or her duties as a RGNGA commissioner. If the legislature had wanted to eliminate even the appearance that commissioners appointed from one municipality might have too much control, it could have, but did not, require all commission votes obtain supermajority support. Cf. NMSA 1978, §§ 3-28-12(A), -14(A) (1990) (commissioners may authorize the issuance of bonds "by the affirmative vote of two-thirds of the entire membership of the board.").