

May 9, 2012 Advisory Letter---Applicability of Recall Amendment to Los Alamos County

The Honorable Jim W. Hall
New Mexico State Representative
129 N. Monte Rey Drive
Los Alamos, New Mexico 87544-3858

Re: Applicability of Recall Amendment to Los Alamos County

Dear Representative Hall:

You have requested our advice regarding the applicability of Article X, Section 9 of the New Mexico Constitution (the "Recall Amendment")¹ to the Incorporated County of Los Alamos ("Los Alamos County"). We understand that the Los Alamos County Council created a Charter Review Committee ("CRC") to recommend changes to the County Charter. Among its recommendations, the CRC proposed adding recall provisions that parallel the Recall Amendment. Upon learning of the CRC's proposal, several constituents asked whether Los Alamos County's status as an incorporated county with a home rule charter exempts it from the Recall Amendment. As discussed in more detail below, the Recall Amendment is a general law setting forth the procedure for recalling elected county officials that applies statewide to all counties, including Los Alamos County.

As a preliminary matter, we believe it would be helpful to review the various constitutional and statutory provisions that guide our discussion. Article X, Section 5 of the New Mexico Constitution authorizes any county to become an incorporated county by following certain procedures, including the appointment of a charter commission to draft an incorporated county charter and calls for the draft charter to be submitted to the qualified voters of the county within one year after the appointment of the commission. Article X, Section 5 further requires that the charter of the incorporated county provide for the form and organization of the incorporated county government and designate those officers which shall be elected or appointed. Upon the adoption of a charter, an incorporated county is subject to the restrictions on municipal debt under Article IX, Section 12 of the constitution and may exercise all powers granted to municipalities by statute, including the authority to adopt a home rule charter under the Municipal Charter Act, NMSA 1978, §§3-15-1 through 3-15-16 (1965, as amended through 1990). See N.M. Const, art. X, § 5.

In turn, the Municipal Charter Act sets out general guidelines relating to the provisions that an entity may want include in its charter. It provides:

The charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including the manner of appointment or election of its officers, the recall of the officers and the

petition and referendum of any ordinance or action of the municipality; *provided, that the charter shall not be inconsistent with the Constitution of New Mexico*

NMSA 1978, § 3-15-7 (1965) (emphasis added). The language of this statute evidences the legislature's intent to delegate to home rule municipalities maximum powers of self-government, as well as its expectation that home rule municipalities exercise those powers in a manner consistent with the rights and responsibilities afforded by the state constitution. Hence, before the Recall Amendment was adopted, Section 3-15-7 authorized incorporated counties that had adopted a home rule charter to include recall provisions in their charters. In accordance with this provision, Los Alamos County adopted its home rule charter in 1968, which charter includes procedures for recalling elected county officials. See Los Alamos, New Mexico, Code of Ordinances, Part I - Charter, Arts. VII and IX (1968, as amended).

In January 1996, the Second Session of the Forty-Second Legislature passed Senate Joint Resolution 21, "proposing to amend Article 10 of the Constitution of New Mexico by adding a new section to provide for the recall of elected county officials," see 1996 N.M. Laws, p. 1977, and it was adopted at the general election in November 1996. Since then, the Recall Amendment has governed elections to recall elected county officials throughout the state.² See N.M. Const, art. X, § 9. See also Sparks v. Graves, 2006-NMCA-030, ¶ 1, 139 N.M. 143, 144 (2006) (county sheriff appealed district court finding of probable cause to believe that sheriff had committed acts of malfeasance or misfeasance while in office). In effect, the Recall Amendment preempted any recall provisions previously adopted by incorporated counties with home rule charters, such as Los Alamos County.

The New Mexico Supreme Court's decision in Cottrell v. Santillanes, 120 N.M. 367 (1995), lends support to our conclusion that a charter provision is preempted by a constitutional provision relating to the same subject matter. In Cottrell, current and former Albuquerque city councilors filed a declaratory judgment action against the City of Albuquerque and several other parties, challenging the constitutionality of a charter amendment limiting the term of Albuquerque city councilors to no more than two terms. The district court found that passage and enforcement of the amendment was a constitutional exercise of the City's powers under Article X, Section 6 of the state constitution, the Home Rule Amendment. See 120 N.M. at 368.

On appeal, the former and current city councilors argued that the district court erred in concluding that the Home Rule Amendment allows home rule municipalities to impose eligibility requirements for municipal elected officials beyond those set forth in the Qualifications Clause, N.M. Const, art. VII, § 2, and elsewhere in the constitution. Id. The City countered that the constitutional qualifications for office were not general law and that deference should be given to a home rule municipality's powers of self-government. Id. at 369.

Before rejecting the City's argument, the court utilized the same analysis it had applied in State ex. rel. Haynes v. Bonem, 114 N.M. 627 (1992). It asked: (1) whether a

statutory provision was a general law, and (2) whether the statutory provision expressly denied a home rule municipality the power to do something differently. See Cottrell, 120 N.M. at 369 (citations omitted). Based on a distinction drawn by the Haynes court between matters of state-wide, rather than local, concern, the court in Cottrell reasoned that the Qualifications Clause is a general law with important statewide ramifications that would prohibit a municipal charter from acting to abrogate it. Id. It also noted that the Home Rule Amendment does not expressly grant home rule municipalities the authority to impose additional qualifications for elected officers. For these reasons, the Cottrell court concluded that the charter amendment passed by the City was unconstitutional because it exceeded the home rule municipality's authority as conferred by the New Mexico Constitution.

Applying the same analysis, we conclude that the Recall Amendment is a general law addressing a matter of statewide concern. It dictates the procedures to be followed by all counties for conducting a recall election of elected county officials and it does not expressly exclude incorporated counties operating as a home rule municipalities from its application. Moreover, Section 3-15-7 of the Municipal Charter Act requires that, in all matters, a municipal charter may not be inconsistent with the New Mexico Constitution. As a result, we believe any recall provision adopted by Los Alamos County that deviates from the requirements of the Recall Amendment would be unconstitutional.

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.

Very truly yours,

Sally Malave
Assistant Attorney General

Cc: Vincent Chiravelle, Los Alamos County Councilor

1 The Recall Amendment provides that "[a]n elected county official is subject to recall by the voters of the county ... [for] malfeasance or misfeasance in office or violation of the oath of office by the official concerned." N.M. Const, art. X, § 9. Before a recall petition is circulated, the Recall Amendment requires that the factual allegations demonstrating malfeasance or misfeasance in office be presented to the district court for a determination that probable cause exists for the grounds for recall. After a determination of probable cause, the petition needs to be circulated and signed by 33.33% of the number of persons who voted in the election for the office in the last general election and then submitted to the county clerk for verification of signatures, as to both number and qualifications of the persons signing the petition.

2 The power of a municipality operating under a home rule charter to adopt recall provisions in its charter is not affected by Article X, Section 9 because the constitutional provision relates only to county officials, not municipal officials.