Petitioner's Folder of Authorities

5 McQuillin Mun. Corp. § 15:2 (3d ed.)

McQuillin The Law of Municipal Corporations | July 2024 Update

Chapter 15. Nature, Requisites, and Operation of Municipal Ordinances

I. Characteristics

§ 15:2. Resolutions and ordinances distinguished

Correlation Table

West's Key Number Digest

- West's Key Number Digest, **Municipal Corporations 105**

Legal Encyclopedias

- Am. Jur. 2d, Municipal Ordinance § 296

A "resolution" is not an "ordinance," and there is a distinction between the two terms as they are commonly used in charters.[1] A resolution ordinarily denotes something less solemn or formal[2] than, or not rising to the dignity[3] of, an ordinance. The term "ordinance" means something more than a mere verbal motion or resolution, adopted, subsequently reduced to writing, and entered on the minutes and made a part of the record of the acting body.[4] It must be invested, not necessarily literally, but substantially, with the formalities, solemnities, and characteristics of an ordinance, as distinguished from a simple motion or resolution.[5] A "resolution" is usually a mere declaration with respect to future purpose or proceedings, while an "ordinance" is a local law which is adopted with all the legal formality of a statute; a resolution adopted without the formality required of an ordinance cannot be deemed an ordinance.[6] It has been said that measures that prescribe binding rules of conduct are "ordinances," while measures that relate to administrative or housekeeping matters are categorized as "resolutions."[7]

A resolution in effect encompasses all actions of the municipal body other than ordinances.[8] Whether the municipal body should do a particular thing by resolution or ordinance depends on the forms to be observed in doing the thing and on the proper construction of the charter.[9] In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed.[10] An ordinance is distinctively a legislative act;[11] a resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance,[12] ordinarily ministerial in character[13] and relating to the administrative business of the municipality.[14] Thus,

it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances.[15] If a municipal act applies generally and prescribes a new plan or policy, it is considered legislative and must be accomplished by an ordinance rather than a resolution.[16] It may further be stated broadly that charters contemplate that all legislation creating liability or affecting in any important or material manner the people of the municipality should be enacted by ordinances, whether the city is acting in its governmental or private capacity. Whenever the controlling law directs the legislative body to do a particular thing in a certain manner the thing must be done in that manner.[17]

Generally, whether what is done by a municipal legislative body is an ordinance or a resolution depends not on what the action is called, but on the reality.[18]

Resolutions, as distinguished from ordinances,[19] need not be, in the absence of some express requirement, in any set or particular form.[20] Furthermore, publication may be requisite with respect to ordinances but not with respect to resolutions.[21] Finally, a common distinction between a resolution and an ordinance is that only the latter need be signed by, or passed over the veto of, the mayor.[22] Whenever the controlling law directs the legislative body to do a particular thing in a certain manner the thing must be done in that manner.[23] Since every ordinance necessarily includes all the essential elements of a resolution,[24] a city council can generally do by ordinance what it is empowered to do by resolution.[25] A municipal corporation cannot accomplish by resolution or order, at least by one that is not equivalent to an ordinance, that which, under its charter, it can do only by an ordinance.[26]

Generally, whether what is done by a municipal legislative body is an ordinance or a resolution depends not on what the action is called but on the reality. Thus the mere doing of a particular thing in the form of an ordinance does not necessarily constitute it an ordinance; in other words, acting by ordinance rather than by resolution does not necessarily constitute municipal legislation.[27] Conversely, where a resolution is in substance and effect an ordinance or permanent regulation, the name given to it is immaterial.[28] If it is passed with all the formalities of an ordinance it thereby becomes a legislative act, and it is not important whether it be called ordinance or resolution.[29] Of course, where the requisites and formalities for passing an ordinance are not observed, a resolution does not have the effect of an ordinance.[30] A presumption arises that a resolution was not passed with the formality required for the passage of an ordinance unless it is shown that the resolution was passed with such formality.[31] Also, a resolution cannot be transformed into an ordinance merely by naming it such in order to evade a law.[32] Nor can a third person raise a resolution to the level of an ordinance by claiming that it has the force and effect of ordinance.[33] A resolution which confers no vested rights may later be altered or abridged by an ordinance.[34]

Footnotes

1 **U.S.**
Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)
Ala.
Rushing v. City of Georgiana, 374 So. 2d 253 (Ala. 1979), quoting this treatise (resolution and ordinance distinct)
Cal.
Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) (there is a substantial difference between a resolution and an ordinance; a city resolution is ordinarily not equivalent to an ordinance)

City of Brentwood v. Department of Finance, 54 Cal. App. 5th 418, 268 Cal. Rptr. 3d 9 (3d Dist. 2020) (general matter, resolutions are not agreements)

Rutgard v. City of Los Angeles, 52 Cal. App. 5th 815, 267 Cal. Rptr. 3d 16 (2d Dist. 2020) (the municipal affairs that are governed by the charter of a home rule city or county include the structure and organization of the charter entity's government, which necessarily entails the process for enacting ordinances, including resolutions of necessity)

A "resolution" is usually a mere declaration with respect to future purpose or proceedings, while an "ordinance" is a local law which is adopted with all the legal formality of a statute; a resolution adopted without the formality required of an ordinance cannot be deemed an ordinance. San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System, 206 Cal. App. 4th 594, 141 Cal. Rptr. 3d 860 (4th Dist. 2012)

Conn.

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Ga.

Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69 (1948) (quoting standard authorities defining "resolution")

Ill.

Village of Gulfport, Henderson County v. Buettner, 114 Ill. App. 2d 1, 251 N.E.2d 905 (3d Dist. 1969)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242 (1972)

Mich.

Rollingwood Homeowners Corp. v. City of Flint, 386 Mich. 258, 191 N.W.2d 325 (1971)

Miss.

Biloxi Firefighters Ass'n v. City of Biloxi, 810 So. 2d 589, 146 Lab. Cas. (CCH) ¶ 59574 (Miss. 2002)

Mo.

Eickhoff v. Gelbach, 611 S.W.3d 834 (Mo. Ct. App. W.D. 2020), transfer denied, (Oct. 27, 2020) and transfer denied, (Dec. 22, 2020) (local governments may adopt ordinances, but those ordinances must be in accordance with the Constitution, statutes, and common law)

Julian v. Mayor, Councilmen and Citizens of City of Liberty, 391 S.W.2d 864 (Mo. 1965); City of Hannibal v. Winchester, 391 S.W.2d 279 (Mo. 1965), citing this treatise; City of Salisbury v. Nagel, 420 S.W.2d 37 (Mo. Ct. App. 1967), citing this treatise

Neb.

McKenzie v. City of Omaha, 14 Neb. App. 398, 708 N.W.2d 286 (2006); Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

A municipal "ordinance" is distinctively a legislative act, but a "resolution," generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance; thus, municipal acts in ministerial capacity and for a temporary purpose may be put in the form of resolutions, but legislative must be put in the form of ordinances. Reuter v. Borough Council of Borough of Fort Lee, 328 N.J. Super. 547, 746 A.2d 511 (App. Div. 2000), aff'd in part, rev'd in part on other grounds, 167 N.J. 38, 768 A.2d 769 (2001), quoting this treatise

Chasis v. Tumulty, 8 N.J. 147, 84 A.2d 445 (1951)

N.C.

Wilkins v. Guilford County, 158 N.C. App. 661, 582 S.E.2d 74, 14 A.D. Cas. (BNA) 1156 (2003)

N.D.

Mitchell v. City of Parshall, 108 N.W.2d 12 (N.D. 1961)

See also § 15:8.

U.S.

Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008)

Fla.

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

Mo.

Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

S.C.

Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004)

Tex.

Rancho Viejo Waste Management, LLC v. City of Laredo, 364 F. Supp. 3d 698 (S.D. Tex. 2019) (under Texas law, unlike an ordinance, a resolution is not a law, but an expression of an opinion)

Wis.

Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion)

2 **U.S.**

See Little v. City of North Miami, 624 F. Supp. 768, 29 Ed. Law Rep. 1021 (S.D. Fla. 1985), decision aff'd in part, rev'd in part on other grounds, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Cal.

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) ("resolution" denotes something less formal than an ordinance; it is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides)

San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System, 206 Cal. App. 4th 594, 141 Cal. Rptr. 3d 860 (4th Dist. 2012)

Conn.

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Kan.

International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

Neb.

McKenzie v. City of Omaha, 14 Neb. App. 398, 708 N.W.2d 286 (2006); Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.Y.

Jewett v. Luau-Nyack Corp., 31 N.Y.2d 298, 338 N.Y.S.2d 874, 291 N.E.2d 123 (1972); Daly v. Eagan, 77 Misc. 2d 279, 353 N.Y.S.2d 845 (Sup 1972)

Ohio

State ex rel. City of Mansfield v. Lowrey, 3 Ohio Misc. 174, 32 Ohio Op. 2d 481, 210 N.E.2d 751 (C.P. 1964)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

Wash.
Baker v. Lake City Sewer Dist., 30 Wash. 2d 510, 191 P.2d 844 (1948)
Wis.
Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) (ordinances are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion; resolutions are those informal municipal legislative acts that address particular pieces of administrative business in a temporary fashion)

3 **Ill.**
Illinois Municipal Retirement Fund v. City of Barry, 52 Ill. App. 3d 644, 10 Ill. Dec. 439, 367 N.E.2d 1048 (4th Dist. 1977)
Md.
Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)
Neb.
Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)
Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)
N.J.
Chasis v. Tumulty, 8 N.J. 147, 84 A.2d 445 (1951); Kessler v. City of Passaic, 113 N.J. Super. 59, 272 A.2d 570 (Law Div. 1971); McLaughlin v. City of Millville, 110 N.J. Super. 200, 264 A.2d 762 (Law Div. 1970)

4 **U.S.**
See Little v. City of North Miami, 624 F. Supp. 768, 29 Ed. Law Rep. 1021 (S.D. Fla. 1985), decision aff'd in part, rev'd in part on other grounds, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)
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Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) (an "ordinance" is a local law which is adopted with all the legal formality of a statute)
A "resolution" is usually a mere declaration with respect to future purpose or proceedings, while an "ordinance" is a local law which is adopted with all the legal formality of a statute; a resolution adopted without the formality required of an ordinance cannot be deemed an ordinance. San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System, 206 Cal. App. 4th 594, 141 Cal. Rptr. 3d 860 (4th Dist. 2012)
Neb.
McKenzie v. City of Omaha, 14 Neb. App. 398, 708 N.W.2d 286 (2006)
N.J.
State v. Township Committee of Ridgewood, 50 N.J.L. 514, 14 A. 598 (N.J. Sup. Ct. 1888)
Okla.
Sand Springs Materials LLC v. City of Sand Springs, 2010 OK CIV APP 128, 243 P.3d 768 (Div. 2 2010)
Tex.
Rancho Viejo Waste Management, LLC v. City of Laredo, 364 F. Supp. 3d 698 (S.D. Tex. 2019) (under Texas law, unlike an ordinance, a resolution is not a law, but an expression of an opinion);
American Const. Co. v. Seelig, 104 Tex. 16, 133 S.W. 429 (1911)
Wis.
Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion; "resolutions" are those informal municipal legislative acts that address particular pieces of administrative business in a temporary fashion)
Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) (ordinances are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion)

5 **Kan.**

Benson v. City of De Soto, 212 Kan. 415, 510 P.2d 1281 (1973)

Tex.

Vance v. Town of Pleasanton, 261 S.W. 457 (Tex. Civ. App. San Antonio 1924), writ granted, (Feb. 18, 1925) and aff'd, 277 S.W. 89 (Tex. Comm'n App. 1925)

Vt.

A resolution is customarily passed without the forms and delays that constitutions and municipal charters generally require for the enactment of valid laws or ordinances. Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

Legislative formality required for enactment of ordinance, §§ 16:1 et seq.

6 **Cal.**

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) (a "resolution" is usually a mere declaration with respect to future purpose or proceedings; an "ordinance" is a local law which is adopted with all the legal formality of a statute)

San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System, 206 Cal. App. 4th 594, 141 Cal. Rptr. 3d 860 (4th Dist. 2012)

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Rancho Viejo Waste Management, LLC v. City of Laredo, 364 F. Supp. 3d 698 (S.D. Tex. 2019) (under Texas law, unlike an ordinance, a resolution is not a law, but an expression of an opinion)

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Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion)

7 **Cal.**

Rutgard v. City of Los Angeles, 52 Cal. App. 5th 815, 267 Cal. Rptr. 3d 16 (2d Dist. 2020) (the municipal affairs that are governed by the charter of a home rule city or county include the structure and organization of the charter entity's government, which necessarily entails the process for enacting ordinances, including resolutions of necessity)

Fla.

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

N.C.

Wilkins v. Guilford County, 158 N.C. App. 661, 582 S.E.2d 74, 14 A.D. Cas. (BNA) 1156 (2003)

Ohio

Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (provision in city charter that required city to pass an ordinance to take action by ordinance in matters of a general or permanent nature, or by resolution for matters of a temporary or informal nature "in the matter herein provided" did not conflict with provision requiring council request that county prosecutor prosecute removal proceedings of council member and appoint a special prosecutor only if the county prosecutor refused; read together, provisions required council to pass an ordinance or resolution requesting county prosecutor's involvement in removal proceeding before it could appoint a special prosecutor)

State ex rel. Henderson v. New Richmond, 2020-Ohio-4875, 160 N.E.3d 349 (Ohio Ct. App. 12th Dist. Clermont County 2020), appeal not allowed, 161 Ohio St. 3d 1440, 2021-Ohio-375, 162 N.E.3d 823 (2021) (village council's adoption of new ordinance, which eliminated position of corporal within village police department, was legislative act that was not an appealable final order, adjudication, or decision under statute governing the appeal from decisions of any agency of any political subdivision,

and thus former police corporal had no right to appeal ordinance, where reasons set forth for ordinance, which included cost savings and streamlining operations of police department, were legitimate matters of concern for village legislative body, village council neither executed nor administered existing ordinance in adopting new ordinance, no quasi-judicial proceedings were involved in adoption of new ordinance, and there was no indication that new ordinance was related to employee discipline)

Tex.

Rancho Viejo Waste Management, LLC v. City of Laredo, 364 F. Supp. 3d 698 (S.D. Tex. 2019) (under Texas law, unlike an ordinance, a resolution is not a law, but an expression of an opinion)

8 **Cal.**

Dimon v. County of Los Angeles, 166 Cal. App. 4th 1276, 83 Cal. Rptr. 3d 576 (2d Dist. 2008), as modified, (Sept. 30, 2008), quoting this treatise

Neb.

A "resolution" is generally not the equivalent of an ordinance, but is rather an act of a temporary character, is ordinarily sufficient for council action on ministerial, administrative, or executive matters, and does not rise to the dignity of an ordinance. A "resolution" is generally not the equivalent of an ordinance, but is rather an act of a temporary character, is ordinarily sufficient for council action on ministerial, administrative, or executive matters, and does not rise to the dignity of an ordinance. Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

Woodhull v. Manahan, 85 N.J. Super. 157, 204 A.2d 212 (App. Div. 1964), judgment aff'd, 43 N.J. 445, 205 A.2d 441 (1964)

N.C.

Wilkins v. Guilford County, 158 N.C. App. 661, 582 S.E.2d 74, 14 A.D. Cas. (BNA) 1156 (2003)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

9 **Mo.**

Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006)

Ohio

Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (provision in city charter that required city to pass an ordinance to take action by ordinance in matters of a general or permanent nature, or by resolution for matters of a temporary or informal nature "in the matter herein provided" did not conflict with provision requiring council request that county prosecutor prosecute removal proceedings of council member and appoint a special prosecutor only if the county prosecutor refused; read together, provisions required council to pass an ordinance or resolution requesting county prosecutor's involvement in removal proceeding before it could appoint a special prosecutor)

S.C.

Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004)

Tenn.

City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988) (involving executory contract)

10 **Cal.**

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) (ordinarily a resolution is of a temporary character, while an "ordinance" prescribes a permanent rule of conduct or of government)

Del.

Piekarski v. Smith, 38 Del. Ch. 402, 153 A.2d 587 (1959), citing this treatise

Fla.

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 159 Fla. 134, 31 So. 2d 905 (1947)

Ga.

Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69 (1948); City of Rome v. Reese, 19 Ga. App. 559, 91 S.E. 880 (1917)

Ill.

Village of Altamont v. Baltimore & O.S.W. Ry. Co., 184 Ill. 47, 56 N.E. 340 (1900); Chicago & N.P.R. Co. v. City of Chicago, 174 Ill. 439, 51 N.E. 596 (1898); Village of Gulfport, Henderson County v. Buettner, 114 Ill. App. 2d 1, 251 N.E.2d 905 (3d Dist. 1969); Nazworthy v. City of Sullivan, 55 Ill. App. 48, 1894 WL 4017 (3d Dist. 1894)

Kan.

Benson v. City of De Soto, 212 Kan. 415, 510 P.2d 1281 (1973); International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990), citing this treatise

Ky.

City of Owensboro v. Board of Trustees, City of Owensboro Emp. Pension Fund, 301 Ky. 113, 190 S.W.2d 1005 (1945)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242 (1972)

Mich.

Kalamazoo Municipal Utilities Ass'n v. City of Kalamazoo, 345 Mich. 318, 76 N.W.2d 1, 61 A.L.R.2d 583 (1956); Parr v. Fulton, 9 Mich. App. 719, 158 N.W.2d 35 (1968), citing this treatise

Miss.

City of Natchez v. Henderson, 207 Miss. 14, 41 So. 2d 41 (1949); Biloxi Firefighters Ass'n v. City of Biloxi, 810 So. 2d 589, 146 Lab. Cas. (CCH) ¶ 59574 (Miss. 2002)

Mont

State ex rel. Easbey v. Highway Patrol Bd., 140 Mont. 383, 372 P.2d 930 (1962)

Neb.

Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

Ex parte Hague, 104 N.J. Eq. 31, 144 A. 546 (Ch. 1929), aff'd, 104 N.J. Eq. 369, 145 A. 618 (Ct. Err. & App. 1929)

N.Y.

Kij v. Aszkler, 163 Misc. 63, 296 N.Y.S. 351 (Sup 1937), citing this treatise

Ohio

Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (provision in city charter that required city to pass an ordinance to take action by ordinance in matters of a general or permanent nature, or by resolution for matters of a temporary or informal nature "in the matter herein provided" did not conflict with provision requiring council request that county prosecutor prosecute removal proceedings of council member and appoint a special prosecutor only if the county prosecutor refused; read together, provisions required council to pass an ordinance or resolution requesting county prosecutor's involvement in removal proceeding before it could appoint a special prosecutor)

Wuebker v. Hopkins, 29 Ohio App. 386, 6 Ohio L. Abs. 526, 163 N.E. 566 (8th Dist. Cuyahoga County 1928); State ex rel. City of Mansfield v. Lowrey, 3 Ohio Misc. 174, 32 Ohio Op. 2d 481, 210 N.E.2d 751 (C.P. 1964)

Okla.

Dunlap v. Williamson, 1962 OK 44, 369 P.2d 631 (Okla. 1962) (generally resolution not continuing regulation of conduct or business)

Pa.

Com. ex rel. Tarner v. Bitner, 294 Pa. 549, 144 A. 733 (1929)

Tex.

City of Deer Park v. State ex rel. Shell Oil Co., 259 S.W.2d 284 (Tex. Civ. App. Waco 1953), judgment aff'd, 154 Tex. 174, 275 S.W.2d 77 (1954), citing this treatise; Southwestern Bell Tel. Co. v. Gohmert, 222 S.W.2d 644 (Tex. Civ. App. San Antonio 1949)

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

11 **U.S.**

Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

See Little v. City of North Miami, 624 F. Supp. 768, 29 Ed. Law Rep. 1021 (S.D. Fla. 1985), decision aff'd in part, rev'd in part on other grounds, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Cal.

City of Sausalito v. County of Marin, 12 Cal. App. 3d 550, 90 Cal. Rptr. 843 (1st Dist. 1970) (legal formality of statute)

Idaho

A city council resolution has no effect on a previously enacted ordinance since an ordinance may be amended, repealed, or suspended only by another ordinance. Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Ind.

Town of Walkerton v. New York, C. & St. L. R. Co., 215 Ind. 206, 18 N.E.2d 799 (1939)

Kan.

International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990), citing this treatise

Ky.

City of Owensboro v. Board of Trustees, City of Owensboro Emp. Pension Fund, 301 Ky. 113, 190 S.W.2d 1005 (1945)

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Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

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City of Hannibal v. Winchester, 391 S.W.2d 279 (Mo. 1965), quoting this treatise

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Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

McCurrie v. Town of Kearny, 344 N.J. Super. 470, 782 A.2d 919 (App. Div. 2001), judgment rev'd on other grounds, 174 N.J. 523, 809 A.2d 789 (2002); Albigese v. Jersey City, 129 N.J. Super. 567, 324 A.2d 577 (App. Div. 1974); Woodhull v. Manahan, 85 N.J. Super. 157, 204 A.2d 212 (App. Div. 1964), judgment aff'd, 43 N.J. 445, 205 A.2d 441 (1964), citing this treatise

N.Y.

City of Troy Unit of Rensselaer County Chapter of Civil Service Emp. Ass'n v. City of Troy, 36 A.D.2d 145, 319 N.Y.S.2d 106, 76 L.R.R.M. (BNA) 3061, 65 Lab. Cas. (CCH) ¶ 52515 (3d Dep't 1971), order aff'd, 30 N.Y.2d 549, 330 N.Y.S.2d 611, 281 N.E.2d 555, 79 L.R.R.M. (BNA) 2944 (1972); Kij v. Aszkler, 163 Misc. 63, 296 N.Y.S. 351 (Sup 1937), citing this treatise

Ohio

State ex rel. Henderson v. New Richmond, 2020-Ohio-4875, 160 N.E.3d 349 (Ohio Ct. App. 12th Dist. Clermont County 2020), appeal not allowed, 161 Ohio St. 3d 1440, 2021-Ohio-375, 162 N.E.3d 823 (2021) (village council's adoption of new ordinance, which eliminated position of corporal within village police department, was legislative act that was not an appealable final order, adjudication, or decision under statute governing the appeal from decisions of any agency of any political subdivision, and thus former police corporal had no right to appeal ordinance, where reasons set forth for ordinance, which included cost savings and streamlining operations of police department, were legitimate matters of concern for village legislative body, village council neither executed nor administered existing ordinance in adopting new ordinance, no quasi-judicial proceedings were involved in adoption of new ordinance, and there was no indication that new ordinance was related to employee discipline)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

Tex.

City of Austin v. Findlay, 538 S.W.2d 9 (Tex. Civ. App. Austin 1976); Williams v. City of Borger, 340 S.W.2d 864 (Tex. Civ. App. Amarillo 1960), writ refused n.r.e., (Feb. 8, 1961)

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), quoting this treatise

Wyo.

See Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

12 **U.S.**

Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)

Ala.

Tucker v. City of Robertsdale, 406 So. 2d 886 (Ala. 1981)

Cal.

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) ("resolution" denotes something less formal than an ordinance; it is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides)

Pinewood Investors v. City of Oxnard, 133 Cal. App. 3d 1030, 184 Cal. Rptr. 417 (2d Dist. 1982)

Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Idaho

Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Ill.

McCarty v. City of Rockford, 96 Ill. App. 3d 531, 51 Ill. Dec. 941, 421 N.E.2d 576 (2d Dist. 1981); Village of Gulfport, Henderson County v. Buettner, 114 Ill. App. 2d 1, 251 N.E.2d 905 (3d Dist. 1969)

Kan.

International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990), citing this treatise

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

Mich.

Kalamazoo Municipal Utilities Ass'n v. City of Kalamazoo, 345 Mich. 318, 76 N.W.2d 1, 61 A.L.R.2d 583 (1956)

Minn.

Lindahl v. Independent School Dist. No. 306 of Hubbard County, 270 Minn. 164, 133 N.W.2d 23 (1965)

Miss.

Evans v. City of Jackson, 202 Miss. 9, 30 So. 2d 315 (1947); Biloxi Firefighters Ass'n v. City of Biloxi, 810 So. 2d 589, 146 Lab. Cas. (CCH) ¶ 59574 (Miss. 2002)

Mo.

Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006); Turner v. City of Independence, 186 S.W.3d 786 (Mo. Ct. App. W.D. 2006)

Mont

State ex rel. Easbey v. Highway Patrol Bd., 140 Mont. 383, 372 P.2d 930 (1962)

N.J.

McCurrie v. Town of Kearny, 344 N.J. Super. 470, 782 A.2d 919 (App. Div. 2001), judgment rev'd on other grounds, 174 N.J. 523, 809 A.2d 789 (2002); McLaughlin v. City of Millville, 110 N.J. Super. 200, 264 A.2d 762 (Law Div. 1970); Ex parte Hague, 104 N.J. Eq. 31, 144 A. 546 (Ch. 1929), aff'd, 104 N.J. Eq. 369, 145 A. 618 (Ct. Err. & App. 1929)

Ohio

State ex rel. City of Mansfield v. Lowrey, 3 Ohio Misc. 174, 32 Ohio Op. 2d 481, 210 N.E.2d 751 (C.P. 1964)

Or.

Baker v. City of Milwaukie, 17 Or. App. 89, 520 P.2d 479 (1974), judgment modified on other grounds, 271 Or. 500, 533 P.2d 772 (1975) (rejected by, West Hill Citizens for Controlled Development Density v. King County Council, 29 Wash. App. 168, 627 P.2d 1002 (Div. 1 1981))

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

Wash.

Baker v. Lake City Sewer Dist., 30 Wash. 2d 510, 191 P.2d 844 (1948)

Wyo.

See Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Mathewson v. City of Cheyenne, 2003 WY 10, 61 P.3d 1229 (Wyo. 2003) (quoting text)

13 **U.S.**

Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Idaho

Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Kan.

International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990), citing this treatise

Ky.

City of Owensboro v. Board of Trustees, City of Owensboro Emp. Pension Fund, 301 Ky. 113, 190 S.W.2d 1005 (1945)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

Mich.

Kalamazoo Municipal Utilities Ass'n v. City of Kalamazoo, 345 Mich. 318, 76 N.W.2d 1, 61 A.L.R.2d 583 (1956) (direction for particular action)

Miss.

Evans v. City of Jackson, 202 Miss. 9, 30 So. 2d 315 (1947)

Mo.

City of Hannibal v. Winchester, 391 S.W.2d 279 (Mo. 1965), quoting this treatise

Mont

State ex rel. Easbey v. Highway Patrol Bd., 140 Mont. 383, 372 P.2d 930 (1962) (directs particular action)

Neb.

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

O'Keefe v. Dunn, 89 N.J. Super. 383, 215 A.2d 66 (Law Div. 1965), judgment aff'd, 47 N.J. 210, 219 A.2d 872 (1966); Woodhull v. Manahan, 85 N.J. Super. 157, 204 A.2d 212 (App. Div. 1964), judgment aff'd, 43 N.J. 445, 205 A.2d 441 (1964), citing this treatise

N.Y.

City of Troy Unit of Rensselaer County Chapter of Civil Service Emp. Ass'n v. City of Troy, 36 A.D.2d 145, 319 N.Y.S.2d 106, 76 L.R.R.M. (BNA) 3061, 65 Lab. Cas. (CCH) ¶ 52515 (3d Dep't 1971), order aff'd, 30 N.Y.2d 549, 330 N.Y.S.2d 611, 281 N.E.2d 555, 79 L.R.R.M. (BNA) 2944 (1972)

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

Wyo.

See Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Mathewson v. City of Cheyenne, 2003 WY 10, 61 P.3d 1229 (Wyo. 2003) (quoting text)

14 **U.S.**

Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)

Cal.

City of Sausalito v. County of Marin, 12 Cal. App. 3d 550, 90 Cal. Rptr. 843 (1st Dist. 1970)

Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Idaho

Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Kan.

Benson v. City of De Soto, 212 Kan. 415, 510 P.2d 1281 (1973); International Ass'n of Firefighters Local 1596 v. City of Lawrence, 14 Kan. App. 2d 788, 798 P.2d 960 (1990), citing this treatise

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

Minn.

Lake Harriet State Bank v. Venie, 138 Minn. 339, 165 N.W. 225 (1917)

Miss.

Biloxi Firefighters Ass'n v. City of Biloxi, 810 So. 2d 589, 146 Lab. Cas. (CCH) ¶ 59574 (Miss. 2002)

Mo.

Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006)

Layne v. City of Windsor, 442 S.W.2d 497 (Mo. 1969); Julian v. Mayor, Councilmen and Citizens of City of Liberty, 391 S.W.2d 864 (Mo. 1965); City of Hannibal v. Winchester, 391 S.W.2d 279 (Mo. 1965), quoting this treatise; City of Salisbury v. Nagel, 420 S.W.2d 37 (Mo. Ct. App. 1967), citing this treatise

Neb.

Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

N.J.

McCurrie v. Town of Kearny, 344 N.J. Super. 470, 782 A.2d 919 (App. Div. 2001), judgment rev'd on other grounds, 174 N.J. 523, 809 A.2d 789 (2002); Albigese v. Jersey City, 129 N.J. Super. 567, 324 A.2d 577 (App. Div. 1974) (matters administrative or procedural in nature); McLaughlin v. City of Millville, 110 N.J. Super. 200, 264 A.2d 762 (Law Div. 1970)

Ohio

Wuebker v. Hopkins, 29 Ohio App. 386, 6 Ohio L. Abs. 526, 163 N.E. 566 (8th Dist. Cuyahoga County 1928)

Pa.

Com. ex rel. Tarner v. Bitner, 294 Pa. 549, 144 A. 733 (1929)

R.I.

5750 Post Road Medical Offices, LLC v. East Greenwich Fire Dist., 138 A.3d 163 (R.I. 2016) (whether what is done by a municipal legislative body is an ordinance or a resolution depends not on what the action is called but on the reality; where a resolution is in substance and effect an ordinance or permanent regulation, the name given to it is immaterial; if it is passed with all the formalities of an ordinance it thereby becomes a legislative act, and it is not important whether it be called ordinance or resolution)

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

Wash.

Baker v. Lake City Sewer Dist., 30 Wash. 2d 510, 191 P.2d 844 (1948)

Wyo.

See Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 28 I.E.R. Cas. (BNA) 307, 156 Lab. Cas. (CCH) P 60675 (10th Cir. 2008) (applying Wyoming law and quoting this treatise)

Mathewson v. City of Cheyenne, 2003 WY 10, 61 P.3d 1229 (Wyo. 2003) (quoting text)

15 **U.S.**

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law); Valentine v. City of Juneau, 36 F.2d 904, 5 Alaska Fed. 467 (C.C.A. 9th Cir. 1929), citing this treatise; City of Alma v. Guaranty Sav. Bank, 60 F. 203 (C.C.A. 8th Cir. 1894)

Fla.

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Ga.

Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69 (1948), citing this treatise

Idaho

Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Ill.

People ex rel. Conlon v. Mount, 186 Ill. 560, 58 N.E. 360 (1900); Chicago & N.P.R. Co. v. City of Chicago, 174 Ill. 439, 51 N.E. 596 (1898); Village of Gulfport, Henderson County v. Buettner, 114 Ill. App. 2d 1, 251 N.E.2d 905 (3d Dist. 1969)

Iowa

Grimmell v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1881)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)

Neb.

Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003); Weilage v. City of Crete, 110 Neb. 544, 194 N.W. 437 (1923); McGavock v. City of Omaha, 40 Neb. 64, 58 N.W. 543 (1894)

N.J.

McCurrie v. Town of Kearny, 344 N.J. Super. 470, 782 A.2d 919 (App. Div. 2001), judgment rev'd on other grounds, 174 N.J. 523, 809 A.2d 789 (2002); Story v. City of Bayonne, 35 N.J.L. 335, 1872 WL 6916 (N.J. Sup. Ct. 1872); Town of Irvington v. Ollemar, 128 N.J. Eq. 402, 16 A.2d 563 (Ch. 1940), decree aff'd by, 131 N.J. Eq. 189, 24 A.2d 368 (Ct. Err. & App. 1942)

Ohio

Blanchard v. Bissell, 11 Ohio St. 96, 1860 WL 28 (1860); Nickles v. Echelberger, 6 Ohio Op. 41, 21 Ohio L. Abs. 679, 31 N.E.2d 474 (Ct. App. 5th Dist. Ashland County 1935)

Tex.

Wilder v. American Produce Co., 147 S.W.2d 936 (Tex. Civ. App. El Paso 1940), judgment rev'd on other grounds, 138 Tex. 519, 160 S.W.2d 519 (1942)

Vt.

Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

16 **Fla.**

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

Idaho

Valley Brook Development, Inc. v. City of Bettendorf, 580 N.W.2d 730 (Iowa 1998) (city council resolution did not entitle landowners to return of monies deposited into escrow for road paving)

Neb.

Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005)

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

Ohio

Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (provision in city charter that required city to pass an ordinance to take action by ordinance in matters of a general or permanent nature, or by resolution for matters of a temporary or informal nature "in the matter herein provided" did not conflict with provision requiring council request that county prosecutor prosecute removal proceedings of council member and appoint a special prosecutor only if the county prosecutor refused; read together, provisions required council to pass an ordinance or resolution requesting county prosecutor's involvement in removal proceeding before it could appoint a special prosecutor)

Vt.

Imposition of development impact fee required an ordinance. Herbert v. Town of Mendon, 159 Vt. 255, 617 A.2d 155 (1992), citing this treatise

Wis.

Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion)

17 **U.S.**

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)

Conn.

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Ky.

City of Louisville v. Parsons, 150 Ky. 420, 150 S.W. 498 (1912)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242 (1972)

Neb.

Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005); McKenzie v. City of Omaha, 14 Neb. App. 398, 708 N.W.2d 286 (2006)

Ohio

Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (where village ordinance requires passage of a resolution to accomplish a particular action, passage of such a resolution is the only manner in which the board may act)

Tenn.

Keenan & Wade v. City of Trenton, 130 Tenn. 71, 168 S.W. 1053 (1914)

18 **Conn.**

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Fla.

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

19 **Cal.**

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) ("resolution" denotes something less formal than an ordinance; it is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides; there is a substantial difference between a resolution and an ordinance; a city resolution is ordinarily not equivalent to an ordinance)

Conn.

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Neb.

Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003)

R.I.

O'Connell v. Bruce, 710 A.2d 674 (R.I. 1998)

See §§ 16:1 et seq.

20 **Cal.**

Childhelp, Inc. v. City of Los Angeles, 91 Cal. App. 5th 224, 308 Cal. Rptr. 3d 193 (2d Dist. 2023), as modified, (May 5, 2023) ("resolution" denotes something less formal than an ordinance; it is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides; there is a substantial difference between a resolution and an ordinance; a city resolution is ordinarily not equivalent to an ordinance)

Dimon v. County of Los Angeles, 166 Cal. App. 4th 1276, 83 Cal. Rptr. 3d 576 (2d Dist. 2008), as modified, (Sept. 30, 2008), quoting this treatise

Mo.

Julian v. Mayor, Councilmen and Citizens of City of Liberty, 391 S.W.2d 864 (Mo. 1965)

Wis.

Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion; "resolutions" are those informal municipal legislative acts that address particular pieces of administrative business in a temporary fashion)

21 **Ark.**

City of Fort Smith v. O.K. Foods, Inc., 293 Ark. 379, 738 S.W.2d 96 (1987) (not valid until published)

Fla.

Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 159 Fla. 134, 31 So. 2d 905 (1947)

Ill.
Illinois Municipal Retirement Fund v. City of Barry, 52 Ill. App. 3d 644, 10 Ill. Dec. 439, 367 N.E.2d 1048 (4th Dist. 1977)
Minn.
Renner v. New Ulm Police Relief Ass'n, 282 Minn. 411, 165 N.W.2d 225 (1969)
Wis.
Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233 (2017) ("ordinances" are municipal legislative devices, formally enacted, that address general subjects in a permanent fashion)
Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 193 Wis. 232, 213 N.W. 873, 52 A.L.R. 1033 (1927)
Publication as affecting when ordinance or resolution takes effect, see § 15:41.

Publication of ordinance or resolution, see §§ 16:76 et seq.

22 **Kan.**
Benson v. City of De Soto, 212 Kan. 415, 510 P.2d 1281 (1973)
Md.
Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)
See §§ 16:33, 16:44.

23 **Conn.**
Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)
Md.
Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988)
Mo.
Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006)
Ohio
Smith v. Nelsonville, 2023-Ohio-2844, 222 N.E.3d 832 (Ohio Ct. App. 4th Dist. Athens County 2023) (where village ordinance requires passage of a resolution to accomplish a particular action, passage of such a resolution is the only manner in which the board may act)
Method of execution of municipal powers generally, see § 10.27.

24 **Conn.**
Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)
Mo.
Julian v. Mayor, Councilmen and Citizens of City of Liberty, 391 S.W.2d 864 (Mo. 1965)

25 **Iowa**
Wood v. Loveless, 244 Iowa 919, 58 N.W.2d 368 (1953)

26 **U.S.**
Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law); Board of Mayor, etc., of City of Morristown, Tenn. v. East Tennessee Tel. Co., 115 F. 304 (C.C.A. 6th Cir. 1902)
Cal.
Pimental v. City of San Francisco, 21 Cal. 351, 1863 WL 484 (1863)
Colo.
City of Central v. Sears, 2 Colo. 588, 1875 WL 316 (1875)
Conn.
State v. Tryon, 39 Conn. 183, 1872 WL 1466 (1872)
Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986); Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 159 Fla. 134, 31 So. 2d 905 (1947); Carlton v. Jones, 117 Fla. 622, 158 So. 170 (1934)

Ga.

Bearden v. City of Madison, 73 Ga. 184, 1884 WL 2346 (1884)

Ill.

People ex rel. Besse v. Village of Crotty, 93 Ill. 180, 1879 WL 8601 (1879); City of Tuscola v. D & B Refuse Service, Inc., 131 Ill. App. 3d 168, 86 Ill. Dec. 419, 475 N.E.2d 633, 1985-1 Trade Cas. (CCH) ¶ 66538 (4th Dist. 1985)

Ind.

City of Anderson v. O'Conner, 98 Ind. 168, 1884 WL 5476 (1884)

Iowa

Peterson v. Town of Panora, 222 Iowa 1236, 271 N.W. 317 (1937); Starr v. City of Burlington, 45 Iowa 87, 1876 WL 849 (1876)

Kan.

Newman v. City of Emporia, 32 Kan. 456, 4 P. 815 (1884)

Md.

Inlet Associates v. Assateague House Condominium Ass'n, 313 Md. 413, 545 A.2d 1296 (1988); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242 (1972)

Mich.

Rollingwood Homeowners Corp. v. City of Flint, 386 Mich. 258, 191 N.W.2d 325 (1971)

Mo.

Client Services, Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. Ct. App. E.D. 2006)

Julian v. Mayor, Councilmen and Citizens of City of Liberty, 391 S.W.2d 864 (Mo. 1965); City of Nevada, to Use of Gilfillan v. Eddy, 123 Mo. 546, 27 S.W. 471 (1894); Bigelow v. City of Springfield, 178 Mo. App. 463, 162 S.W. 750 (1914), citing this treatise; City of Cape Girardeau v. Fougeu, 30 Mo. App. 551, 1888 WL 1717 (1888)

N.J.

Shedden v. Hagmann, 128 N.J.L. 200, 24 A.2d 874 (N.J. Sup. Ct. 1942); City of Paterson v. Barnet, 46 N.J.L. 62, 1884 WL 7629 (N.J. Sup. Ct. 1884); Story v. City of Bayonne, 35 N.J.L. 335, 1872 WL 6916 (N.J. Sup. Ct. 1872)

Tex.

City of Austin v. Findlay, 538 S.W.2d 9 (Tex. Civ. App. Austin 1976) (changing name of street); Brand v. City of San Antonio, 37 S.W. 340 (Tex. Civ. App. 1896)

Wash.

Burmeister v. Howard, 1 Wash. Terr. 207, 1867 WL 5421 (1867)

When ordinance necessary, § 15:3.

Necessary implication that act should be done by ordinance, § 15:6.

27 **Conn.**

Shoreline Shellfish, LLC v. Town of Branford, 336 Conn. 403, 246 A.3d 470 (2020) ("local ordinance" is a municipal legislative enactment and for purposes of appeal is to be treated as though it were a statute)

Or.

Campbell v. City of Eugene, 116 Or. 264, 240 P. 418 (1925)

28 **Fla.**

White v. Town of Inglis, 988 So. 2d 163 (Fla. 1st DCA 2008)

29 **U.S.**

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Conn.

Morris v. Town of Newington, 36 Conn. Supp. 74, 411 A.2d 939 (Super. Ct. 1979), judgment aff'd, 180 Conn. 89, 428 A.2d 342 (1980), citing this treatise

Fla.

Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)

Ga.

Cason v. McLeod, 168 Ga. 702, 148 S.E. 584 (1929)

Ind.

Town of Walkerton v. New York, C. & St. L. R. Co., 215 Ind. 206, 18 N.E.2d 799 (1939); City of Crawfordsville v. Braden, 130 Ind. 149, 28 N.E. 849 (1891)

Ky.

City of Hickman v. Helm, 264 Ky. 266, 94 S.W.2d 665 (1936); Robertson v. Southern Bitulithic Co., 190 Ky. 314, 227 S.W. 453 (1921), citing this treatise; Gleason v. Barnett, 115 Ky. 890, 22 Ky. L. Rptr. 1660, 61 S.W. 20 (1901)

La.

First Municipality v. Cutting, 4 La. Ann. 335, 1849 WL 3735 (1849)

Minn.

State ex rel. Child v. City of Waseca, 195 Minn. 266, 262 N.W. 633 (1935); Steenerson v. Fontaine, 106 Minn. 225, 119 N.W. 400 (1908)

Miss.

Luter v. Oakhurst Associates, Ltd., 529 So. 2d 889 (Miss. 1988) (zoning action effective even though labeled resolution not ordinance), quoting this treatise

Mo.

Wheeler v. City of Poplar Bluff, 149 Mo. 36, 49 S.W. 1088 (1899); City of Springfield, to Use of McEvilly v. Knott, 49 Mo. App. 612, 1892 WL 1839 (1892); Rumsey Mfg. Co. v. Inhabitants of Town of Schell City, 21 Mo. App. 175, 1886 WL 5036 (1886)

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City of Paterson v. Barnet, 46 N.J.L. 62, 1884 WL 7629 (N.J. Sup. Ct. 1884); Green v. City of Cape May, 41 N.J.L. 45, 1879 WL 6961 (N.J. Sup. Ct. 1879)

N.Y.

Jewett v. Luau-Nyack Corp., 31 N.Y.2d 298, 338 N.Y.S.2d 874, 291 N.E.2d 123 (1972)

Ohio

Jones v. City of Middletown, 59 Ohio L. Abs. 329, 96 N.E.2d 799 (C.P. 1948), citing this treatise

Or.

State v. Bozorth, 84 Or. 371, 164 P. 958 (1917); State ex rel. Beeman v. Kelsey, 66 Or. 70, 133 P. 806 (1913), citing this treatise

Pa.
Sower v. City of Philadelphia, 35 Pa. 231, 1860 WL 8246 (1860)
Wis.
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30 **U.S.**
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Cal.
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N.Y.
In re Radio Station WNYC, 169 Misc. 502, 7 N.Y.S.2d 297 (Sup 1938), order aff'd, 255 A.D. 844, 7 N.Y.S.2d 998 (1st Dep't 1938), order aff'd, 280 N.Y. 629, 20 N.E.2d 1008 (1939)
Ohio
W.B. Gibson Co. v. Warren Metropolitan Housing Authority, 65 Ohio App. 84, 18 Ohio Op. 302, 29 N.E.2d 236 (7th Dist. Trumbull County 1940)
Tex.
Southwestern Bell Tel. Co. v. Gohmert, 222 S.W.2d 644 (Tex. Civ. App. San Antonio 1949); American Const. Co. v. Davis, 141 S.W. 1019 (Tex. Civ. App. Austin 1911), writ refused, (Feb. 14, 1912)

31 **U.S.**
Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)
Fla.
Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)
Mo.
Ketchum v. City of Monett, 193 Mo. App. 529, 181 S.W. 1064 (1916)

32 **Mich.**
Swanson v. City of Southfield, 365 Mich. 131, 112 N.W.2d 63 (1961); Parr v. Fulton, 9 Mich. App. 719, 158 N.W.2d 35 (1968)
Ohio
Wuebker v. Hopkins, 29 Ohio App. 386, 6 Ohio L. Abs. 526, 163 N.E. 566 (8th Dist. Cuyahoga County 1928)

33 **U.S.**
See Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986) (applying Florida law)
Fla.
See Little v. City of North Miami, 805 F.2d 962, 35 Ed. Law Rep. 1037 (11th Cir. 1986)
Ga.
Yarn v. City of Atlanta, 203 Ga. 543, 47 S.E.2d 556 (1948)

34 **Ill.**

Even though city council resolution equated union with nonunion employees for purpose of payment of sick leave benefits, plaintiff former employee did not acquire vested right to payment prescribed by resolution and payment would be governed under terms of subsequent ordinance. McCarty v. City of Rockford, 96 Ill. App. 3d 531, 51 Ill. Dec. 941, 421 N.E.2d 576 (2d Dist. 1981)

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ARTICLE IV. COUNCIL

Section 1. AUTHORITY AND MEMBERSHIP OF THE COUNCIL.

The legislative authority of the city shall be vested in a governing body which shall constitute the legislative branch of the city and shall be known as a Council, consisting of nine members from separate Council Districts, each member to be known as a Councillor. Each of the Council Districts shall elect one Councillor, who shall be a qualified voter of the District. (Amended at Regular Municipal Election, October 8, 1991, as Proposition #1; Amended at a Special Election held in conjunction with a Regular Municipal Election, October 5, 1999, as Question #7.)

Section 2. COUNCIL DISTRICTS.

(a) The total area of the city shall be divided into nine Council Districts, numbered one to nine inclusive, and each district shall elect one Councillor. Any member of the Council representing one of the districts shall be elected by the registered qualified electors of that district only.

(b) The boundaries, 1980 Census population and numerical designation of the Council Districts are specified in Appendix A of this Charter and shall remain in effect until altered or changed in accordance with the provisions set forth in this Charter.

Section 3. DISTRICT BOUNDARY REVISIONS.

(a) After each Federal Census, the Council shall appoint a committee composed of an equal number of representatives from each Council District, none of whom shall be elective city officers, to review and make recommendations concerning the nine Council Districts. In making such appointments, the Council shall, as nearly as is practicable, provide fair and balanced representation of all geographical areas of the City in the redistricting process and provide a total membership that reflects the racial, ethnic and gender makeup of the City's population. Any recommended changes will comply with constitutional principles governing voting rights, population and similar related problems as determined by judicial decision from time to time. The district boundaries may be altered by the Council and Mayor once following each Federal Census. Such action shall require the approval of the Mayor and shall not constitute an amendment to the Charter.

(b) The district boundaries may be altered as necessary to incorporate areas which are annexed to the city. Such action shall not constitute an amendment to this Charter.

(Amended at Regular Municipal Election, October 2, 2001, as Proposition #8.)

Section 4. TERMS OF OFFICE.

The terms of the office of a Councilor, unless sooner recalled or removed, shall begin on January 1 following the candidate's election and be four years or until a successor is duly elected and qualified. The Councilors may succeed themselves in office. The terms of office of Councilors shall be staggered with four or five districted Councilors elected every two years.

(Am. Ord. 2018-034)

Section 5. COUNCIL ORGANIZATION.

The Council shall elect a president from its number and shall determine its order and procedure.

Section 6. COMPENSATION OF THE COUNCIL.

Councillors shall receive annual salaries as determined by a citizens' independent salary commission.

(Amended at Regular Municipal Election, October 6, 2009.)

Section 7. MEETINGS OF THE COUNCIL.

(a) The Council or any of its component committees shall meet as frequently as its business may require. The Council shall establish regular Council meeting times by ordinance. Between official Council meetings the Council shall form itself into committees for consideration of specific areas of government, using citizenship participation in committee work if found advisable.

(b) All meetings of both the Council and the committees shall be open to the public and due notice thereof given. Records shall be kept of all voting by each Councillor and committee member. Publicity shall be given to the minutes of all meetings of the Council and committees, and the official records of such meetings shall be open to inspection at all convenient times.

Section 8. COUNCIL POWERS.

The Council shall have the power to adopt all ordinances, resolutions or other legislation conducive to the welfare of the people of the city and not inconsistent with this Charter, and the Council shall not perform any executive functions except those functions assigned to the Council by this Charter.

Section 9. VACANCIES IN OFFICE.

(a) A vacancy in the office of Councillor occurs upon the Councillor's death, disability, recall, resignation, removal or

termination of residency in the district represented.

(b) If a vacancy occurs in the office of Councillor, the Mayor shall appoint a registered qualified elector of the District to fill the vacancy. Anyone appointed to fill a vacancy shall serve until the next regular election, at which time a person shall be elected to fill the remaining unexpired term, if any.

Section 10. COUNCIL DUTIES.

The Council shall:

(a) Be the judge of the election and qualification of its members;

(b) Establish and adopt by ordinance or resolution five-year goals and one-year objectives for the city, which goals and objectives shall be review and revised annually by the Council;

(c) Consult with the Mayor, seek advice from appropriate committees, commissions and boards, and hold one or more public hearings before adopting or revising the goals and objectives of the city;

(d) Review, approve or amend and approve all budgets of the city and adopt policies, plans, programs and legislation consistent with the goals and objectives established by the Council;

(e) Preserve a merit system by ordinance;

(f) Hire the personnel necessary to enable the Council to adequately perform its duties;

(g) Perform other duties not inconsistent with or as provided in this Charter; and

(h) Faithfully execute and comply with all laws, ordinances, regulations and resolutions of the city and all laws of the State of New Mexico and the United States of America which apply to the city.

Section 11. DEFINITIONS.

Whenever used in this Charter:

(a) The word "Commission" means "Council"; "Commissioner" and "District Councillor" mean "Councillor"; "Commissioners" means "Councillors".

(b) "Quorum" means a majority of the entire Council, committee or other body involved.

(c) The masculine term refers equally to the feminine.

Section 12. OFFICER OR EMPLOYEE OF A COUNTY.

Effective December 1, 1993, no Councillor shall be an officer or employee of any county of the State of New Mexico while in office, except a person who on October 3, 1989, is both a Councillor and an officer or employee of a county of the State of New Mexico may thereafter hold and be elected to the office of Councillor while so employed.

(Section 12 adopted at Regular Municipal Election, October 3, 1989, as Proposition #7; Article IV amended at Regular Municipal Election, October 3, 1989, as Proposition #2.)

Section 13. TERM LIMITS.

Effective January 1, 1994, Councillors may not serve more than two elected terms. Councillors who have served more than two terms on that date may remain in office until their term expires.

(Section 13 adopted at Special Municipal Election, January 11, 1994, as Proposition #7. This Section has been declared unconstitutional by the New Mexico Court of Appeals on July 18, 1995. The New Mexico Supreme Court denied certiorari and therefore the New Mexico Court of Appeals decision declaring this section unconstitutional stands.)

ARTICLE V. MAYOR

Section 1. ELECTION OF THE MAYOR.

The Mayor shall be a registered qualified elector on the date of filing of the declaration of candidacy for the office of Mayor. The Mayor shall be elected by the registered qualified electors of the city.

(Amended at a Special Election held in conjunction with a Regular Municipal Election, October 5, 1999, as Question #9.)

Section 2. MAYOR'S TERM AND SALARY.

The term of Mayor, unless sooner recalled or removed, shall begin on January 1 following the candidate's election and shall be for four years or until a successor is duly elected and qualified. The Mayor's salary shall be determined by a citizens' independent salary commission.

(Amended at Regular Municipal Election, October 6, 2009. Am. Ord. 2018-034)

Section 3. POWERS; PERFORMANCE; APPOINTMENTS.

The executive branch of the city government is created. The office of Mayor is created. The Mayor shall control and direct the executive branch. The Mayor is authorized to delegate executive and administrative power within the executive branch. The Mayor shall be the chief executive officer with all executive and administrative powers of the city and the official head of the city for all ceremonial purposes. The Mayor shall devote full time and attention to the performance of the duties of office and shall hold no other paid public or private employment.

Section 4. DUTIES OF THE MAYOR.

The Mayor shall:

(a) Organize the executive branch of the city;

(b) Exercise administrative control and supervision over and appoint directors of all city departments, which appointments shall not require the advice or consent of the Council except as provided in (d) of this Section;

(c) Be responsible for the administration and protection of the merit system;

(d) With the advice and consent of the Council, appoint the Chief Administrative Officer, any deputy administrative officers, the Chief of Police, and the Fire Chief. Appointees requiring the advice and consent of the Council shall be presented to the Council for confirmation within 45 days after the Mayor takes office or after a vacant appointed position is filled. When an appointee is presented to and not confirmed by the Council, the Mayor shall, within 60 days thereafter, nominate another person to fill the position, and the Mayor may continue to nominate until confirmation;

1. The Police Chief or Fire Chief may be removed for cause by a vote of two-thirds of the entire membership of the Council.

(e) Select and remove the City Attorney only as follows:

1. The City Attorney shall be selected and appointed through an open and competitive hiring process conducted by the Mayor with the advice and consent of two-thirds of the entire membership of the Council.

2. The City Attorney's appointment shall be for a term that coincides and terminates with the term of the Mayor making the appointment unless sooner removed as provided herein.

3. The City Attorney may only be removed from office for cause by the Mayor with the concurrence of two-thirds of the entire membership of the Council after cause has been determined by the Director of the Office of Internal Audit and Investigations.

(f) Select and remove the City Clerk only as follows:

1. The City Clerk shall be selected and appointed through an open and competitive hiring process conducted by the Mayor with the advice and consent of two-thirds of the entire membership of the Council.

2. The City Clerk's appointment shall be for a term that coincides and terminates with the term of the Mayor making the appointment unless sooner removed as provided herein.

3. The City Clerk may only be removed from office for cause by the Mayor with the concurrence of two-thirds of the entire membership of the Council after cause has been determined by the Director of the Office of Internal Audit and Investigations.

(g) Except as otherwise provided for by ordinance, with the prior advice and final consent of the Council appoint the members of city committees, commissions and boards;

(h) Formulate the budgets of the city consistent with the city's goals and objectives, as provided in this Charter;

(i) Establish and maintain a procedure for investigation and resolution of citizen complaints;

(j) Prepare a written state of the city report annually, within thirty days after final approval of the operating budget of the city, which report shall be filed with the City Clerk, made a part of the permanent records of the city and available to the public;

(k) Perform other duties not inconsistent with or as provided in this Charter; and

(l) Faithfully execute and comply with all laws, ordinances, regulations and resolutions of the city and all laws of the State of New Mexico and the United States of America which apply to the city.

(Amended at Regular Municipal Election, October 2, 2007. Amended at Regular Municipal Election, October 6, 2009. Amended at Regular Municipal Election, October 6, 2015.)

Section 5. VACANCY IN THE OFFICE OF MAYOR.

(a) If the Mayor shall die, resign or terminate residence in the City of Albuquerque during his term of office, or be removed from office, the office of the Mayor shall become vacant.

(b) If a regular election will occur within one year of the date on which the vacancy occurs, the President of the Council shall serve as Mayor Pro Tem until a successor is elected and qualified. If the President of the Council shall decline to serve, the Council shall select from among its membership the person to serve as Mayor Pro Tem until a successor is elected and

qualified. If the President of the Council or any Councillor becomes Mayor Pro Tem pursuant to this Section, the Mayor Pro Tem shall cease to be a Councillor during the term as Mayor Pro Tem and the seat on the Council shall become vacant. The Mayor Pro Tem shall receive the same salary on a pro-rata basis as that provided for the former Mayor.

(c) A vacancy in the office of Mayor which occurs more than one year prior to the next regular election shall be filled for the remainder of the unexpired term by a special election. During the interim between the date the office is vacated and the date of the special election, the Mayor's position shall be filled by a Mayor Pro Tem determined by the same procedure specified in Subparagraph (b) above. However, in this event, the Mayor Pro Tem shall temporarily cease to be a Councillor during the term as Mayor Pro Tem and the seat on the Council shall remain vacant until reassumed. Likewise, in this event the Mayor Pro Tem is exempt from the provision of Section 3 above that the Mayor shall hold no other paid public or private employment. During the interval the Mayor Pro Tem serves pursuant to this Subparagraph, the Mayor Pro Tem shall receive a pro-rata salary based on the same salary that the former Mayor was receiving and shall receive no salary as a member of the Council.

(Article V amended at Regular Municipal Election, October 3, 1989, as part of Proposition #4.)

130 N.J. 439
Supreme Court of New Jersey.

COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO, and Robert W. Pursell, Plaintiffs–Appellants,
v.
Jim FLORIO, in his capacity as Governor, State of New Jersey, Anthony Cimino, individually and in his capacity as Commissioner, Department of Personnel, and Samuel Crane, individually and in his capacity as State Treasurer, Defendants–Respondents.
John HARTMANN, Dick LaRossa, Peter Inverso, Paul Kramer, Robert Singer, Melvin Cottrell, and Barbara Wright, Plaintiffs–Appellants,
v.
Jim FLORIO, in his capacity as Governor, State of New Jersey, Anthony Cimino, individually and in his capacity as Commissioner, Department of Personnel, and Samuel Crane, individually and in his capacity as State Treasurer, Defendants–Respondents.

A-106, A-105
|
Argued Oct. 13, 1992.
|
Decided Dec. 29, 1992.

Synopsis

Action was brought challenging governor's refusal to implement employee layoffs in manner mandated by the legislature in Appropriations Act. Following transfer from the Law Division, the Superior Court, Appellate Division, denied application for stay pending appeal. After directly certifying appeals, the Supreme Court, Garibaldi, J., held that restrictions on governor's implementation of reduction in state employees necessitated by reduced appropriations unconstitutionally interfered with the authority of the executive branch.

Ordered accordingly.

Attorneys and Law Firms

****224** ***443** Steven P. Weissman, for plaintiffs-appellants Communications Workers of America, AFL–CIO and Robert W. Pursell.

****225** Michael T. Hartsough, for plaintiff-appellant Dick LaRossa (Hartsough, Kenny, Innes & Kline, Princeton, attorneys).

Angelo J. Onofri, for plaintiffs-appellants John Hartmann, et al. (McCarthy and Schatzman, Princeton, attorneys).

Robert J. Del Tufo, Atty. Gen., for defendants-respondents (Robert J. Del Tufo, attorney; Edward J. Dauber, Executive Asst. Atty. Gen., of counsel; Joseph L. Yannotti, Jack M. Sabatino, and Mark J. Fleming, Asst. Attys. Gen., Bertram P. Goltz, Jr., Donald M. Palombi, Carol A. Blasi, June K. Forrest, and Lewis A. Scheindlin, Deputy Attys. Gen., on the briefs).

The opinion of the Court was delivered by

Opinion

GARIBALDI, J.

These joint appeals arise from lawsuits raising identical issues that challenge the Governor's refusal to implement employee layoffs in the manner mandated by the Legislature in the 1993 Fiscal Year Appropriations Act, *L.* 1992, *c.* 40 (the "Appropriations Act" or the "Act"), as amended by Senate Bill 996, *L.* 1992, *c.* 99, (the "Appropriations Amendments" or "Senate Bill 996"). Unlike the language of the original Appropriations Act that obligated the Governor "whenever possible" to avoid the layoff of career State employees, the language of Senate Bill 996 is mandatory and directs that personnel reductions *shall* be accomplished by layoffs of managerial and other exempt personnel outside the collective bargaining units.

The critical issue is whether the Act, as amended by Senate Bill 996, violates the separation-of-powers provision of the ***444** New Jersey Constitution, article III, paragraph 1, by allowing the Legislature to interfere excessively with the Governor's constitutional authority to manage government.

I

A. *The 1993 Appropriations Act*

On June 25, 1992, the New Jersey Legislature passed the Appropriations Act. The Act directed that various departments of State government accomplish personnel savings through staff reduction. Specifically,

most departmental appropriations contained a proviso that authorized the intra-departmental transfer of funds

> from the other appropriations made for Salaries and wages in the department to reflect savings throughout the department from the reduction of employees whose annual salaries exceed $50,000. Such savings shall first be made by reduction of employees in the unclassified service. If those reductions in the unclassified service are insufficient, additional reduction of employees shall be made in the classified service. These reductions shall be made among management and administrative personnel and shall, to the maximum extent possible, not affect direct service personnel. If reductions are made of employees in the classified service, the commissioner shall provide written notice and justification of such action to the Director of the Division of Budget and Accounting and the Joint Budget Oversight Committee. [S. 1000, § 1 (Department of Banking Appropriations).]

Additionally, in a provision applying to all appropriations, the Act stated:

> 38. Notwithstanding the provisions of any law to the contrary, no State Troopers, corrections officers or personnel providing services in any institution operated by the State shall be laid off. Whenever possible, layoffs shall exclude those employees of any department who provide direct services and shall also exclude career employees who have occupied the same job title for at least five years or who have ten years of State service. [S. 1000, § 38.]

On June 26, 1992, the Governor vetoed the Act, and on June 30, 1992, the Legislature overrode the Governor's veto, and the Appropriations Act became law.

B. *Senate Bill 996—The Amendment to the Appropriations Act*

On June 29, 1992, the Legislature approved an amendment to the Appropriations Act. Senate Bill 996 amended section 38 to ***445** add communications operators, security ****226** guards, alcoholic beverage control inspectors, and marine police officers to the list of employees who could not be laid off. Senate Bill 996 also deleted the discretionary "whenever possible" language of section 38 and replaced it with the following mandatory language:

> Savings required to be realized through the reduction of personnel shall be made by the reduction of managerial and other exempt personnel outside the collective negotiations units in the unclassified service, and then, if necessary, by the reduction of managerial and other exempt personnel outside the collective negotiations units in the career service. As used in this section, managerial and other exempt personnel means employees assigned to employee relations groupings X, M, D, E, V, Z, Y and W. [S. 996, § 1.]

The employee-relations groupings listed in the amendment are among the higher paid of State workers and are exempt from union representation, based on either their managerial or confidential status.

On September 10, 1992, Governor Florio vetoed Senate Bill 996. In his veto message, the Governor stated that "[w]ithin the confines of [the Appropriations Act] and the massive cuts enacted by the Legislature, I agree wholeheartedly with the spirit of that priority list. And, as interpreted by the Attorney General, I believe this language is sufficiently

permissive that it does not run afoul of the State Constitution." However, the Governor stated that the mandatory provisions of the Appropriations Amendment are "a completely different matter" that "would impose upon the Executive Branch a series of restrictions that would clearly interfere in the Executive's constitutional duty to manage government."

On September 14, 1992, the Legislature overrode the Governor's veto, and Senate Bill 996 became law.

C. *The Executive Branch's Response to the Act*

The Governor sought advice from the Attorney General concerning the constitutionality of the Appropriations Act and the ***446** Appropriations Amendments. The Attorney General in a letter opinion dated July 2, 1992, advised the Governor that the personnel reduction language in the Appropriations Act as drafted was permissive and hence did not violate the separation-of-powers doctrine. As the Attorney General read the Appropriations Act, "the legislative directive does not differ significantly from existing Department of Personnel practices (as embodied in statutes and regulations) governing reductions in force." (citations omitted). He therefore concluded:

> We reasonably may read the conditional budgetary language as referring to and being consonant with existing statutory and administrative practice. In this way, the conditional language does not interfere with the substantial degree of discretion agencies have to marshal the resources appropriated to carry out the many statutory duties.

However, the Attorney General then wrote that if the personnel reduction language were read as dictating particular staffing decisions for each agency, it would be unconstitutional. He also concluded that the exemption of certain classes of employees from layoff violated the separation of powers because those categorical exemptions "could severely hamper the Governor's discretion as to how to administer the government efficiently with fewer employees."

Based on the Attorney General's opinion, on July 2, 1992, the Governor's Chief Counsel issued a directive to all members of the Governor's cabinet instructing them "not to follow the language provisions which [the Attorney General] has identified as unconstitutional."

In response to the Appropriations Act, the State departments prepared layoff plans, which they submitted to the Commissioner of the Department of Personnel, Anthony Cimino, for his review. On or about July 10, 1992, the Commissioner wrote to several department heads, informing them that their layoff plans were unacceptable "because, among other reasons, the management reductions that are made disproportionately impact employees in lower salaried ****227** ranges represented by bargaining units." On August 5, 1992, the Commissioner approved all department layoff plans and so notified each department ***447** head. Based on the various plans, the State was to lay off 1,459 employees on October 2, 1992.

According to plaintiff Communications Workers of America, AFL–CIO (the "CWA"), the union represents approximately 900 of the employees that were slated for layoff. Only 450 employees of the 1,459 were from the unclassified or managerial ranks. In its amended notice of appeal, CWA asserts that the "vast majority of employees who have been targeted for layoff on or about October 2, 1992 receive annual salaries of less than $50,000. Hundreds of targeted employees, performing vital clerical and other functions, earn less than $20,000 per year." CWA further asserts that "[a]lthough there are approximately 6,000 unclassified employees in State government, of the 1,500 employees targeted for layoff, fewer than one-third are in the unclassified service. The vast majority of employees to be laid off are not managerial or exempt personnel * * *."

D. *Letter from the Office of Legislative Services in Response to the Opinion Letter of the Attorney General*

On August 7, 1992, the Executive Director of the Office of Legislative Services, Albert Porroni, issued a letter to the Senate President and General Assembly Speaker in which he disagreed with the Attorney General's opinion letter of July 2, 1992. According to Porroni,

> In times of economic distress, such as result in the revenue shortfalls expected by this State in the prior and

> current fiscal years, the Legislature may determine that sufficient funds are not available to fully fund all programs or projects. Policy determinations must be made. The Legislature may choose not to fund programs at all, to partially fund programs or to establish priorities within programs. *See City of Camden v. Byrne,* 82 *N.J.* 133 [411 *A.*2d 462] (1980). Contrary to the conclusion of the Attorney General, such determinations and priorities are for the Legislature, not the Executive Branch, to make. Once the Legislature establishes its priorities, the Executive Branch must administer existing programs within the limits of those priorities.

Because the Legislature viewed its establishment of restrictions as a constitutional act in furtherance of its appropriations powers, Porroni concluded that "we are of the opinion that the Legislature, by law, may direct certain administrative aspects ***448** of the State Government[,] especially those rationally related to an appropriation or fiscal policy."

E. *Procedural History*

On August 12, 1992, the CWA and Robert W. Pursell, plaintiffs, commenced an action in the Law Division against defendants, Governor Jim Florio, Commissioner of Personnel Anthony Cimino, and State Treasurer Samuel Crane. Plaintiffs seek a judgment that defendants are in violation of the Act and an order enjoining defendants from violating the Act and directing the rescission of all layoff notices served on employees in violation of the Act. On September 25, 1992, the Law Division granted defendants' motion to transfer Count 1 of the Complaint to the Appellate Division. Another count in that complaint is not before us.

On September 29, 1992, John Hartmann, a member of the New Jersey General Assembly, filed a complaint in the Law Division against Governor Florio, Commissioner Cimino, and Treasurer Crane, demanding the same relief as requested by CWA in its action. On September 29, 1992, Assemblyman Hartmann filed an amended complaint in the Law Division, in which Dick LaRossa and Peter Inverso, members of the New Jersey Senate, and Paul Kramer, Robert Singer, Melvin Cottrell, and Barbara Wright, members of the General Assembly, joined as party plaintiffs. On October 1, 1992, the legislators filed a verified amended complaint.

On October 2, 1992, CWA filed an amended complaint in the Appellate Division, ****228** which it termed an "amended notice of appeal." The legislators' suit was consolidated on appeal with CWA's suit. Plaintiffs also filed an application for emergent relief enjoining the layoff of State employees scheduled for October 2, 1992. The Appellate Division, with one judge dissenting, denied the application for a stay pending appeal. Plaintiffs brought a motion for a stay to this Court, and on October 2, 1992, Justice Handler granted a stay of the layoffs pending review by the full Court on October 5, 1992. On that ***449** date, the Court vacated the stay but directly certified the consolidated appeals pursuant to *Rule* 2:12–1.

II

A. *The Separation-of-Powers Provision*

Article III, paragraph 1 of the New Jersey Constitution reads:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The doctrine of separation of powers is a fundamental principle of our State government. The separation-of-powers article first appeared in substantially its present form in the New Jersey Constitution of 1844. It was designed to "maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch." *David v. Vesta Co.,* 45 *N.J.* 301, 326, 212 *A.*2d 345 (1965) (footnote and emphasis omitted).

Despite the explicit constitutional mandate that "contemplates that each branch of government will exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch," *Knight v. Margate,* 86 *N.J.* 374, 388, 431 *A.*2d 833 (1981), we have always recognized that the doctrine requires not an absolute division of power but a cooperative accommodation among the three branches of government. *General Assembly v. Byrne,* 90 *N.J.* 376, 382, 448 *A.*2d 438 (1982); *Knight v. Margate, supra,* 86 *N.J.* at 388, 431 *A.*2d 833; *Brown v. Heymann,* 62 *N.J.* 1, 11, 297 *A.*2d 572 (1972).

In one of the first cases to address the separation-of-powers doctrine under the 1947 Constitution, Chief Justice Vanderbilt recognized that a rigid and inflexible classification of the branches of government into mutually-exclusive, water-tight ***450** compartments would "render government unworkable." *Massett Bldg. Co. v. Bennett,* 4 *N.J.* 53, 57, 71 *A.*2d 327 (1950). More recently we expressed the same thought in *In re Salaries for Probation Officers,* 58 *N.J.* 422, 425, 278 *A.*2d 417 (1971): "The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight."

We understand that "[i]nevitably some osmosis occurs when the branches touch one another; the powers of one branch sometimes take on the hue and characteristics of the powers of the others." *Knight v. Margate, supra,* 86 *N.J.* at 388, 431 *A.*2d 833. The aim of the separation-of-powers doctrine is not to prevent such cooperative action, but to guarantee a system in which one branch cannot "claim[ ] or receiv[e] an inordinate power." *Brown v. Heymann, supra,* 62 *N.J.* at 11, 297 *A.*2d 572.

The parties disagree on whether the Appropriations Act, as amended, encroaches on the Executive's power, and they present a "parade of horribles" that will result if the other's position prevails. CWA and the plaintiff legislators argue that to sustain the Governor's position will require them to give the Governor a "blank check" in the appropriations process. The Governor argues that to sustain the plaintiffs' position will allow the Legislature to micromanage the Executive branch. Both sides claim that their own layoff plan is efficient and effective, and that the adversary's plan will result in the chaotic disruption of government services.

****229** The executive branch contends that the Appropriations Amendments impermissibly intrude on the Governor's constitutional authority to administer appropriated funds, which includes the making of specific staffing and resource-allocation decisions. The Governor claims that if government is to operate efficiently and effectively, the selection and assignment of necessary personnel and the decisions concerning how best to effectuate a reduction in force must reside in the executive ***451** branch. The Legislature's attempt to control the order of layoffs both usurps and thwarts the Governor's duty to make staffing and resource allocations, which are an essential part of the Executive's day-to-day management of that branch of government.

Plaintiffs, on the other hand, assert that the amended Appropriations Act does not impermissibly intrude on the Governor's power because it does not unduly restrict his ability to choose the employees he will lay off. Plaintiffs allege that because the State has so many managers and the Act requires so few layoffs, the Governor has sufficient options under the amendment to function effectively.

To determine whether in enacting Senate Bill 996 the Legislature impermissibly intruded on the Governor's authority, we first examine the power and authority given to the legislative and executive branches of government under the 1947 Constitution.

B. *The Legislature's Power*

The Legislature's power to appropriate funds for the operation of State government derives from several constitutional provisions.

> The legislative power shall be vested in a Senate and General Assembly. [*N.J. Const.* art. IV, § 1, ¶ 1.]
>
> All bills for raising revenue shall originate in the General Assembly; but the Senate may propose or concur with amendments, as on other bills. [*N.J. Const.* art. IV, § 6, ¶ 1.]
>
> No money shall be drawn from the State treasury but for appropriations made by law. [*N.J. Const.* art. VIII, § 2, ¶ 2.]

"New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." *City of Camden v. Byrne,* 82 *N.J.* 133, 148, 411 *A.*2d 462 (1980). We reaffirm our commitment to that fundamental constitutional principle.

***452** The Constitution, however, sets no specific standards or rules for determining the content of an appropriations act. That allows for some flexibility and discretion in the appropriation process. *Karcher v. Kean,* 97 *N.J.* 483, 491, 479 *A.*2d 403 (1984). Appropriation enactments customarily include conditions, restrictions, or limitations on the expenditure of appropriated funds. The power to impose such conditions is inherent in the power to appropriate. *Id.* at 492, 479 *A.*2d 403. But as with all legislative enactments, those statutory conditions must comport with the constitutional principle of separation of powers.

In 1983, New Jersey legislators took Governor Kean to court after he exercised his line-item veto on provisions of the 1983 Appropriations Act. The legislators argued that the line-item veto power extended only to items of appropriation of money and not to conditions on those appropriations. One of the vetoed conditions was similar to the provisions at issue here. Paragraph 47 of Senate Bill 1600 stated:

> If, as a result of an insufficiency of appropriations in any program account, it is required or determined that there will be a reduction in the number of State offices, positions or employees in that program account, the head of the department which administers the program shall effect that reduction in personnel from among all offices, positions or employment at salaries which exceed $15,000.00 in the unclassified service of the civil service before effecting any reduction in personnel from the classified service. [*In re Karcher,* 190 *N.J.Super.* 197, 209 n. 4, 462 *A.*2d 1273 (App.Div.1983), *aff'd in part, rev'd in part, Karcher v. Kean, supra,* 97 *N.J.* 483, 479 *A.*2d 403.]

****230** The Attorney General successfully argued before the Appellate Division that that provision would "infringe[ ] unconstitutionally on the Governor's day-to-day administration of government." 190 *N.J.Super.* at 210, 462 *A.*2d 1273. That "excessive intrusion[ ]" would "impede the Governor's duty to execute the law, and result in an impermissible arrogation of power to the Legislature." *Ibid.* After citing several cases from other jurisdictions in support of the proposition that the Legislature cannot administer already-appropriated funds without usurping executive branch power, the Appellate Division held that paragraph ***453** 47 was unconstitutional because it violated the separation-of-powers doctrine.

When the case came before this Court, we approved the Governor's use of the line-item veto to eliminate paragraph 47. We therefore did not reach the separation-of-powers issue, although we noted that "[i]t may be that these particular provisions offend relevant constitutional doctrine * * *." 97 *N.J.* at 504, 479 *A.*2d 403.

In *Karcher* we recognized that the power of the purse is an awesome power. The scope of that power makes vital the observance of its limits, lest the power concentrated in the hands of the Legislature overwhelm the coordinate branches and upset the constitutional scheme of shared but separate powers.

> "[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers * * * would be substantially undermined." [*Id.* 97 *N.J.* at 507–08, 479 *A.*2d 403 (citing *In re Opinion of the Justices,* 294 *Mass.* 616, 2 *N.E.*2d 789 (1936)).]

Similar fears were voiced by Justice Schreiber in *Enourato v. New Jersey Building Authority,* 90 *N.J.* 396, 415, 448 *A.*2d 449 (1982) (Schreiber, J., dissenting and concurring): "Legislative control over appropriations purse strings does not warrant violation of the constitutional separation of powers. Otherwise the Legislature could through this mechanism direct the operations of all executive functions."

C. *The Governor's Powers*

The Governor's power and duty to execute the laws is also set forth in the New Jersey Constitution.

> The executive power shall be vested in the Governor. [*N.J. Const.* art. V, § 1, ¶ 1.]
>
> Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed

> by the Governor, with the advice and consent of the Senate, to serve ***454** at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General. [*N.J. Const.* art. V, § 4, ¶ 2.]

Article V, section 4, paragraph 2 is aimed at pinpointing responsibility and control of the departments within the executive branch. The Governor appoints department heads who serve under his supervision and serve at his pleasure.

Paragraphs 4 and 5 of article V, section 4, further implement the powerful-executive approach. Paragraph 4 gives the Governor direct control over departments where the head of the department is a board and commission. Paragraph 5 gives the Governor power to investigate the conduct of executive branch officials and to discipline them. Of course, to avoid violating the separation-of-powers doctrine, the Governor does not have such power over members of the Legislature or the judicial branch. Robert F. Williams, *The New Jersey State Constitution, A Reference Guide,* 91–92 (1990) (hereinafter Williams, *N.J. State Constitution*).

Additionally, to prevent the Legislature from exercising inordinate power over the other branches of government through its ****231** power of the purse, the 1947 Constitution gave the Governor a "vital constitutional role in the budget process." *Karcher v. Kean, supra,* 97 *N.J.* at 489, 479 *A.*2d 403. The Governor has the statutory power to propose the State budget, *N.J.S.A.* 52:27B–20, and the right to exercise a selective veto over the appropriations. *N.J. Const.* art. V, § 1, ¶ 15.

The members of the Constitutional Convention of 1947 considered the Governor's "significant responsibilities over the State's fiscal affairs" to be an important aspect of the centralization of State finances essential to efficient modern government operations. *City of Camden v. Byrne, supra,* 82 *N.J.* at 150, 411 *A.*2d 462 (citing George C. Skillman & Sidney Goldmann, "The Single Budget, Single State Fund and Single Fiscal Year" (Monograph), II *Proceedings of the New Jersey Constitutional Convention of 1947* 1668 at 1683–84). Indeed, "a ***455** prime objective of the 1947 Constitutional Convention was to create a strong executive," Williams, *N.J. State Constitution, supra,* at 79. The aim was to make the principal departments of government subject to gubernatorial supervision so as to form a streamlined, modern, and accountable executive branch. *Id.* at 90 (citing *Association of New Jersey State College Faculties, Inc. v. Board of Higher Educ.,* 112 *N.J.Super.* 237, 270 *A.*2d 744 (Law Div.1970)).

The New Jersey Constitution is unusual because it is the only state constitution under which the Governor is the only official elected on a statewide basis. "This pinpoints responsibility for executive branch operations in the Governor's Office and adds to his power." Williams, *N.J. State Constitution, supra,* at 91.

In *Kenny v. Byrne,* 144 *N.J.Super.* 243, 365 *A.*2d 211 (App.Div.1976), *aff'd,* 75 *N.J.* 458, 383 *A.*2d 428 (1978), executive-branch employees challenged an executive order that required high-echelon State employees to file financial disclosure statements with the Secretary of State. Those employees argued that such an order was beyond the Governor's authority. The Appellate Division disagreed and found the executive order well within the Governor's authority. In reaching its conclusion, the court relied on the Governor's constitutional power, as head of the executive branch, to take care that the laws be faithfully executed, and the 1947 Constitution's recognized objective to create a strong executive.

> To achieve this goal, the major principles of modern state administrative reorganization were incorporated into the 1947 Constitution:
>
> > "These principles—directed toward the achievement of maximum efficiency and economy in the execution of State administrative activities, are:
> >
> > (1) integration of all administrative activities of the State along functional lines within a few well-balanced principal departments;
> >
> > (2) establishment of direct lines of responsibility for the administration of such functions and activities—from the Governor, through the department heads, to the subordinate officers of each department;
> >
> > (3) providing the Governor with executive authority commensurate with his responsibilities to the people of the State, * * *."
>
> [144 *N.J.Super.* at 251, 365 *A.*2d 211 (quoting Leon S. Milmed, *The New Jersey Constitution of 1947,* in *N.J.S.A. Const.* 91, 103–04).]

***456** The court understood that "[u]nmistakably, the executive power reposed in the Governor under the Constitution * * * must be given life and meaning by investing him with the authority to implement his responsibilities. * * * To conclude otherwise is to negate the intent of the framers of the Constitution of 1947." *Kenny v. Byrne, supra,* 144 *N.J.Super.* at 251, 365 *A.*2d 211 (citations omitted). The Appellate Division also was influenced by the fact that the executive order did not encroach on the prerogatives of other branches of government, but in fact furthered the purpose of a related statute, the Conflicts of Interest Law, *N.J.S.A.* 52:13D–12 to –27.

****232** III

We begin our analysis of the challenged legislative provisions by setting forth the well-established basic principles that must guide us. The Appropriations Amendment, like all legislative enactments, is presumed to be constitutionally valid. *See State v. Lagares,* 127 *N.J.* 20, 601 *A.*2d 698 (1992). The Legislature has the power to appropriate funds and to attach conditions or restrictions to appropriations. *Karcher v. Kean, supra,* 97 *N.J.* at 491–92, 479 *A.*2d 403. However, the Legislature's power to attach conditions to appropriations is limited by the doctrine of separation of powers, as well as by other constitutional provisions. The "primary responsibility for the conduct of the executive and administrative branches of government reside[s] in the Governor." *Russo v. Walsh,* 18 *N.J.* 205, 209, 113 *A.*2d 516 (1955). The Governor has direct and extensive control over the staffing and resources of each department of the executive branch. Those fundamental principles are firmly established in our constitutional law.

Separation-of-powers questions can arise when a branch delegates some of its own power away, *see Brown v. Heymann, supra,* 62 *N.J.* 1, 297 *A.*2d 572, or when a branch takes unto itself some of the powers of another branch, *see Enourato v. New Jersey Bldg. Auth., supra,* 90 *N.J.* 396, 448 *A.*2d 449; ***457** *General Assembly v. Byrne, supra,* 90 *N.J.* 376, 448 *A.*2d 438. Although both the giving and taking of power can be constitutional if not excessive, the taking of power is more prone to abuse and therefore warrants an especially careful scrutiny. The case before us is one in which the Legislature has taken for itself a power normally lodged in the executive branch. Therefore, our deference to the Legislature must be accompanied by the most thorough and careful review to guard against the encroachment of one co-equal branch of government on another.

Our review begins with two opinions involving legislative veto power over the Governor's actions. Those two cases set forth the test to be applied in determining whether the Legislature has unconstitutionally intruded on the Governor's executive power.

In *General Assembly v. Byrne, supra,* 90 *N.J.* at 376, 448 *A.*2d 438, we considered the constitutionality of the Legislative Oversight Act, which allowed the Legislature "to veto by a concurrent resolution of both houses '[e]very rule hereafter proposed by a State agency,' with certain limited exceptions." *Id.* at 378, 448 *A.*2d 438. We held that the Legislative Oversight Act violated the separation-of-powers principle by "excessively interfering with the functions of the executive branch" and by "impeding the Executive in its constitutional mandate to faithfully execute the law." *Ibid.* Yet we maintained that not all legislative-veto provisions were necessarily a violation of the principle of separation of powers, and indeed we upheld such a provision in *Enourato v. New Jersey Building Authority, supra,* 90 *N.J.* 396, 448 *A.*2d 449, decided the same day as *General Assembly v. Byrne.*

The challenged statute in *Enourato* created the New Jersey Building Authority for the purpose of building and operating office space for State agencies. The statute provided that the Governor could veto all actions taken by the Authority. If the Governor approved the plan, then there were two forms of ***458** legislative veto. First, the Authority was required to obtain a concurrent resolution in order to begin a project if its estimated cost would exceed $100,000. Second, the Act required that every lease agreement between the Authority and a State agency be approved by the presiding officer of each house of the Legislature. We held that those limited legislative veto provisions could be accommodated within the constitutional structure of separation of powers.

The crucial difference between the two legislative-veto provisions lay in the nature and scope of the infringement on the powers of the Executive. The same test was used to analyze both statutes.

> Where legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential ****233** to interfere with exclusive executive functions or alter

> the statute's purposes, legislative veto power can pass constitutional muster. [*General Assembly v. Byrne,* 90 *N.J.* at 395, 448 *A.*2d 438, *quoted in Enourato v. New Jersey Bldg. Auth.,* 90 *N.J.* at 401, 448 *A.*2d 449.]

We found that the Legislative Oversight Act in *General Assembly v. Byrne* did not pass that test. Legislative oversight of agency rulemaking was not necessary to effectuate the statutory scheme underlying the rules. Moreover, the potential for interference with exclusive executive functions was high. The legislative-veto provision contained in the Legislative Oversight Act allowed the Legislature "to nullify virtually every existing and future scheme of regulation or any portion of it * * * 'without a change in the general standards the legislature has initially decreed.' " *General Assembly v. Byrne, supra,* 90 *N.J.* at 386, 448 *A.*2d 438 (quoting *Chadha v. Immigration and Naturalization Service,* 634 *F.*2d 408, 432 (9th Cir.1980), *aff'd Immigration and Naturalization Service v. Chadha,* 462 *U.S.* 919, 103 *S.Ct.* 2764, 77 *L.Ed.*2d 317 (1983)). That intrusion into the constitutionally-delegated authority of the Executive to enforce the laws was excessive under the existing constitutional scheme.

By contrast, in *Enourato,* we determined that due to the ongoing need for funding of Building Authority projects, the ***459** statutory scheme did require cooperation between the two branches. We found that there was some limited potential for interference with exclusive executive functions, but that "the mere remote possibility of never-ending legislative vetoes is insufficient to invalidate a veto provision that serves an important governmental purpose." 90 *N.J.* at 407, 448 *A.*2d 449. Furthermore, the Executive retained significant control over the functions of the Authority, including a veto, and therefore the legislative veto would neither "substantially disrupt exclusively executive branch functions" nor "subvert the Governor's role in enforcing the law." *Id.* at 402–03, 448 *A.*2d 449. Hence, intrusion on the Executive area of control was limited.

Other examples of the limits of separation of powers and the limits of accommodation are presented by *Winberry v. Salisbury,* 5 *N.J.* 240, 74 *A.*2d 406, *cert. denied,* 340 *U.S.* 877, 71 *S.Ct.* 123, 95 *L.Ed.* 638 (1950), and *Knight v. Margate, supra,* 86 *N.J.* at 374, 431 *A.*2d 833. In *Winberry,* we considered a conflict between a court Rule and a statute dealing with the time within which a litigant may file an appeal. Rule-making authority was assigned to the Supreme Court in Article VI, Section 2, paragraph 3 of the 1947 Constitution, but that authority was given "subject to the law."

> [I]n *Winberry,* the issue was whether "subject to law" allowed the Legislature to override all the rules of the Court, even those dealing with the Court's own rules and procedures. Chief Justice Vanderbilt held that complete power and responsibility in the Judiciary are concepts inconsistent with the notions of overriding legislation. He realized that if the Legislature could overrule the courts in some of their essential operations, the Judiciary "instead of being one of the three coordinate branches of State Government, would have been rendered subservient to the Legislature in a fashion never contemplated by any."
>
> So the Vanderbilt Court interpreted the phrase "subject to law" to refer to laws "substantive in content" that define our rights and duties but not to refer to the Court's exclusive powers of rule-making with respect to practice and procedure, the administration of the courts, and the professional conduct of members of the bench and bar. [Marie L. Garibaldi, *The New Jersey Experience: Accommodating the Separation between the Legislature and the Judiciary,* 23 *Seton Hall L.Rev.* 3, 7 (1992).]

***460** In *Knight v. Margate,* we upheld an amendment to the New Jersey Conflicts of Interest Law that prohibited members of the judiciary from participating in dealings with casinos. We found that because of the vital governmental interest in pervasive regulation of the gambling industry, and because the restrictions did not interfere ****234** with the judiciary branch's authority to administer the court system and to regulate the bar, the limited legislative intrusion into the area of judicial authority could be accommodated without offending the Constitution.

A crucial factor, however, in *Knight v. Margate* was that the legislative enactment did not purport to strip the judiciary branch of the ultimate authority to administer its functions.

> We do not believe that the restrictions imposed by the latest amendments will in any way interfere with the sound administration of the judicial system or undermine the proper regulation of the ethical conduct of members of the judiciary and the bar. Any possible doubts on this score dissipate

> in light of this Court's overriding constitutional authority to adopt and fashion its own regulatory and ethical requirements for the judicial branch and the practicing bar at any time it becomes appropriate to do so regardless of the Legislature's action.

[*Knight v. Margate, supra,* 86 *N.J.* at 394, 431 *A.*2d 833 (citations omitted).]

The principles that governed our separation-of-powers decisions in the cases discussed above are equally applicable to this case. Where cooperation between the branches is necessary to further the underlying substantive purposes of the legislative enactment, and where the cooperation offers no substantial potential for interference with the exclusive functions of the other branch, the mechanism for legislative involvement will not violate the separation-of-powers principle. But where shared authority is not necessary to effectuate the statutory scheme, or where the legislative intrusion threatens to interfere with exclusive functions of another branch, then the intrusion will violate the separation-of-powers principle.

The Legislature properly has the power to reduce appropriations for the operation of State government. Both the executive and legislative branches agree that because the Appropriations ***461** Act did not provide sufficient funds to maintain staffing at then-current levels, personnel cuts were required. According to plaintiffs, the Legislature's purpose in enacting the provisions restricting layoffs was to ensure that those personnel cuts were made in the most efficient manner possible, with the least possible disruption in the provision of State services.

Legislative oversight of or cooperation with the Executive was not necessary to fulfill that purpose. The Governor had the ability—and indeed the duty—to make the necessary personnel cuts so as to enable the agencies to continue to function as efficiently and effectively as possible. Not only was the legislative mandate of how to make the cuts unnecessary for the effectuation of the statutory scheme, but the Legislature's attempt to "micromanage" the staffing and resource allocations in administering the appropriated funds was a serious intrusion on the Governor's authority and ability to perform his constitutionally-delegated functions.

Staffing decisions are at the core of the Governor's day-to-day administration of government. Decisions about what type of employees are needed in a department and how many positions can be retained or eliminated directly affect how the executive branch operates. By hampering executive discretion on staffing decisions, the provisions prevent the Governor and department heads from using their expertise and familiarity with the agencies they manage to make the cuts in the least disruptive manner. Thus the provisions impede them in the performance of their constitutional duties faithfully to execute the laws.

Plaintiffs point out that the Legislature could severely affect the day-to-day operation of executive agencies without running afoul of the Constitution by refusing to fund them. Although that is undoubtedly true, plaintiffs fail to recognize the distinction between the power to appropriate or not appropriate funds, a legislative function, and the power to expend the ***462** appropriated funds, an executive function. *In re Karcher, supra,* 190 *N.J.Super.* at 213, 462 *A.*2d 1273 (quoting *Brown v. Honiss,* 74 *N.J.L.* 501, 521, 68 *A.* 150 (E. & A. 1906)). The Governor is duty-bound to use the resources ****235** given him by the Legislature to provide the most efficient government. To interfere with his ability to perform that duty is "to negate the intent of the framers of the Constitution of 1947" to form a strong, effective, and accountable executive branch. *Kenny v. Byrne, supra,* 144 *N.J.Super.* 243, 365 *A.*2d 211 (App.Div.1976).

Indisputably, the Legislature retains broad powers in the appropriations process to control the size and priorities of the State government. The Legislature properly exercised that power in this case by choosing to reduce the amount of money it appropriated to the salaries-and-wages accounts of most executive departments, thus necessitating a reduction of the State workforce through layoffs. The Legislature's power to shape State government and achieve savings in this manner is unquestioned. However, in this case the Legislature went one step further in its attempt to shape State government. Having reduced the salaries-and-wages accounts, it attempted, through the provisions challenged here, to control how those reduced appropriations would be administered by specifying which employees should and should not be laid off. Although the Legislature may "appropriate and dictate, if it desires, the services and positions designated for such appropriation," *New York Pub. Interest Research Group v. Carey,* 86 *Misc.*2d 329, 383 *N.Y.S.*2d 197, 200 (Sup.Ct.), *aff'd,* 55 *A.D.*2d 274, 390 *N.Y.S.*2d 236 (1976), " '[t]here is one thing * * * [the

Legislature] cannot do * * *. It cannot exercise the functions of the executive. It cannot administer the money after it has been once appropriated.' " *Ibid* (quoting *People v. Tremaine,* 252 *N.Y.* 27, 168 *N.E.* 817, 828 (1929) (Crane, J., concurring)).

The mandatory requirements of the Appropriations Amendment, unlike the provisions upheld in *Knight v. Margate,* purport to deny the Governor's overriding authority to administer the executive branch "regardless of the Legislature's action" ***463** where he deems it necessary. Like the invalidated statute in *Winberry,* the Appropriations Amendments not only attempt to regulate the internal administration of a coordinate branch but also purport to override the authority of that coordinate branch to administer its own functions. The Legislature may at times *overlap* the authority of the Executive but it may never *override* the Executive's authority to manage its own affairs.

This is not a case, like *Enourato,* in which the Legislature had delegated power to an executive agency to commence long-lasting, costly projects that would require the ongoing cooperation of the Legislature in the form of annual appropriations. This case is more like *General Assembly v. Byrne,* in which the Legislature trusted its own judgment on how to implement the laws more than it trusted the judgment of the executive agencies to which the role of implementation was constitutionally assigned. Here, the Legislature evidently believed that it could implement personnel cuts more efficiently than the Governor could or would, and so it attempted to force the Governor to make personnel savings in the manner the Legislature thought best. The Governor ignored the legislative mandate in order to make cuts in the manner he found most efficient.

Our role is not to judge whose plan was better. That power and duty belongs ultimately to the people, who through their elected representatives and officials in both the legislative and executive branches can determine what kind of government they want. Our role and duty is to interpret the New Jersey Constitution and apply it to the situation before us. In so doing, we "attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore v. Regan,* 453 *U.S.* 654, 661, 101 *S.Ct.* 2972, 2977, 69 *L.Ed.*2d 918, 928 (1981).

In the present case, the extent to which the legislation prevents the executive branch from accomplishing its constitutionally-assigned functions disrupts the balance between the ***464** Legislature and the Executive. The Constitution commits the authority and the duty to run the executive branch to the Governor. For better or for ****236** worse, decisions on how to use the funds appropriated by the Legislature to staff executive agencies are for the Governor to make, and the Legislature may not dictate whom he may, or may not, lay off. Therefore, we hold that Section 1 of S. 996, the Appropriations Amendments Act, is void because it violates the separation-of-powers principle as embodied in the New Jersey Constitution, Article III, paragraph 1.

IV

The original Appropriations Act contains some of the same constitutional infirmities as the Appropriations Amendment. Section 38 states, in part:

> 38. Notwithstanding the provisions of any law to the contrary, no State Troopers, corrections officers or personnel providing services in any institution operated by the State shall be laid off.

That language, like that contained in Senate Bill 996, impermissibly intrudes on executive authority by dictating staffing decisions and is therefore void.
The original Appropriations Act, prior to its amendment, also contained the following language in section 38:

> Whenever possible, layoffs shall exclude those employees of any department who provide direct services and shall also exclude career State employees who have occupied the same job title for at least five years or who have ten years of state service.

The amendment deleted that language and substituted the mandatory language that we find unconstitutional in Part III of this opinion. We must consider whether the portion

of the amendment that deleted the discretionary language is severable from the portion of the amendment that inserted the mandatory language now held to be void in order to determine whether the amendment effectively repealed the original discretionary language.

***465** The doctrine of severance of an unconstitutional portion of a statute is to be applied with caution and attention to the legislative intent. An unconstitutional amendment will not impair the pre-existing valid provision of an existing statute if the Legislature intends that the constitutional insufficiency of the amendment not render the pre-existing statute inoperative. *Washington Nat'l Ins. Co. v. Board of Review,* 1 *N.J.* 545, 556, 64 *A.*2d 443 (1949). "Whether such 'judicial surgery' should be utilized depends upon whether the Legislature would have wanted the statute to survive." *Chamber of Commerce v. State,* 89 *N.J.* 131, 151–52, 445 *A.*2d 353 (1982). Invalidating the insertion of the mandatory language in amended Section 38, while upholding the deletion of discretionary language in the existing Section 38, would thwart the Legislature's clear intent to offer some guidance to the Executive concerning the implementation of layoffs. We are confident that the Legislature would prefer to offer discretionary guidance to the Executive than to offer no guidance at all. We therefore conclude that the pre-existing Section 38 of the Appropriations Act was not impaired by the Amendment of Section 38. The legislative intent is best fulfilled by restoring the original language of Section 38. *See State v. Lagares, supra,* 127 *N.J.* at 32, 601 *A.*2d 698.

The "whenever possible" language of the original language leaves room for the Executive's exercise of judgment. The Governor retains the "overriding constitutional authority to adopt and fashion" his own lay-off plan "regardless of the Legislature's action" if he determines that it is "appropriate to do so." *Knight v. Margate, supra,* 86 *N.J.* at 394, 431 *A.*2d 833. The original Section 38 therefore represents less of an interference with executive authority than the mandatory provisions of the amended Section 38. Because the ultimate authority to manage executive affairs remains with the executive branch, the discretionary guidance contained in the original Section 38 can be accommodated within our constitutional scheme of separation of powers.

***466** Most departmental appropriations in the Appropriations Act contain a paragraph stating that a program could augment its salary account by transferring to it a specified sum "from the other appropriations made for Salaries and wages in the department to reflect savings throughout the department ****237** from the reduction of employees whose annual salaries exceed $50,000." *See supra* at 444, 617 *A.*2d at 225 for the specific statutory language.

If that restriction on the use of salary accounts were interpreted as mandatory, overriding the authority of the executive branch to implement layoffs according to its own discretion, then it would be void. However, both the Governor and plaintiffs agree that this language should be interpreted as discretionary. To avoid a reading that would invalidate the statute, we accept the parties' interpretation of the language. *State Farm Mut. Automobile Ins. Co. v. State,* 124 *N.J.* 32, 61, 590 *A.*2d 191 (1991) ("[E]ven were this construction doubtful, we would accept it in order to avoid an interpretation of the statute that would render it unconstitutional."). Such discretionary guidance from the Legislature does not excessively interfere with the constitutionally-assigned authority of the Executive and can be accommodated within the structure of separated powers.

Likewise, we find that the requirement in the Appropriations Act that each Commissioner provide the Director of the Division of Budget and Accounting and the Joint Budget Oversight Committee with written notice and justification of any reductions in the classified service does not impermissibly encroach on the executive branch's power. Although the provision interferes with the Executive's authority to staff the executive departments of government, it does not give the Legislature veto power over the Executive's authority to discharge any employees. Hence, it does not "substantially disrupt exclusive executive branch functions." *Enourato v. New Jersey Bldg Auth., supra,* 90 *N.J.* at 401, 448 *A.*2d 449.

***467** V

In resolving this case, we emphasize that this Court is most reluctant to interfere in a separation-of-powers dispute between the other branches of government. Such disputes are best resolved by the other branches reaching an accommodation of their respective powers. However, we cannot decline to hear a properly brought case that raises the substantial constitutional issues of whether the acts of one branch of government impermissibly encroach on another branch's power so as to violate the separation-of-powers clause of the New Jersey Constitution. *N.J. Const.* art. VI, § 2, ¶ 2 & § 5, ¶ 1. Our opinion is, therefore, limited solely to the

issues presented in plaintiffs' complaints and amended notice of appeal.

In Justice Powell's concurrence in *Chadha v. INS, supra,* he noted that the "boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental coordination.' " 462 *U.S.* at 962, 103 *S.Ct.* at 2790, 77 *L.Ed.*2d at 352 (quoting *J.W. Hampton v. United States,* 276 *U.S.* 394, 406, 48 *S.Ct.* 348, 351, 72 *L.Ed.* 624, 629 (1928)). Applying the *General Assembly/Enourato* test in a realistic and practical manner, we find that the layoff provisions in the 1993 Appropriations Act violate the separation-of-powers doctrine: they are not necessary to further a statutory scheme that requires cooperation between the legislative and executive branches, nor do they merely interfere indirectly or incidentally with exclusive executive functions. Rather, they effectively strip the executive branch of its authority properly to administer its constitutionally-imposed functions.

Accordingly, we conclude that Section 1 of the Appropriations Amendments, Senate Bill 996, *L.*1992, *c.* 99, is unconstitutional. Section 38 of the 1993 Appropriations Act, Senate Bill 1000, *L.*1992, *c.* 40, is also unconstitutional insofar as it purports to dictate to the Executive whom he may and may not lay off. However, the discretionary guidance provisions of the Appropriations ***468** Act do not offend the separation-of-powers principle and are therefore constitutional.

For the judgment—Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

All Citations

130 N.J. 439, 617 A.2d 223

114 N.M. 47
Court of Appeals of New Mexico.

R.E. DUGGER, Jr., and Gregory Salinas, Petitioners–Appellees,
v.
The CITY OF SANTA FE, et al., Respondents–Appellants.

No. 11532
|
Feb. 17, 1992.
|
Writ Issued Quashed as Improvidently Granted and Petition for Certiorari Denied May 21, 1992.

Synopsis
City rejected annexation petition of certain land developers despite planning commission's recommendation of approval. Developers sought a writ of certiorari. The District Court, Santa Fe County, Patricio Serna, D.J., denied city's motion to dismiss and ruled that it had jurisdiction to review matter, granted developer's request for adoption of whole record standard of review, and determined that city's denial of petition was not supported by substantial evidence. City appealed. The Court of Appeals, Apodaca, J., held that: (1) city acted in purely legislative capacity in refusing to enact ordinance granting annexation petition, and thus, district court improperly granted writ of certiorari and reviewed the city's decision on merits; (2) process by which city reached its decision did not transform it into quasi-judicial proceeding allowing administrative review; (3) city's ordinances or master plan did not create entitlement in developers to have their property annexed; and (4) developers received all process due them.

Reversed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

****426 *49** Frank R. Coppler, John A. Aragon, Coppler and Aragon, Santa Fe, for petitioners-appellees.

James C. McKay, City Atty., Santa Fe, for respondents-appellants.

Judith A. Olean, Gen. Counsel, Santa Fe, amicus curiae, New Mexico Municipal League.

OPINION

APODACA, Judge.

{1} The City of Santa Fe, the Santa Fe City Council, and the Santa Fe City Councillors in their official capacity (collectively referred to as the City) appeal from an order of the district court reversing the City's rejection of the annexation petition of certain land developers (petitioners). The district court reversed the City's decision to reject the annexation petition at a writ of certiorari proceeding, on the grounds that the City had violated its own ordinances and that the rejection was not supported by the evidence considered by the City. The City argues that the district court: (1) lacked jurisdiction to issue a writ of certiorari to review the annexation proceedings because they were legislative, not quasi-judicial, in nature; (2) violated the separation of powers doctrine; (3) applied an improper standard of review; (4) ignored the rational reasons underlying the City's decision to reject the annexation petition; (5) compelled municipal annexation through judicial fiat; and (6) erred in denying the City's motion to quash the writ of certiorari.

{2} We hold that the petition method of annexation provided by NMSA 1978, Section 3–7–17 (Repl.Pamp.1987), is a legislative procedure. Although the statute provides no express right of appeal when a petition is denied, we conclude that only a direct appeal lies to the district court, as opposed to a writ of certiorari proceeding. However, on direct appeal, the focus of the district court's attention must be on the constitutionality of the ordinance and the municipality's authority to enact it. Here, neither the City's general plan nor its ordinances afforded petitioners the right to have the City annex their property. It necessarily follows that the district court erred in granting petitioners' writ of certiorari (which is limited to a review of quasi-judicial actions) and in applying a whole record standard of review (which is limited to a review of administration decisions). We reverse and remand with instructions to quash the writ.

BACKGROUND
{3} Pursuant to Section 3–7–17(A), petitioners petitioned to have 147.5 acres annexed to the southern edge of the City. Two committees of the City, a Development

Review Committee and an Urban Policy Committee, together constituted the Planning Commission (Commission). The Commission's function was to review land-use issues, including annexation and zoning, and to make recommendations to the City concerning such issues. After holding meetings on petitioners' petition, the Commission recommended that the property be annexed and zoned, subject to several conditions to which petitioners agreed. The City held a public hearing and, despite the Commission's recommendation, voted not to adopt an ordinance approving the annexation ****427 *50** as required under Section 3–7–17(A)(4). This action essentially had the effect of denying the annexation petition.

{4} Following the City's denial, petitioners sought a writ of certiorari from the district court, requesting an adjudication that the City's decision was contrary to the applicable state statutes and city ordinances, and that it was arbitrary and capricious. The City responded to the writ petition by requesting dismissal. Later, the City also moved for (1) judgment on the pleadings; (2) dismissal of the action for failure to state a claim; and (3) an order quashing the writ. As grounds for these motions, the City argued that it had acted legislatively when it refused to annex petitioners' property and that neither statutory nor constitutional authority allowed the writ or a direct appeal from such an action.

{5} The district court denied the City's motions and held that it had jurisdiction to review the matter. It also granted petitioners' request for adoption of a whole record standard of review, the standard typically reserved for a review of administrative actions. *See In re Apodaca,* 108 N.M. 175, 769 P.2d 88 (1989); *Duke City Lumber Co. v. New Mexico Envtl. Improv. Bd.,* 95 N.M. 401, 622 P.2d 709 (Ct.App.1980). The district court issued a letter opinion, holding that, because the City had acted in a quasi-judicial capacity, the writ of certiorari was the appropriate method of obtaining judicial review and the City's decision should be reviewed to determine if it was supported by substantial evidence on the whole record. The district court also held that the City's denial of the petition, on the bases that the City would be unable to deliver services to the proposed annexation site and that it was not within the parameters of the City's Master Plan, was not supported by substantial evidence. The district court denied the City's request to submit findings and conclusions. This appeal by the City followed.

OUR ANALYSIS AS A REVIEWING COURT

{6} Essentially, the main issue in this case, at least as formulated by the parties, is whether the City acted in a quasi-judicial capacity when it denied the annexation petition, thereby conferring appellate jurisdiction on the district court. *See* N.M. Const. art. VI, § 13. "Quasi-judicial" has been defined as:

> A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and *to exercise discretion of a judicial nature.*

Black's Law Dictionary 1121 (5th ed. 1979) (emphasis added); *see also State ex rel. Battershell v. Albuquerque,* 108 N.M. 658, 777 P.2d 386 (Ct.App.1989); *Duke City Lumber Co. v. New Mexico Envtl. Improv. Bd.,* 95 N.M. at 402, 622 P.2d at 710.

{7} New Mexico Constitution article VI, Section 13, states in part:

> The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, * * * and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, * * *. The district courts, or any judge thereof, shall have power to issue writs of * * * certiorari * * *; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

This provision grants district courts the authority to issue writs of certiorari. New Mexico follows the general rule that a writ of certiorari is available to parties seeking review of *quasi-judicial* actions of courts or tribunals inferior to the district courts, and not legislative actions. *See Hillhaven Corp. v. Human Servs. Dep't,* 108 N.M. 372, 772 P.2d 902

(Ct.App.1989); *see also State ex rel. Sisney v. Board of Comm'rs,* 27 N.M. 228, 199 P. 359 (1921).

{8} We believe that the dispositive issues in this appeal are (1) the nature of the final decision required by the petition method of annexation, as opposed to the other two methods provided for by statute, and (2) the appropriate standard of review. We note that petitioners concede on appeal that annexation decisions are generally legislative in nature. *See* ****428 *51** *Torres v. Village of Capitan,* 92 N.M. 64, 582 P.2d 1277 (1978); *Leavell v. Town of Texico,* 63 N.M. 233, 316 P.2d 247 (1957). Legislative action usually reflects some public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective. *Cherry Hills Resort v. Cherry Hills Village,* 757 P.2d 622, 625 (Colo.1988) (en banc). Despite petitioners' concession, however, they nonetheless argue that, because the petition method of annexation has many of the trappings usually attributed to a quasi-judicial action, such as open meetings and hearings with the opportunity to present evidence, as well as what petitioners term "ordinances enacted by [the] municipality [that] establish mandatory standards and criteria for annexation," the district court was free to review the proceedings to determine whether the City acted arbitrarily and capriciously and whether the City's findings were supported by substantial evidence.

{9} In New Mexico, decisions that determine how a particular piece of property can be used have been held to be quasi-judicial. *See, e.g., State ex rel. Battershell v. Albuquerque* (hearings before zoning hearing examiner and Environmental Planning Commission regarding application for conditional use permits were quasi-judicial); *Duke City Lumber Co. v. New Mexico Envtl. Improv. Bd.* (public hearing to consider petition by sawmill operator for variance in air quality regulation limiting emissions from wood waste incinerator was quasi-judicial). Additionally, annexations that have been completed pursuant to an administrative agency's order can be reviewed by writ of certiorari. *See Mutz v. Municipal Boundary Comm'n,* 101 N.M. 694, 688 P.2d 12 (1984); NMSA 1978, § 3–7–15 (Repl.Pamp.1987).

{10} However, annexations completed by a municipality under the petition method are reviewed under the district court's original jurisdiction. *See Hughes v. City of Carlsbad,* 53 N.M. 150, 203 P.2d 995 (1949); § 3–7–17(C). Thus, if the annexation had been approved rather than denied by the City, the district court would have been required to exercise its original jurisdiction. However, because Section 3–7–17(C) grants the right of appeal only to property owners within an area that has been annexed, review by writ of certiorari of a decision *not* to annex might be deemed appropriate, *see Roberson v. Board of Educ.,* 78 N.M. 297, 299–300, 430 P.2d 868, 870–71 (1967) (where no provision is made for appeal, the only review available is by certiorari), but only if the City's action in denying petitioners' request for annexation could be categorized as quasi-judicial in nature. *See Cherry Hills Resort v. Cherry Hills Village.*

SECTION 3–7–17 REQUIRES A LEGISLATIVE DECISION

{11} Initially, we observe that the legislature has the inherent authority to expand municipal boundaries. *See Torres v. Village of Capitan.* This proposition is stated most aptly in 2 Eugene McQuillin, *The Law of Municipal Corporations* § 7.10 (3d ed. 1988) (McQuillin):

> The extension of the boundaries of a city or town is viewed as purely a political matter, entirely within the power of the state legislature to regulate. It is, in other words, a legislative function. This power is sometimes said to be inherent in the legislature, while in other instances it has been said to be a power incidental to the power to create and abolish municipal corporations * * *.
>
> [The enactment of annexation statutes] is regarded as a discretionary legislative prerogative, and unless the obligations of contracts or vested rights or third persons are impaired by such action, in accordance with the well established rule, the judiciary cannot interfere. [Footnotes omitted.]

{12} The legislature has delegated its authority of annexation under three separate methods, each of which is attuned to distinct goals and exemplifies different degrees of legislative delegation. Of the three types of annexation procedures, two (the boundary commission and arbitration methods) are administrative, and one (the petition method) is legislative. *See* NMSA 1978, § 3–7–1(A) (Repl.Pamp.1987).

****429 *52** {13} Section 3–7–17(A), the statute governing the petition method, states:

> A. Whenever a petition:
>
> (1) seeks the annexation of territory contiguous to a municipality;

(2) is signed by the owners of a majority of the number of acres in the contiguous territory;

(3) is accompanied by a map which shall show the external boundary of the territory proposed to be annexed and the relationship of the territory proposed to be annexed to the existing boundary of the municipality; and

(4) is presented to the governing body, the governing body *shall by ordinance express its consent or rejection* to the annexation of such contiguous territory. [Emphasis added.]

We interpret the highlighted language to mean that the legislature intended to delegate its authority to a *legislative* body and required a legislative decision-making process—the enactment of an ordinance—to make the decision effective. We realize that, in this appeal, the City did not enact an ordinance rejecting the annexation. Instead, it declined to adopt an ordinance consenting to the annexation. However, we hold that the City's rejection of the proposed ordinance had the same effect as the enactment of an ordinance rejecting the annexation. There is no practical difference between the two actions because either results in a denial of the proposed annexation. A basic tenet of judicial review is not to exalt form over substance. *See, e.g., Worland v. Worland,* 89 N.M. 291, 551 P.2d 981 (1976); *State ex rel. Human Servs. Dep't v. Martin,* 104 N.M. 279, 720 P.2d 314 (Ct.App.1986).

{14} Additionally, unlike the two administrative methods, the petition method does not expressly include criteria that, if met, require a municipality to approve an annexation petition. *Cf.* NMSA 1978, § 3–7–10(A) (Repl.Pamp.1987); § 3–7–15(A), (B); *Mutz v. Municipal Boundary Comm'n; Cox v. City of Albuquerque,* 53 N.M. 334, 207 P.2d 1017 (1949). Because Section 3–7–17 requires the municipality to use legislative processes in approving or disapproving a petition to annex and does not impose criteria for annexation, we conclude that the petition method of annexation is legislative, not quasi-judicial, in nature. As we interpret the statute, the decision to annex is made after considering the same criteria as are relevant in denying a decision to annex. Under these circumstances, we believe the legislature should be understood to have intended that, whether the decision is to grant or deny, it would be reviewed on the same basis. Thus, we conclude either decision is reviewable only on direct appeal to the district court. It necessarily follows that, because the petition method used here was legislative in nature and not quasi-judicial, the district court lacked jurisdiction to entertain a writ of certiorari.

{15} Petitioners nevertheless argue that the City's ordinances themselves created a quasi-judicial procedure, and thus, that review by writ of certiorari was proper. Essentially, petitioners contend that the City had identified requirements they had met, and, for that reason, they were entitled to a decision in favor of annexation. As we later discuss, we do not believe the City identified criteria that entitled petitioners to a decision in favor of annexation. Consequently, we need not decide whether the legislature has authorized municipalities to identify requirements that, if met, require annexation. *Cf. Mutz v. Municipal Boundary Comm'n* (holding that the municipal boundary commission could only exercise the power and authority granted to it by statute). The process by which the City reached its decision did not transform it into a quasi-judicial proceeding, even if the process had the appearance of quasi-judicial proceedings. Although the municipality may properly establish criteria and apply them in a "quasi-judicial" fashion, the final decision to annex or not to annex retains its legislative character. *Cf. Stewart v. City of Corvallis,* 48 Or.App. 709, 617 P.2d 921 (1980) (final decision regarding annexation remains legislative in character irrespective of state-mandated quasi-judicial planning process). For these reasons, we reject petitioners' suggestion that the City could somehow transform a legislative ****430 *53** process into a quasi-judicial process by requiring more than the legislature authorized. *Cf. Westgate Families v. County Clerk of Los Alamos,* 100 N.M. 146, 667 P.2d 453 (1983) (legislative power to rezone property is derived from the state and state statutes mandating zoning by adoption of a municipal ordinance precluded a home rule municipality from varying the statutory procedure by allowing a referendum on a rezoning ordinance).

STANDARD USED IN REVIEWING LEGISLATIVE ACTS

{16} We next consider the appropriate standard of review when a *legislative* act is challenged. The majority of jurisdictions limit judicial review of an ordinance passed pursuant to express legislative authority to the constitutional validity of the statute or its application. *See* 5 McQuillin § 18.22. New Mexico follows the majority rule. *See City of Roswell v. Bateman,* 20 N.M. 77, 146 P. 950 (1915). When an ordinance is challenged as unconstitutional, the test generally applied is whether the ordinance bears a reasonable or rational relationship to a legitimate legislative goal or purpose. *See Barber's Super Mkts., Inc. v. City of Grants,* 80 N.M. 533, 458 P.2d 785 (1969); *Mitchell v. City of Roswell,* 45 N.M. 92, 111 P.2d 41 (1941); *Garcia v. Village of Tijeras,* 108 N.M. 116, 767 P.2d 355 (Ct.App.1988). The presumption that legislative

acts are legal, valid, and constitutional extends to municipal ordinances. *City of Albuquerque v. Jones,* 87 N.M. 486, 535 P.2d 1337 (1975).

{17} Under the reasonableness standard, a court is required to show great deference to the municipality's decision. It is well settled in New Mexico that:

> [w]here power to do an act is conferred upon a municipality in general terms without describing the mode of exercising it, the trustees have the discretion as to the manner in which the power shall be employed, and the courts will not interfere with this discretion.

Page v. Town of Gallup, 26 N.M. 239, 245, 191 P. 460, 461–62 (1920); *see also Town of Gallup v. Constant,* 36 N.M. 211, 213, 11 P.2d 962, 963 (1932) (review limited to "an obviously arbitrary or unreasonable exercise of the power conferred"); *Doyal v. Waldrop,* 37 N.M. 48, 53, 17 P.2d 939, 941–42 (1932) (review limited to situations where there is "fraud or collusion on the part of the officers charged with performance of the duty"). There is no independent inquiry into the wisdom, policy, or justness of the legislative action. *See Richardson v. Carnegie Library Restaurant, Inc.,* 107 N.M. 688, 763 P.2d 1153 (1988) (generally discussing the appropriate standard of review in the context of an equal protection challenge).

{18} When the district court applied the administrative standard of review to determine that there was not substantial evidence on the whole record to support the City's decision to deny annexation, in effect the court made an independent inquiry into the wisdom of the City's action based on the evidence before it and did not limit itself to a determination of whether the City's action was constitutional and within its legislatively granted authority. Thus, the district court impermissibly substituted its judgment for that of the City. We hold that application of the administrative standard of review to the City's decision whether to approve or deny an annexation petition pursuant to Section 3–7–17 was improper.

{19} Petitioners analogize to zoning decisions in arguing that, even if annexation decisions are legislative in nature, the district court was correct in applying the standard of review normally applied in reviewing administrative decisions. *See Coe v. City of Albuquerque,* 76 N.M. 771, 418 P.2d 545 (1966); *Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 783 P.2d 962 (Ct.App.1989). We are not persuaded.

{20} Although zoning decisions are an exercise of legislative power, *see Downtown Neighborhoods Association v. City of Albuquerque,* they are subject nonetheless to the administrative standard of review. *See Coe v. City of Albuquerque.* However, the statutes governing zoning ****431 *54** specifically provide for zoning decisions to be quasi-judicial in nature. The municipality is authorized to set up an administrative agency to make zoning decisions. NMSA 1978, § 3–21–7 (Repl.Pamp.1985). The initial appeal from the decision of the administrative agency is to the zoning authority. NMSA 1978, § 3–21–8 (Repl.Pamp.1985); *Corondoni v. City of Albuquerque,* 72 N.M. 422, 384 P.2d 691 (1963). Further appeal is by writ of certiorari to the district court. NMSA 1978, § 3–21–9 (Repl.Pamp.1985). Because the legislature demonstrated its intent that zoning decisions be handled administratively, application of the administrative standard of review is therefore appropriate.

{21} Similarly, the legislature provided for the establishment of administrative bodies to make annexation decisions pursuant to the arbitration methods and boundary commission methods. § 3–7–6 (establishment of board of arbitration when municipality desires to annex contiguous territory); NMSA 1978, § 3–7–11 (Repl.Pamp.1987) (establishment of independent municipal boundary commission). Decisions of the municipal boundary commission are to be reviewed by certiorari. § 3–7–15(E). Thus, application of administrative standards of review to annexations made pursuant to these two methods is likewise proper.

{22} However, the legislature has not established such an administrative or quasi-judicial scheme for the making and reviewing of annexation decisions under the petition method established by Section 3–7–17. Instead, as we concluded earlier, the legislature demonstrated its intent that the municipality make a *legislative* decision by requiring the municipality to pass an ordinance, the quintessential legislative act. § 3–7–17(A). Additionally, the legislature required that review of the municipality's decision be by direct appeal "questioning the validity of the annexation proceedings." § 3–7–17(C). This provision indicates the legislature's intent that decisions made under the petition method be reviewed in the same manner as other ordinances and the court's inquiry limited to the procedures followed,

rather than the merits of the decision. Therefore, we do not consider zoning law analogous to the law governing annexation petitions.

PETITIONERS HAVE FAILED TO SHOW THAT THE CITY'S ACTION WAS UNCONSTITUTIONAL OR THAT THEY WERE DENIED DUE PROCESS

{23} Although the district court's review of the City's action by writ of certiorari was improper, petitioners could have had the City's action reviewed in the same manner by which ordinances are generally reviewed—by filing an original action in district court based on the court's original jurisdiction. *See, e.g., Garcia v. Village of Tijeras; cf. Richardson v. Carnegie Library Restaurant, Inc.* In such an action, petitioners would have been limited to challenging either the constitutionality of Section 3–7–17 or its application. *See City of Roswell v. Bateman.* The constitutionality of the petition method of annexation has already been upheld. *Torres v. Village of Capitan* (petition method does not violate equal protection nor does it infringe on right to vote).

{24} Petitioners' argument that the City failed to follow its own ordinances in denying their petition could be construed as a claim that the City violated their right to procedural due process under the 14th amendment of the United States Constitution and Article II, Section 18 of the New Mexico constitution. Petitioners essentially argue that the City did not follow its own ordinances in rejecting their annexation petition because, under the City's ordinances and general plan, once petitioners had complied with the criteria required by the City, they were entitled as a matter of right to have their property annexed by the City. However, petitioners' argument fails because the City's ordinances did not create an entitlement in petitioners to have their property annexed and because petitioners received all the process due them.

{25} In view of our holding, we need not decide whether the City was authorized to create such an entitlement. We do note, however, that the creation of an entitlement may have been beyond the City's ****432 *55** authority granted to it by the legislature because it could be deemed inconsistent with the legislative procedure mandated by Section 3–7–17(A). § 3–17–1; 2 McQuillin § 7.13.

{26} To address petitioners' entitlement argument, we turn to the pertinent statutory provisions. NMSA 1978, Sections 3–19–1 to –12 (Repl.Pamp.1985) authorizes municipalities to engage in planning activities and to adopt a master plan. Such master-planning actions have been described as follows:

> The master plan contains chosen community goals and policies to be used as an advisory guide for future municipal development. * * * [T]he master plan coordinates the myriad of often conflicting factors and policies considered in the community development process. * * *
>
> The master plan is usually merely an advisory declaration of policy and intention with no regulatory effect.

5 Patrick J. Rohan, *Zoning and Land Use Controls* § 37.01(1)(c) (1991) (footnotes omitted). The New Mexico legislature intended any master plan adopted by a municipality to be advisory in nature. Section 3–19–9(A) states expressly that the master plan "shall be made with *the general purpose of guiding* and accomplishing a coordinated, adjusted and harmonious development of the municipality...." (Emphasis added.)

{27} The Santa Fe Area General Plan was adopted by Resolution No. 1983–96, which was amended by another resolution, No. 1985–107. In New Mexico, a resolution does not carry the weight of law, as do ordinances for municipalities. *Williams v. City of Tucumcari,* 31 N.M. 533, 249 P. 106 (1926). Thus, it is commonly recognized that "a resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality." 5 McQuillin § 15.02. Thus, the master plan, being only a resolution, does not bind the City to any specific procedures as would an ordinance.

{28} The language of the General Plan does not purport to entitle petitioners to have their property annexed by the City. The General Plan states:

> 1. [T]he City *should* annex land if the basic urban services are or will be reasonably capable of accommodating the additional demand. Annexation of land *should* be undertaken at a rate that would not cause the inefficient utilization and deployment of urban services.
>
> 2. The City *should* monitor the supply of potential dwelling units on vacant subdivided lots in approved developments. This survey * * * *should* be taken into account by the

> Planning Commission when making a *recommendation* to the *City Council* on every large-scale annexation request.
>
> 3. Each annexation proposal *should* conform with the criteria set out in the City's "Annexation Policy," * * *. This policy sets out *guidelines* for both large and small annexation requests. Generally, the property owners or developers must demonstrate that the annexation area is suitable for the proposed uses; will not overload the capacity of existing streets, sewers, and City services; and is appropriately located for annexation, in terms of existing City boundaries and plans for City utilities.

Plan 83, § IX.D.1.–3 at 54 (emphasis added). The emphasized language does not unequivocally require that the City annex certain land at certain times; it merely sets out certain policies, guidelines and factors that the City *should* consider in determining whether or not to annex territory. The City's master plan sets broad priorities concerning general areas that would be considered appropriate for annexation over a twenty-year period. *See* Plan 83, § IX.B.1. at 53. The plan also points out that development could occur in a different sequence than that contemplated by the staging plan. Plan 83, Section IX.B.3. at 54, indicates that the plan is not intended to commit the City to annexing particular territory at any particular time. We thus conclude ****433 *56** that the Master Plan did not create an entitlement to annexation, as petitioners contend.

{29} Even the ordinance relied on by petitioners does not mandate that certain territory be annexed. Rather, Santa Fe City Code 1981, Section 3–8–1.5(C)(2) states that:

> If the accommodation of the impacts cannot be demonstrated *to the city's satisfaction* as to the assumptions, methodology, or data then:
> * * *
>
> (2) The city shall deny the annexation. [Emphasis added.]

This indicates to us that the City retained the final decision-making authority. Requirements that a land developer must meet before his or her land is to be considered for annexation do not limit the City's power to approve or disapprove a proposed annexation. Thus, petitioners' contention that the City's master plan and ordinances required the City to annex petitioners' land if certain criteria were met must fail.

{30} Additionally, petitioners received all the procedural due process they were entitled to receive. They received all notices of hearings provided for in the City's ordinances. The only failure was that the City refused to pass an ordinance annexing petitioners' property. We have already determined that this inaction was, in effect, the same as the passage of an ordinance refusing to annex petitioners' property. In reality, petitioners attack only the merits of the City's decision. Because the City's decision was legislative, the wisdom of the action is not for the courts to decide. It follows that any claim by petitioners that they were denied due process must fail.

{31} Petitioners have not asserted that the City acted fraudulently or unconstitutionally in rejecting their petition. Nor have they claimed that the City acted beyond the scope of its delegated authority. We therefore conclude that the district court erred when it looked beyond the purely procedural dictates of the annexation statute into the merits of the City's decision. *See generally* 5 McQuillin § 16.91.

CONCLUSION

{32} We hold that the City acted in a purely legislative capacity in refusing to enact an ordinance granting petitioners' annexation petition. The district court thus erred in granting the writ of certiorari and in reviewing the City's decision on its merits. We therefore reverse the district court and uphold the City's decision disapproving petitioners' annexation petition. We take this opportunity to acknowledge the helpfulness of the amicus curiae brief filed by the New Mexico Municipal League. The parties shall bear their own costs on appeal.

{33} IT IS SO ORDERED.

MINZNER and CHAVEZ, JJ., concur.

All Citations

114 N.M. 47, 834 P.2d 424, 1992-NMCA-022

97 Ill.App.3d 153
Appellate Court of Illinois, Second District.

NAPERVILLE POLICE UNION, LOCAL 2233, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO, Plaintiff-Appellee,
v.
CITY OF NAPERVILLE, Defendant-Appellant.

No. 80-612
|
May 29, 1981.
|
Rehearing Denied July 22, 1981.

Synopsis

Police union brought suit seeking declaration of parties' rights and an order directing city to negotiate with union over matters affecting hours, wages and working conditions of city patrolmen. The DuPage Circuit Court, Robert A. Nolan, J., rendered judgment in favor of union, and city appealed. The Appellate Court, Reinhard, J., held that: (1) resolution did not have effect of amending or modifying ordinance which expressly repealed prior ordinance relating to collective bargaining by city employees; (2) resolution could not have revived repealed collective bargaining provisions of ordinance; (3) if city, after having by ordinance repealed collective bargaining provisions of prior ordinance, had intended to confer, or continue to extend, bargaining rights on police union by resolution of the same date as repealer ordinance, city would have done more than simply state that "(p)reviously recognized bargaining representatives will continue to be recognized for already established and defined bargaining units"; and (4) although police union and union representing city's electrical workers were certified and recognized under certain ordinance prior to its repeal, and although city, since the repeal, had continued formal recognition of electrical workers union while ceasing to afford similar treatment to police union, there was a rational basis for negotiating with electrical workers union but not with police union, and there was thus no violation of equal protection clause.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****871 *153 ***662** Ancel, Glink, Diamond & Murphy, P. C., Marvin J. Glink and Mary Denise Cahill, Chicago, for defendant-appellant.

***154** Cornfield & Feldman, Gilbert Feldman, Chicago, for plaintiff-appellee.

Opinion

REINHARD, Justice.

This appeal arises from an action brought in the circuit court of DuPage County by plaintiffs, Naperville Police Union, Local 2233, American Federation of State, County and Municipal Employees, AFL-CIO (Union), seeking a declaration of the rights of the parties and an order directing defendant, City of Naperville (City), to negotiate with the Union over matters affecting the hours, wages and working conditions of the City patrolmen. The trial court issued a memorandum decision in favor of the Union and entered a permanent mandatory injunction compelling the City to recognize the Union as the exclusive bargaining agent for the police patrolmen and to negotiate in good faith concerning salaries, wages, hours and other conditions of employment. From that judgment the City brings this appeal.

The facts of this case are undisputed and were presented to the trial court by way of a stipulation. On November 1, 1971, the City, a home rule municipality, duly adopted Ordinance No. 394.71 entitled, "AN ORDINANCE PROVIDING FOR THE RECOGNITION OF EMPLOYEE ORGANIZATIONS," a comprehensive enactment providing for public employee organization and collective bargaining. Pursuant to the provisions of that ordinance, the Union was certified as the exclusive bargaining representative for the City patrolmen and negotiations were conducted and contracts entered into between the parties regarding hours, wages and working conditions subsequent to passage of Ordinance No. 394.71 through the City's 1977 fiscal year.

On January 18, 1977, the City enacted Ordinance No. 77-17, which repealed those sections of Ordinance No. 394.71 relating to public employee organization, certification and collective bargaining. Ordinance No. 77-17 provides in relevant part:

> "WHEREAS, the City Council believes that no new collective negotiations with new bargaining units of

employees is necessary, desirable, or in the best interests of the City especially when consideration is given to the costs and expense in dollars, efforts and management loss of productivity;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF NAPERVILLE, DuPAGE AND WILL COUNTIES, ILLINOIS, in the exercise of its home rule powers, as follows:

SECTION 1: That Sections 7.123 through 7.128, inclusive, of Article I, Personnal (sic), Principles and Policies, of Chapter 7, Other Provisions Relating to City Government, of the Municipal Code of Naperville of 1960, as amended, be and the same are ***155** hereby repealed." Naperville, Ill., Ordinance 77-17 (Jan. 18, 1977).

Also, on January 18, 1977, the City adopted Resolution No. 77-3, which provides in pertinent part:

"WHEREAS, this City Council has by ordinance repealed Sections 7.123-7.128 of the City Code which prescribed certain ****872 ***663** procedures for the formal recognition of exclusive bargaining units of City employees and provided for formal collective negotiations; and

WHEREAS, the City Council believes that no new collective negotiations with new bargaining units of employees is necessary, desirable, or in the best interests of the City especially when consideration is given to the costs and expense in dollars, effort and management loss of productivity;

NOW, THEREFORE, BE IT RESOLVED THAT:

1) The City of Naperville will no longer formally recognize new exclusive employee bargaining representatives. Previously recognized bargaining representatives will continue to be recognized for already established and defined bargaining units." Naperville, Ill., Resolution 77-3 (Jan. 18, 1977).

Three days later, on January 21, 1977, the City and the Union entered into an agreement concerning, among other things, rates of pay, hours of employment and other conditions of employment. Article XXIII thereof provided that the agreement would be effective as of May 1, 1976 and would remain in full force and effect until April 30, 1977, but that the agreement:

"shall continue in effect from year to year thereafter unless notice of termination is given * * * by either party not less than sixty (60) nor more than ninety (90) days before the expiration date."

The agreement further provided that:

"Notwithstanding the foregoing, this Agreement shall remain in full force and effect after any expiration date while negotiations are continuing for a new contract between the parties."

On February 19, 1977, the Union sent a letter to the City indicating that the Union was electing to terminate the agreement pursuant to Article XXIII thereof and desired to negotiate for a new contract. The parties conducted negotiations at nine negotiating sessions between May 19, 1977, and August 11, 1977. At the August 11, 1977, meeting, the Union cut off negotiations by declaring an impasse. Impasse procedures were implemented thereafter as provided by Articles XXIII and XIV of the agreement. Pursuant to those provisions, the matter was referred for mediation ***156** to the City Personnel Board and, having failed to resolve the dispute there, the issues were then submitted to the State of Illinois Mediation Service. Such procedures were exhausted in January 1978 without success.

On June 12, 1978, the Union sent a letter to the City requesting that the City reconvene contract negotiations, but the City declined that request. Thereafter, the Union sent a letter to the City Personnel Board charging the City with an unfair labor practice in violation of Ordinance No. 394.71. The Board, however, refused to conduct an independent investigation of the charge because of the fact that Ordinance No. 394.71 had been repealed by Ordinance No. 77-17. While refusing to negotiate further with the Union, the City has continued to recognize and negotiate with the International Brotherhood of Electrical Workers (I.B.E.W.).

On July 3, 1980, the trial judge issued a memorandum decision in which he concluded that "Resolution No. 77-3 bound the municipality to conduct itself in accord with the repealed Ordinance No. 394.17 (sic) insofar as the provisions thereof are applicable." Having so concluded, the court ordered the City to negotiate with the Union in good faith with respect to wages, hours of employment and other working conditions of the City's patrolmen. It is from this decision that the City appeals:

The City presents four issues for review:

1. Whether Resolution 77-3 amended or modified Ordinance 77-17 which expressly repealed the Collective Bargaining Ordinance 394.71;

2. Whether Resolution 77-3 revived the repealed Ordinance 394.71;

3. Whether the trial court erred in interpreting Resolution 77-3 as requiring the City of Naperville to continue recognition of and negotiations with the Police Union;

**873 ***664 4. Whether there is any authority which requires the City of Naperville to bargain collectively with employee units.

First of all, there can be little doubt that Resolution No. 77-3 did not have the effect of amending or modifying Ordinance No. 77-17, which expressly repealed Ordinance No. 394.71 relating to collective bargaining by City employees. An ordinance may be repealed, modified or amended only by municipal action of like dignity (DuMond v. City of Mattoon (1965), 60 Ill.App.2d 83, 207 N.E.2d 320) and, therefore, may not be amended or modified by resolution (Phillips Petroleum Co. v. City of Park Ridge (1958), 16 Ill.App.2d 555, 149 N.E.2d 344; Cassidy v. Triebel (1948), 337 Ill.App. 117, 85 N.E.2d 461) since a resolution is an act of lesser dignity than an ordinance. (Illinois Municipal Retirement Fund v. City of Barry (1977), 52 Ill.App.3d 644, 10 Ill.Dec. 439, 367 N.E.2d 1048.) Even if the City had the requisite intent to amend Ordinance No. 77-17, which we *157 certainly are not convinced of, an attempt to do so by resolution would be ineffective.

Secondly, it is clear that Resolution No. 77-3 could not have revived the repealed collective bargaining provisions of Ordinance No. 394.71, since "(t) he effect of an express repeal of an ordinance is to eliminate the ordinance and end all proceedings growing out of such ordinance as if it had never been passed, unless saved by a clause in the repealing ordinance." (State National Bank v. Zoning Board of Appeals (1980), 81 Ill.App.3d 105, 107, 36 Ill.Dec. 13, 15, 400 N.E.2d 433, 435; see also City of Chicago v. Degitis (1943), 383 Ill. 171, 48 N.E.2d 930.) Since there is no saving clause in Ordinance No. 77-17, Ordinance No. 394.71 must be deemed revoked in its entirety. Therefore, we conclude that the trial court erred in ruling that Resolution No. 77-3 bound the municipality to act in accordance with the repealed Ordinance No. 394.71 insofar as the provisions thereof were applicable.

Having so concluded, the focus of our inquiry must turn to the issue of whether Resolution No. 77-3 itself obligates the City to continue collective bargaining negotiations with the Union or whether there is some other authority which mandates such action on the part of the City. The crucial language of the resolution reads: "Previously recognized bargaining representatives will continue to be recognized for already established and defined bargaining units." While the Union's complaint and argument in the trial court seem to be based on the provisions of Ordinance No. 394.71, it now appears to have abandoned that approach and instead argues that, although Ordinance No. 394.71 has been repealed, Resolution No. 77-3 is consistent with some of the provisions of that ordinance in requiring the City to continue to negotiate in good faith with the Union. Specifically, the Union argues that the word "recognize" in Resolution No. 77-3 implies a duty or obligation on the part of the City to bargain or negotiate with the Union in good faith in an attempt to arrive at a contract. The City, on the other hand, contends that there is no authority for the Union's interpretation of the word "recognize" as including a duty to negotiate but that, even assuming that such a duty could be inferred from the language of the resolution, the City's obligation to bargain in good faith was intended to continue only during the life of existing contractual relationships; if a labor contract between a public employee union and the City terminates, the duty to bargain ceases to exist.

In construing municipal ordinances, the same rules which govern the construction of statutes are applied. (East St. Louis v. Union Electric Co. (1967), 37 Ill.2d 537, 542, 229 N.E.2d 522; State National Bank v. Zoning Board of Appeals (1980), 81 Ill.App.3d 105, 107, 36 Ill.Dec. 13, 15, 400 N.E.2d 433, 435.) The intention of the lawmaking body as revealed by the *158 language used is a primary consideration. (Highcrest Management Co. v. Village of Woodridge (1978), 60 Ill.App.3d 763, 765, 18 Ill.Dec. 162, 164, 377 N.E.2d 315, 317.) The surrounding circumstances and conditions under which the ordinance was enacted are to be considered, as well as the purposes **874 ***665 sought to be attained, in order to dispel uncertainty or ambiguity in its meaning. (City of DesPlaines v. Chicago & N.W. Ry. Co. (1975), 30 Ill.App.3d 944, 332 N.E.2d 596, rev'd on other grounds (1976), 65 Ill.2d 1, 2 Ill.Dec. 266, 357 N.E.2d 433.) Obviously, the same rules of construction which govern statutes and ordinances are equally applicable to resolutions. However, such rules are easier stated than applied.

In the present case, it is difficult to ascertain the City's intentions from the language of the resolution and the record is not developed sufficiently to enlighten this court as to the surrounding circumstances and conditions existent at the time the resolution was adopted. The critical words in Resolution No. 77-3, "recognize" and "already established and defined bargaining units," are not defined, nor are we aware of any well-established and commonly understood meaning ascribed to such words in this context in Illinois. Furthermore, contrary to the argument proffered by the Union, we do not believe that the duty to bargain in good faith is necessarily inherent in the word "recognize". No authority is cited by the Union for such a proposition, nor have we found any to exist in Illinois.

While not inconceivable, we consider it highly unlikely that the City would have followed the course it did if they intended to bind themselves to collective bargaining with the Union. Ordinance No. 77-17 expressly repealed the collective bargaining provisions of Ordinance No. 394.71, yet there is nothing in the main body of the ordinance to reflect an intent to continue to be bound to collective bargaining with the Union; nor does the ambiguous language in the preamble ("Whereas, the City Council believes that no new collective negotiations with new bargaining units of employees is necessary * * *.") convince us that such an intent existed. We are even less convinced that the City would reinstate collective bargaining rights in the Union that same day by way of a resolution. We have little doubt that, had the City intended to confer, or continue to extend, bargaining rights on the Union by Resolution No. 77-3, they would have done more than to simply state that "(p) reviously recognized bargaining representatives will continue to be recognized for already established and defined bargaining units." If the City intended to continue to extend bargaining rights to the Union, it could have done so by expressly providing that Ordinance No. 394.71 would not be repealed as to existing bargaining units.

Absent a clear manifestation of intent by the city council to obligate themselves to future collective bargaining with the Union, we cannot accept the Union's argument that the City is bound by Resolution No. ***159** 77-3 to continue negotiating in good faith. Although not indisputable, we think it is more likely that the City was issuing a general statement of policy in Resolution No. 77-3 indicating an intent to continue negotiations with the Union as long as there was an existing contract between the two parties. Assuming that such an interpretation is correct, the City's duty to bargain with the Union ended after the last agreement between the parties expired following unsuccessful dispute settlement procedures. We conclude, therefore, that the City was not required to bargain with the Union by virtue of the resolution or the contract. Having chosen not to recognize the Union as the exclusive bargaining agent of the patrolmen on a voluntary basis, the City is under no enforceable legal duty to do so. Rend Lake College Federation of Teachers Local 3708 v. Board of Community College, District No. 521 (1980), 84 Ill.App.3d 308, 310, 39 Ill.Dec. 611, 614, 405 N.E.2d 364, 367; Cook County Police Ass'n v. City of Harvey (1972), 8 Ill.App.3d 147, 149, 289 N.E.2d 226.

Finally, we must address the Union's argument that there was discriminatory treatment of the Union by the City which violates the equal protection rights of its members as guaranteed by the Fourteenth Amendment. The Union's argument is premised on the fact that both the Union and the IBEW, representing the City's electrical workers, were certified and recognized under Ordinance No. 394.71 prior to ****875** *****666** its repeal. Since the repeal, the City has continued formal recognition of the IBEW while ceasing to afford the Union similar treatment. Citing Confederation of Police v. City of Chicago (N.D.Ill.1974), 382 F.Supp. 624, aff'd. (7th Cir. 1977), 547 F.2d 375), the City argues that there was no discrimination. The City seeks to justify its treatment by arguing that the IBEW enjoyed continued recognition by virtue of renegotiated contracts.

Inasmuch as no fundamental right is involved, the question is whether negotiating with the IBEW and not with the police patrolmen is rationally or reasonably related to a legitimate State purpose. (Confederation of Police v. City of Chicago (N.D.Ill.1974), 382 F.Supp. 624, 629.) The burden of proving discriminatory treatment which violates the equal protection clause of the Fourteenth Amendment rests upon the person challenging such action. (See In Re Estate of Karas (1975), 61 Ill.2d 40, 47-8, 329 N.E.2d 234, 238.) The record below does not provide us with any evidence to support the Union's contention in this respect other than the fact that the City continued to negotiate with the IBEW. We nevertheless are able to conclude that there was no violation of the equal protection clause by the City and that there was a rational basis for negotiating with the IBEW but not with the Union. The IBEW has continued to renew their contracts with the City, so they still have a contractual right to collective bargaining. When, if ever, their contract with the City expires, by termination or otherwise, as the Union's contract has, their right to ***160** bargain with the City will likewise cease to exist. Until that time, however,

they are in a distinctly different position than the Union and, therefore, may be treated differently by the City. There also is an obvious difference between the work performed by patrolmen and electrical workers. The nature of police work, being dangerous and important for the public welfare, makes rational, logical and necessary the decision to treat the police differently from other types of employees. Confederation of Police v. City of Chicago (N.D.Ill.1974), 382 F.Supp. 624, 630.

For these reasons, the judgment of the circuit court is reversed.

Reversed.

SEIDENFELD, P. J., and NASH, J., concur.

All Citations

97 Ill.App.3d 153, 422 N.E.2d 869, 52 Ill.Dec. 660

N. M. S. A. 1978, § 3-12-2

§ 3-12-2. Governing body; corporate authority; legislative body; members of council and boards of trustees; quorum

Currentness

A. The corporate authority of a municipality is vested in the governing body that shall constitute the legislative branch of the municipality and shall not perform any executive functions except those functions assigned to it by law.

B. A majority of the members of the governing body is a quorum for the purpose of transacting business.

C. Unless otherwise provided by law, a question before the governing body shall be decided by a majority vote of the members present.

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.

E. In those municipalities with a mayor-council form of government, when there is a requirement that a certain fraction or percentage of the members of the entire governing body or of all the members of the governing body or of the entire membership of the governing body or other similar language other than the requirement of a simple majority vote for the measure, the mayor shall not be counted in determining the actual number of votes needed but he shall vote to break a tie vote as provided in Section 3-11-3 NMSA 1978 unless he has declared a conflict of interest.

F. The governing body of a municipality may redistrict the municipality whenever redistricting is warranted. Upon petition signed by qualified electors equal in number to the votes cast for the councilman or trustee receiving the greatest number of votes at the last regular municipal election, the governing body of the municipality shall redistrict the municipality.

Credits
L. 1965, Ch. 300; L. 1985, Ch. 203, § 2; L. 1992, Ch. 6, § 2; L. 2003, Ch. 208, § 1.

Formerly 1953 Comp., § 14-11-2.

Notes of Decisions (1)

NMSA 1978, § 3-12-2, NM ST § 3-12-2

Current through Chapters 1, 7, 10, 21, 24, 35, 55, 61, 67, and 131 of the 2025 First Regular Session of the 57th Legislature (2025). The 2025 First Regular Session convened on January 21, 2025, and adjourned on March 22, 2025.

End of Document

West's New Mexico Statutes Annotated
Chapter 3. Municipalities
Article 17. Ordinances

N. M. S. A. 1978, § 3-17-6

§ 3-17-6. Codes adopted and enforced by reference; availability

Currentness

A. A municipality may adopt by ordinance the conditions, provisions, limitations and terms of:

(1) an administrative code;

(2) an air pollution code;

(3) a building code that includes provisions for plan review, permitting and inspections for general, electrical, mechanical and plumbing construction;

(4) an elevator code;

(5) a fire prevention code;

(6) a health code;

(7) [a] housing code;

(8) a traffic code; or

(9) any other code not in conflict with the laws of New Mexico or valid regulations issued by any board or agency of New Mexico authorized to issue regulations.

Any code so adopted shall provide for minimum requirements at least equal to the state requirements on the same subject.

B. An ordinance adopting any such code need only refer to the proper title and date of the code, without setting forth the code's conditions, provisions, limitations and terms, and may include any exception or deletion to the code by setting forth the exception or deletion to the code. The ordinance shall further specify at least one place within the municipality where the code, so adopted, is available for inspection during the normal and regular business hours of the municipal clerk. A copy of the code shall be available upon request and payment of a reasonable charge.

C. Any amendment to such a code may be adopted in the same manner as other ordinances are adopted.

Credits
L. 1965, Ch. 300; L. 2007, Ch. 132, § 1, eff. July 1, 2009.

Formerly 1953 Comp., § 14-16-5.

Notes of Decisions (2)

NMSA 1978, § 3-17-6, NM ST § 3-17-6
Current through Chapters 1, 7, 10, 21, 24, 35, 55, 61, 67, and 131 of the 2025 First Regular Session of the 57th Legislature (2025). The 2025 First Regular Session convened on January 21, 2025, and adjourned on March 22, 2025.

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685 So.2d 333
Court of Appeal of Louisiana, Fifth Circuit.

Paul A. PACIERA, Jr., Individually, and in his Capacity as Trustee of the Paul A. Paciera (Sr.) Testamentary Trust No. 1 and the Rose B. Paciera Inter Vivos Trust No. 1
v.
The PARISH OF JEFFERSON, Fred Arcement, Elson Savoie, Jon Rabalais and Kirk Landry.

No. 96–CA–441
|
Nov. 26, 1996.
|
Writ Denied Feb. 7, 1997.

Synopsis

Landowner appealed decision of zoning appeals board, affirming revocation of his permit to excavate clay for installation of a fish pond. The Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 489-576, Robert J. Burns, J., reversed. On appeal, the Court of Appeal, Gaudin, J., held that resolution passed by parish council providing that there would be no moratorium on permitting clay extraction operations during course of zoning study regarding such operations could not supersede an explicitly opposite provision in zoning ordinance.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***333** Albert J. Derbes, IV, Eric J. Derbes, Albert J. Derbes, III, Metairie, for plaintiff-appellee.

Robert P. Early, David Dyer, Assistant Parish Attorney, Harahan, for defendant-appellant.

Lloyd N. Shields, Daniel Lund, III, Shields, Mott, Lund & Burnside, L.L.P., New Orleans, for appellants-respondents.

Before GAUDIN, BOWES and GRISBAUM, JJ.

Opinion

****1** GAUDIN, Judge.

At paramount issue in this case is whether the Jefferson Parish Council **by resolution** can supersede a provision in the Comprehensive Zoning Ordinance directly contrary to the resolution. A trial judge in the 24th Judicial District Court said yes. We reverse. An ordinance, by its very nature and definition, is superior to a resolution and must prevail.

The facts of this case are generally not in dispute. Appellant Paul Paciera owns a parcel of land in Kenner, Louisiana which is zoned S–1 Residential. He applied for a ***334** permit to excavate clay and to install a fish pond. The permit was issued and later revoked.

The following dates and events are relevant to this proceeding:

On February 2, 1995, the Jefferson Parish Council passed resolution No. 78855, as follows:

> "Section I. That the Planning Department and the Planning Advisory Board is hereby requested and authorized to conduct a study of the text of the Comprehensive Zoning Ordinance, more particularly Section VI, Suburban Residential (S–1) and Section XVII, Unrestricted District (U–1) to consider eliminating clay extracting and borrow pit operations as permitted uses in Suburban Residential (S–1) and to develop specific criteria for the siting of these uses as a Special Permitted Use in the Unrestricted District (U–1), in accordance with the provisions of Section XX–A, Special Permitted Uses.
>
> ****2** "Section II. That a moratorium on the permitting of such operations shall be in effect for one year from the date of this resolution; and the Council may grant an extension to said moratorium for a period of an additional six months."

Section XXVIII(5) of the Comprehensive Zoning Ordinance states unequivocally that when a zoning study is initiated by the Parish Council, "... the Department of Inspection and Code Enforcement shall not issue a certificate of use and occupancy on a building permit ... which would be prohibited by passage of the amendment, supplement, change or zoning study."

On April 5, 1995, the Parish Council adopted resolution No. 79195. This resolution referred to the earlier resolution (No. 78855) authorizing the zoning study regarding elimination of clay extraction and borrow pit operations in S–1; the new

resolution then went on to state, in spite of contradictory wording in the Comprehensive Zoning Ordinance, that:

> "There will be no moratorium on the permitting of such operations during the course of the zoning study."

On October 11, 1995, the Jefferson Parish Department of Inspection and Code Enforcement issued a permit to Paciera to excavate clay for installation of a fish pond. Paciera started work pursuant to the permit. Although the permit is for a "fish pond," it is quite evident from the record and testimony, including admissions by Paciera, that extensive clay removal was planned and that the excavated site would easily qualify as a borrow pit and be subject to the zoning study.

Paciera's permit was revoked by the Department of Inspection and Code Enforcement by letter to him dated February 1, 1996. The letter said that the permit was being revoked because of an advisory opinion received from the Parish Attorney's office. This opinion stated that resolution ****3** No. 79195 was null and of no effect because a provision in the Comprehensive Zoning Ordinance can only be repealed by an act of equal dignity and not by a mere council resolution.

Paciera filed an appeal to the Zoning Appeals Board, which found that the permit issued to Paciera was illegal and that it has been properly revoked. Paciera then filed suit in district court, which by judgment dated March 27, 1996 reversed the Zoning Appeals Board saying:

> "Zoning laws are in derogation of private ownership and must be strictly construed in favor of the property owner.
>
> "The Jefferson Parish Council validly declared that there would be no moratorium during the zoning study ..."

We fully agree with the first part of the judgment. The Council's no moratorium resolution No. 79195, however, was an improper attempt to contravene an explicitly opposite provision in the Comprehensive Zoning Ordinance.

The Council can institute a change in the Comprehensive Zoning Ordinance but steps and procedures required for an amendment, spelled out in detail in Section XXVIII of the ordinance, must be followed. The process is involved and includes a public hearing, after notice, before the Planning Advisory Board.

A resolution in conflict with an ordinance cannot stand. Probably the best statement of the difference between a resolution ***335** and an ordinance is in *James v. Rapides Parish Police Jury,* 236 La. 493, 108 So.2d 100 (1959), wherein the Supreme Court of Louisiana said at page 102:

> "While we do not doubt the correctness of counsel's statement respecting the jury's compliance with the same formalities in the adoption of resolutions and ordinances, we cannot accede to his view that there is no difference between a resolution and an ordinance. In a broad sense, an ordinance is a ****4** local law or rule prescribed by a public subdivision or a municipality which emanates from its legislative authority as distinguished from an administrative action; it is a permanent rule, a law or statute. See Black's Law Dictionary, page 1238; McQuillin, 'Municipal Corporations', 3rd Ed. Vol. 5, Sec. 15:01. A resolution, on the other hand, has been defined to be a formal expression of the opinion or will of an official body, adopted by vote; the adoption of a motion, the subject matter of which would not properly constitute a statute. See Black's Law Dictionary, page 1474, McQuillin states in his treatise on Municipal Corporations, 3rd Ed. Vol. 5, Sec. 15:02:
>
> > 'A resolution is not an ordinance and there is a distinction between the two terms as they are commonly used in charters * * * a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government to continue in force until the ordinance is repealed. It may further be observed that a resolution is ordinarily ministerial in character and relates to the administrative business of the municipality, whereas an ordinance is distinctively a legislative act. Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of ordinances.' "

For the foregoing reasons, we set aside the district court judgment in Paciera's favor and we reinstate the ruling of the Zoning Appeals Board which affirmed the revocation of Paciera's permit.

Each side is to pay its respective court costs.

REVERSED.

96-441 (La.App. 5 Cir. 11/26/96)

All Citations

685 So.2d 333, 96-441 (La.App. 5 Cir. 11/26/96)

CITY of ALBUQUERQUE
TWENTY-SECOND COUNCIL

COUNCIL BILL NO. R-16-41 ENACTMENT NO. R-2016-039

SPONSORED BY: Isaac Benton and Dan Lewis

RESOLUTION

ESTABLISHING MINIMUM STAFFING REQUIREMENTS FOR ALBUQUERQUE FIRE DEPARTMENT ENGINE APPARATUS, RESCUE APPARATUS, LADDER APPARATUS, HAZARDOUS MATERIALS SQUADS, HEAVY TECHNICAL RESCUE SQUADS, QUALITY ASSURANCE UNITS, BATTALION COMMANDER UNITS AND SUPPORT DIVISIONS.

WHEREAS, the Albuquerque Fire Department has a proud tradition of providing excellent emergency response services to the citizens and visitors of the City of Albuquerque; and

WHEREAS, the City of Albuquerque recognizes that firefighting and emergency medical response are inherently dangerous with calls for fire suppression and emergency medical responses increasing annually; and

WHEREAS, the Albuquerque Fire Department has earned a Class 1 rating by the Insurance Services Office (ISO). The ISO Class 1 rating is the highest rating possible and has been achieved by less than 100 fire departments nationwide; and

WHEREAS, receiving the ISO Class 1 rating is a reflection of the Albuquerque Fire Department's resource capacity and capability to respond to emergencies; and

WHEREAS, evaluation by the Insurance Services Office is extremely comprehensive. Programs and resources including fire prevention and investigation, training, dispatch, water supply system capabilities, staffing levels, equipment, and resource deployment capabilities are each reviewed. An ISO Class 1 rating indicates that the risk and cost of property loss due to fire in our community is significantly reduced through both fire prevention and emergency response efforts when a fire does occur. Achieving an ISO Class 1

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rating is a tremendous accomplishment that benefits the entire business and residential community; and

WHEREAS, the Albuquerque Fire Department has accomplished the ISO Class 1 rating, in part, by staffing rank specific sworn personnel ("firefighters") to all Engine apparatus with a minimum of four (4) firefighters, Rescue apparatus with a minimum of two (2) firefighters, Ladder apparatus with a minimum of three (3) firefighters, Hazardous Materials Squad apparatus with a minimum of two (2) firefighters, Heavy Technical Rescue Squads with a minimum of four (4) firefighters, Quality Assurance Units with one (1) firefighter, Battalion Commander Units with one (1) firefighter; and

WHEREAS, the practice of staffing Albuquerque Fire Department apparatus, as stated above, strives to meet the intent of the accepted fire service industry standards; as adopted by the National Fire Protection Association including: 1710 - STANDARD FOR THE ORGANIZATION AND DEPLOYMENT OF FIRE SUPPRESSION OPERATIONS, EMERGENCY MEDICAL OPERATIONS, AND SPECIAL OPERATIONS TO THE PUBLIC BY CAREER FIRE DEPARTMENTS; Occupational Safety & Health Administration, 29CFR 1910.134(g)(4), "2-In/2-Out Rule"; the International Association of Fire Chiefs, and the International Association of Fire Fighters, National Institute of Standards and Technology (NIST) – Report on Residential Fire ground Field Experiments (2010) and NIST - Report on EMS Field Experiments (2010); and

WHEREAS, the City Council, Mayor, Fire Chief, and members of the Albuquerque Area Fire Fighters, IAFF Local 244, recognize that the standards and best practices of fire suppression and emergency medical service (EMS) responses are ever evolving, and that the Albuquerque Fire Department shall continually monitor trends in Fire/EMS operations to expand Fire/EMS services; and

WHEREAS, the City of Albuquerque is committed to support our firefighter's efforts to provide our citizens and visitors with the best possible service in the most efficient and effective manner, and to provide our firefighters with a reasonable level of safety while performing their assigned duties.

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BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. That, with the exception of temporary exigencies or emergencies, as determined by the Chief, the City of Albuquerque will continue the policy and practice of staffing rank specific firefighters to all Engine apparatus with a minimum of four (4) firefighters, Rescue apparatus with a minimum of two (2) firefighters, Ladder apparatus with a minimum of three (3) firefighters, Hazardous Materials Squads with a minimum of two (2) firefighters, Heavy Technical Rescue Squads with a minimum of four (4) firefighters, Quality Assurance Units with one (1) firefighter, and Battalion Commander Units with one (1) firefighter.

Section 2. The City of Albuquerque will continue to staff firefighters in the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, Emergency Medical Services (EMS) Division, and Training Division with adequate staffing levels.

Section 3. That as the size of the City and call volume for the Fire Department increases thereafter the City of Albuquerque shall increase the number of apparatus with categorical staffing levels maintained, increase firefighter staffing levels of the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, Emergency Medical Services (EMS) Division, and Training Division.

Section 4. That in the event of staffing modifications recommended by the Chief, the City of Albuquerque and Albuquerque Area Fire Fighters, IAFF Local 244, must meet and confer prior to amending the staffing levels stated in this Resolution.

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PASSED AND ADOPTED THIS 2nd DAY OF May, 2016
BY A VOTE OF: 8 FOR 1 AGAINST.

Against: Jones

Dan Lewis, President
City Council

APPROVED THIS 18th DAY OF May, 2016

Bill No. R-16-41

Richard J. Berry, Mayor
City of Albuquerque

ATTEST:

Natalie Y. Howard, City Clerk

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CITY of ALBUQUERQUE
TWENTY SIXTH COUNCIL

COUNCIL BILL NO. R-25-122 ENACTMENT NO. R-2025-011

SPONSORED BY: Dan Lewis, Joaquín Baca

RESOLUTION

ESTABLISHING MINIMUM STAFFING REQUIREMENTS FOR ALBUQUERQUE FIRE RESCUE, RESCUE APPARATUS.

WHEREAS, Albuquerque Fire Rescue has a proud tradition of providing excellent emergency response services to the citizens and visitors of the City of Albuquerque; and

WHEREAS, Albuquerque Fire Rescue operates a triaged response that prioritizes paramedics for emergency medical calls rather than non-patient related emergencies; and

WHEREAS, prompt and coordinated care is essential for maximizing positive patient outcomes in medical emergencies, especially heart attacks, trauma-related incidents requiring immediate transport, and multi-casualty accidents; and

WHEREAS, two paramedic Rescue apparatus provide a higher standard of care, particularly in complex medical emergencies, by reducing treatment delays, improving patient monitoring, and enhancing on-scene decision making; and

WHEREAS, two paramedics working in tandem and responding on the same apparatus provide increased crew cohesion, checks and balances for complex EMS protocol interpretation, leading to increased positive patient outcomes and ultimately saving lives; and

WHEREAS, Albuquerque Fire Rescue's two paramedic Rescue apparatus system offers beneficial professional mentorship and peer support to paramedics new and old; and

WHEREAS, to ensure full staffing of the two-paramedic Rescue apparatus system, the City must take proactive steps and train its own paramedics by

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working with our education partners to bring back our own training program; and

WHEREAS, the City of Albuquerque has repeatedly fought trends to diminish and dilute service delivery to constituents; and

WHEREAS, the City of Albuquerque has a responsibility to prioritize public health and safety by ensuring its emergency medical services are equipped to effectively respond to life-threatening situations, and deploying two paramedics on rescues significantly improves service delivery and patient care outcomes; and

WHEREAS, the City of Albuquerque is committed to supporting the efforts of our firefighters to provide our citizens and visitors with the best possible service in the most efficient and effective manner, and to provide our firefighters with a reasonable level of safety while performing their assigned duties.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. That, with the exception of temporary exigencies or emergencies, as determined by the Chief, the City of Albuquerque will continue the policy and practice of staffing rank-specific firefighters to all Engine apparatus with a minimum of four (4) firefighters, Rescue apparatus with a minimum of two (2) paramedic firefighters, Ladder apparatus with a minimum of three (3) firefighters, Hazardous Materials Squads with a minimum of two (2) firefighters, Heavy Technical Rescue Squads with a minimum of four (4) firefighters, Quality Assurance Units with one firefighter, and Battalion Commander Units with one (1) firefighter.

Section 2. The City of Albuquerque will continue to staff firefighters in the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, and Training Division with adequate staffing levels.

Section 3. That as the size of the City and call volume for Albuquerque Fire Rescue increases thereafter, the City of Albuquerque shall increase the number of apparatus with categorical staffing levels maintained, and increase firefighter staffing levels of the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, and Training Division.

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Section 4. That in the event of staffing modifications recommended by the Chief, the City of Albuquerque and Albuquerque Area Fire Fighters IAFF Local 244 must meet and confer prior to amending.

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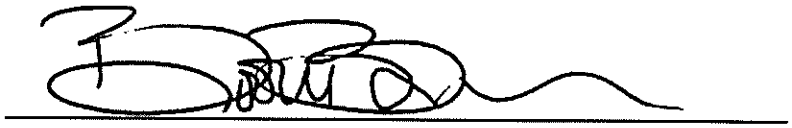
PASSED AND ADOPTED THIS 3rd DAY OF March, 2025
BY A VOTE OF: 7 FOR 2 AGAINST.

For: Baca, Champine, Grout, Lewis, Peña, Rogers, Sanchez
Against: Bassan, Fiebelkorn



Brook Bassan, President
City Council

APPROVED THIS _____ DAY OF _____, 2025

Bill No. R-25-122

Timothy M. Keller, Mayor
City of Albuquerque

ATTEST:

Ethan Watson, City Clerk

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City of Albuquerque

Office of the City Clerk

Timothy M. Keller, Mayor **Ethan Watson, City Clerk**

Interoffice Memorandum

March 21, 2025

To: CITY COUNCIL

From: Ashley Santistevan, Records Center Manager

Subject: BILL NO. R-25-122; ENACTMENT NO. R-2025-011

I hereby certify that on March 21, 2025, the Office of the City Clerk received Bill R-25-122 as signed by the president of the City Council, Brook Bassan. Enactment No. R-2025-122 was passed at the March 3, 2025 City Council meeting. Mayor Keller did not sign the approved Resolution within the 10 days allowed for his signature and did not exercise his veto power. Pursuant to the Albuquerque City Charter Article XI, Section 3, this Resolution is in full effect without Mayor's approval or signature. This memorandum shall be placed in the permanent file for Bill No. R-25-122.

Sincerely,

Ethan Watson
City Clerk

CITY of ALBUQUERQUE
TWENTY SIXTH COUNCIL

COUNCIL BILL NO. R-25-122 ENACTMENT NO. _____

SPONSORED BY: Dan Lewis, Joaquín Baca

RESOLUTION

Establishing minimum staffing requirements for Albuquerque Fire Rescue, Rescue Apparatus.

WHEREAS, Albuquerque Fire Rescue has a proud tradition of providing excellent emergency response services to the citizens and visitors of the City of Albuquerque; and

WHEREAS, Albuquerque Fire Rescue operates a triaged response that prioritizes paramedics for emergency medical calls rather than non-patient related emergencies; and

WHEREAS, prompt and coordinated care is essential for maximizing positive patient outcomes in medical emergencies, especially heart attacks, trauma-related incidents requiring immediate transport, and multi-casualty accidents; and

WHEREAS, two paramedic Rescue apparatus provide a higher standard of care, particularly in complex medical emergencies, by reducing treatment delays, improving patient monitoring, and enhancing on-scene decision making; and

WHEREAS, two paramedics working in tandem and responding on the same apparatus provide increased crew cohesion, checks and balances for complex EMS protocol interpretation, leading to increased positive patient outcomes and ultimately saving lives; and

WHEREAS, Albuquerque Fire Rescue's two paramedic Rescue apparatus system offers beneficial professional mentorship and peer support to paramedics new and old; and

WHEREAS, the City of Albuquerque has repeatedly fought trends to diminish and dilute service delivery to constituents; and

WHEREAS, the City of Albuquerque has a responsibility to prioritize public health and safety by ensuring its emergency medical services are equipped to effectively respond to life-threatening situations, and deploying two paramedics on rescues significantly improves service delivery and patient care outcomes; and

WHEREAS, the City of Albuquerque is committed to supporting the efforts of our firefighters to provide our citizens and visitors with the best possible service in the most efficient and effective manner, and to provide our firefighters with a reasonable level of safety while performing their assigned duties.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. That, with the exception of temporary exigencies or emergencies, as determined by the Chief, the City of Albuquerque will continue the policy and practice of staffing rank-specific firefighters to all Engine apparatus with a minimum of four (4) firefighters, Rescue apparatus with a minimum of two (2) [paramedic] firefighters, Ladder apparatus with a minimum of three (3) firefighters, Hazardous Materials Squads with a minimum of two (2) firefighters, Heavy Technical Rescue Squads with a minimum of four (4) firefighters, Quality Assurance Units with one firefighter, and Battalion Commander Units with one (1) firefighter.

Section 2. The City of Albuquerque will continue to staff firefighters in the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, and Training Division with adequate staffing levels.

Section 3. That as the size of the City and call volume for Albuquerque Fire Rescue increases thereafter, the City of Albuquerque shall increase the number of apparatus with categorical staffing levels maintained, and increase firefighter staffing levels of the Fire Marshal's Office, Arson Investigation Division, Communications and Dispatch Division, and Training Division.

Section 4. That in the event of staffing modifications recommended by the Chief, the City of Albuquerque and Albuquerque Area Fire Fighters IAFF Local 244 must meet and confer prior to amending.

§ 1-1-5 DEFINITIONS.

(A) *General rule.* Words and phrases shall be taken in their plain, or ordinary and usual sense. However, technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

(B) For the purpose of this code, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

ARTICLE. A division of a chapter designated in this code by a number and heading in the chapter analysis, setting apart a group of sections related by the subject matter of the heading.

CITY, MUNICIPAL CORPORATION, or ***MUNICIPALITY.*** The City of Albuquerque, New Mexico.

CITY COUNCIL or ***COUNCIL.*** The legislative body of the city.

CITY COUNCILLOR or ***COUNCILLOR.*** A member of the City Council of the city.

CODE, CODE OF ORDINANCES or ***ROA 1994.*** The City of Albuquerque Revised Ordinances of 1994 as modified by amendment, revision, and adoption of new chapters, articles or sections.

COUNTY. Bernalillo County, New Mexico.

MAY. The act referred to is permissive.

MAYOR. The elected officer of the city who exercises administrative control and supervision over the city and hires or appoints directors of all city departments. Where applicable, the term ***MAYOR*** means those persons whose authority has been granted by the Mayor. See Chart. Art. V. for a fuller description of the Mayor's position and duties.

MONTH. A calendar month.

OATH. An affirmation in all cases in which, by law, an affirmation may be substituted for an oath, and in such cases the words ***SWEAR*** and ***SWORN*** shall be equivalent to the words ***AFFIRM*** and ***AFFIRMED***.

OFFICER, OFFICE, EMPLOYEE, COMMISSION, or ***DEPARTMENT***. An officer, office, employee, commission, or department of the city unless the context clearly requires otherwise.

PART. A division of an article designated in this code by a number and heading in the chapter analysis and a number and a capitalized heading in the body of the article, setting apart a group of sections related by the subject matter of the heading.

PERSON. Extends to and includes person, persons, firm, corporation, copartnership, trustee, lessee, or receiver. Whenever used in any clause prescribing and imposing a penalty, the terms ***PERSON*** or ***WHOEVER*** as applied to any unincorporated entity shall mean the partners or members thereof, and as applied to corporations, the officers or agents thereof.

PRECEDING or ***FOLLOWING.*** Next before or next after, respectively.

REVISED ORDINANCES OF 1994 or ***ROA 1994.*** See ***CODE.***

SHALL. The act referred to is mandatory.

SIGNATURE or ***SUBSCRIPTION.*** Includes a mark when the person cannot write.

STATE. The State of New Mexico.

WRITTEN. Any representation of words, letters, or figures, whether by printing or otherwise.

YEAR. A calendar year, unless otherwise expressed; equivalent to the words ***YEAR OF OUR LORD.***

§ 3-1-1 THE MERIT SYSTEM.

In accordance with Article X of the Charter of the city, there is hereby established a merit system governing the hiring, promotion and discharge of employees and providing for the general regulation of employees. Pursuant to the Charter, the Mayor designates the Chief Administrative Officer of the city to be responsible for the administration of the merit system. The Chief Administrative Officer is authorized to establish Rules and Regulations to implement this article. If this article conflicts with any federal law, federal law will control.

('74 Code, § 2-9-1) (Ord. 52-1978; Am. Ord. 29-1998)

§ 3-1-2 RESPONSIBILITIES OF THE CHIEF ADMINISTRATIVE OFFICER FOR PERSONNEL FUNCTIONS.

(A) The Chief Administrative Officer shall have the following responsibilities:

(1) To exercise leadership in and encourage the development of effective personnel administration within the departments, agencies, and special programs in the city service;

(2) To recommend changes to this article for consideration by the City Council;

(3) To approve Personnel Rules and Regulations prior to their final adoption and publication by the Director of Human Resources as provided in this article;

(4) To issue administrative instructions to provide policy and guidance in furtherance of and limited by the responsibilities of the Chief Administrative Officer specifically granted by this article;

(5) To approve a compensation plan as recommended by the Director of Human Resources for classified city employees consistent with other provisions of this article; and

(6) To designate a Deputy Chief Administrative Officer or a department head to assume the duties of the Chief Administrative Officer in the event of his or her inability to act or absence from the city.

(B) The power of appointment or promotion to a position in the classified or unclassified service of the city shall rest with the Chief Administrative Officer; provided that, in the absence of a written directive to the contrary signed by the Chief Administrative Officer, such power may be exercised by the administrative head of a city department, agency or special program for the positions within such department, agency or special program.

(C) Pursuant to and within the authority granted by the charter and this article, the Chief Administrative Officer shall have the following authority:

(1) To direct the work of city employees;

(2) To hire, promote, evaluate, transfer, and assign employees;

(3) To reprimand, suspend, demote or discharge unclassified employees and to reprimand, suspend, demote or discharge classified employees for just cause;

(4) To determine staffing requirements;

(5) To maintain the efficiency of the city government and ensure the carrying out of normal management functions;

(6) To take actions as may be necessary to carry out the mission of the city government in emergencies; and

(7) To manage and to exercise judgment on all matters specifically within his or her authority pursuant to the charter or this article and not prohibited by a collective bargaining agreement in effect between the city employer and an employee organization.

(D) The Chief Administrative Officer shall have no power or authority to appoint the Director of Council Services or to hire, promote, discipline or discharge the staff of the offices of the City Council, which shall be the responsibility of the Director of Council Services.

('74 Code, § 2-9-2) (Ord. 52-1978; Am. Ord. 69-1988; Am. Ord. 29-1998; Am. Ord. 7-2010)

ARTICLE 2: LABOR - MANAGEMENT RELATIONS

Section

§ 3-2-1 SHORT TITLE.

This article may be cited as the "City of Albuquerque Labor-Management Relations Ordinance."

('74 Code, § 2-2-1) (Ord. 153-1971; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-2 PURPOSE.

The City Council declares that it is the public policy of the city, and purpose of this article:

(A) To allow the city employees to organize and bargain collectively with the city government;

(B) To promote harmonious and cooperative relationships between all parties; and

(C) To protect the public interest by assuring, at all times, the orderly and uninterrupted operations and functions of the city government.

('74 Code, § 2-2-2) (Ord. 153-1971; Am. Ord. 121-1972; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-3 DEFINITIONS.

For the purpose of this article, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

APPROPRIATE BARGAINING UNIT. A group of employees designated by the Board for the purpose of collective bargaining.

BOARD. The City Labor-Management Relations Board.

CERTIFICATION. The designation by the Board of a labor organization as the exclusive representative for all public employees in an appropriate bargaining unit.

CITY EMPLOYEE. Any permanent, non-probationary employee of the city, including employees whose work is funded in whole or in part by grants or other third party sources, except officials elected by popular vote or appointed to fill vacancies in elective offices; members of boards, commissions, and heads of agencies appointed by the Mayor; heads of agencies

appointed by boards and commissions; supervisors; temporary or seasonal employees; and individuals privy to confidential matters of the city government affecting the employer-employee relationship, or any other individuals defined under § 3-2-9(D).

CITY GOVERNMENT. The government of the city acting through and for its agencies, departments, divisions and branches and bureaus.

COLLECTIVE BARGAINING. A procedure whereby representatives of the city government and an employee organization meet, confer, consult, and negotiate with one another in a good-faith effort to reach agreement or otherwise resolve differences relating, or with respect, to wages, hours and other terms and conditions of employment.

CONFIDENTIAL EMPLOYEE. An employee who devotes the majority of their working time to assisting and acting in a confidential capacity with respect to a person who formulates, determines, and effectuates management policies.

EMERGENCY. A one-time crisis that was unforeseeable and unavoidable.

EMPLOYEE ORGANIZATION or LABOR ORGANIZATION. Any organization or labor union one of whose purposes is to represent city employees in collective bargaining, on matters pertaining to wages, hours, terms and conditions of employment, but it does not include any organization that:

(1) Advocates the overthrow of the constitutional form of government in the United States by other than lawful means; or

(2) Discriminates with regard to the terms or conditions of membership because of race, color, sex, creed, age, or national origin.

EXCLUSIVE REPRESENTATIVE. A labor organization that, as a result of certification, has the right to represent all public employees in an appropriate bargaining unit for the purposes of collective bargaining.

IMPASSE. The failure of the parties to agree with respect to any issue or issues over which the parties have negotiated in good faith, and with respect to which neither party is willing to make further concessions.

LOCKOUT. An act by the employer to prevent its employees from going to work for the purpose of resisting demands of the employees' exclusive representative or for the purpose of gaining a concession from the exclusive representative.

MANAGEMENT EMPLOYEE. An employee who is engaged primarily in executive and management functions and is charged with the responsibility of developing, administering or effectuating management policies. An employee shall not be deemed a management employee solely because the employee participates in cooperative decision-making programs or whose fiscal responsibilities are routine, incidental or clerical.

MEDIATION. Assistance by an impartial third party to resolve an impasse between the city and an exclusive representative regarding employment relations through interpretation, suggestion and advice.

PROFESSIONAL EMPLOYEE. Any city employee engaged in work that:

(1) Is predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

(2) Involves the consistent exercise of discretion and judgment in its performance;

(3) Is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given time period;

(4) Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of a specialized intellectual instruction and study in an institution of higher learning or hospital, as distinguished from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

STRIKE. A public employee's refusal, in concerted action with other public employees, to report for duty or the willful absence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment.

SUPERVISOR. An employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively, but ***SUPERVISOR*** does not include an individual who performs merely routine, incidental or clerical duties or who occasionally assumes a supervisory or directory role or whose duties are substantially similar to those of the individual's subordinates and does not include a lead employee or an employee who participates in peer review or occasional employee evaluation programs.

('74 Code, § 2-2-3) (Ord. 153-1971; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-4 RIGHTS OF CITY EMPLOYEES.

(A) City employees have the right to form, join and otherwise participate in the activities of an employee organization of their own choosing for the purpose of bargaining collectively with the city government, and for other lawful reasons. City employees also have the right to refuse to join and participate in the activities of employee organizations. An employee

organization which has been certified by the Mayor as the exclusive bargain representative for an appropriate bargaining unit of the city employees may bargain collectively with the city government concerning hours, salary, wages, working conditions, and all terms and conditions of employment.

(B) Nothing contained in this article shall be construed to limit, impair, or affect the rights of any individual city employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of city employment or their betterment aside from the method described herein, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of his employment.

(C) City employees have the right to engage in other concerted activities for mutual aid and benefit.

(D) The rights enumerated herein shall not be construed as modifying the prohibition on strikes contained in this article.

('74 Code, § 2-2-4) (Ord. 153-1971; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-5 MANAGEMENT RIGHTS.

Subject to existing law, the Mayor and his administrative staff shall have the following rights:

(A) To direct the work of its employees;

(B) To hire, promote, evaluate, transfer and assign employees;

(C) To demote, suspend, discharge or terminate employees for just cause;

(D) To determine staffing requirements;

(E) To maintain the efficiency of the city government and ensure the carrying out of normal management functions;

(F) To take actions as may be necessary to carry out the mission of the city government in emergencies; and

(G) To manage and to exercise judgment on all matters not specifically prohibited by this article or by a collective bargaining agreement in effect between the city employer and an employee organization.

('74 Code, § 2-2-5) (Ord. 153-1971; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-6 EXCLUSIVE REPRESENTATION.

(A) A labor organization that has been certified by the Labor-Management Relations Board as representing the city employees in the appropriate bargaining unit shall be the exclusive representative of all city employees in the appropriate bargaining unit. The exclusive representative shall act for all city employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all employees in the appropriate bargaining unit. The exclusive representative shall represent the interests of all city employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization. A claim by a city employee that the exclusive representative has violated this duty of fair representation shall be forever barred if not brought within six months of the date on which the city employee knew, or reasonably should have known of the violation.

(B) This section does not prevent a city employee, acting individually, from presenting a grievance without the intervention of the exclusive representative. At a hearing on a grievance brought by a city employee individually, the exclusive representative shall be afforded the opportunity to be present and make its views known. An adjustment made shall not be inconsistent with or in violation of the collective bargaining agreement then in effect between the city and the exclusive representative.

(C) The city shall provide an exclusive representative of an appropriate bargaining unit reasonable access to employees within the bargaining unit, including the following:

(1) For purposes of newly hired employees in the bargaining unit, reasonable access includes:

(a) The right to meet with new employees, without loss of employee compensation or leave benefits; and

(b) The right to meet with new employees within 30 days from the date of hire for a period of at least 30 minutes, but not more than 120 minutes, during new employee orientation.

(2) For purposes of employees in the bargaining unit who are not new employees, reasonable access includes:

(a) The right to meet with employees during the employees' regular work hours at the employees' regular work location to investigate and discuss grievances, workplace-related complaints and other matters relating to employment relations; and

(b) The right to conduct meetings at the employees' regular work location before or after the employees' regular work hours, during meal periods and during any other break periods.

(D) The city shall permit an exclusive representative to use the city's facilities or property, whether owned or leased by the city, for purposes of conducting meetings with the represented employees in the bargaining unit. An exclusive representative may hold the meetings described in this section at a time and place set by the exclusive representative. The exclusive representative shall have the right to conduct the meetings without undue interference and may establish reasonable rules regarding appropriate conduct for meeting attendees.

(E) The meetings described in this section shall not interfere with the city's operations.

(F) If the city has the information in its records, the city will provide, in an editable digital file format agreed to by the exclusive representative, the following information for each employee in an appropriate bargaining unit:

(1) The employee's name and date of hire;

(2) The employee's cellular, home, and work telephone numbers;

(3) The employee's work and personal electronic mail addresses;

(4) Home address or personal mailing address; and

(5) Employment information, including the employee's job title, salary, and work site location.

(G) The city shall provide the information described in division (F) of this section to the exclusive representative within ten days from the date of hire for newly hired employees in an appropriate bargaining unit, and every 120 days for employees in the bargaining unit who are not newly hired employees. The information shall be kept confidential by the labor organization and its employees or officers.

(H) An exclusive representative shall have the right to use the city's electronic mail system to communicate with the employees in the bargaining unit regarding:

(1) Collective bargaining, including the administration of collective bargaining agreement;

(2) The investigation of grievances or other disputes relating to employment relations; and

(3) Matters involving the governance or business of the labor organization.

(Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-7 DETERMINATION OF REPRESENTATION.

(A) Any employee organization may file a written request with the Board asserting that a majority of the members of a bargaining unit of the city desires to be represented by it for the purpose of collective bargaining and asking to be recognized as the exclusive bargaining representative. The request shall include a demonstration of support of at least 30% of the employees in the bargaining unit by means of a dated membership list or signed and dated membership cards of those employees desiring representation. Notice of the request shall be posted on the next working day following the filing of the request, by the City Human Resources Department in a place conspicuous to the city employees in the bargaining unit.

(B) Other employee organizations may file with the Board a written claim, within ten days after the posting of the notice of the request as specified in division (A) above, showing a demonstration of support of at least 30% of the employees in the bargaining unit by means of a dated membership list or signed and dated membership cards of those employees desiring representation. Notice of this claim shall also be posted on the next working day following the filing of the claim, by the City Human Resources Department in a place conspicuous to the city employees in the bargaining unit.

(C) If an employee organization wishes to solicit membership cards from city employees who are not in an existing bargaining unit, upon request, the Mayor shall provide a list of the requested employees to the employee organization. If the Board finds that the employee organization subsequently presents a valid demonstration of support from 50% of the employees, plus one additional employee, in the proposed unit, and that no other employee organization has filed a written claim under division (B) of this section, the Board shall certify the employee organization as the exclusive representative of the bargaining unit.

(D) If the Board does not certify the organization as the exclusive representative under division (C) of this section, the Board shall take one of the following actions:

(1) Review the employee organization's showing of interest and resolve any disputes over whether the employee organization has presented a valid demonstration of support from 50% of the employees, plus one additional employee, in an appropriately constituted bargaining unit. If the Board finds the employee organization's demonstration of support does not exceed 50% of the employees in an appropriate bargaining unit, the employee organization shall have five additional working days to submit supplemental demonstration of support. If the Board determines that a majority of city employees in an appropriately constituted bargaining unit support representation by the employee organization for the purpose of collective bargaining as provided for in this article, the Board shall certify that employee organization as the exclusive representative for the bargaining unit; or

(2) If the employee organization has demonstrated support from at least 30% of the employees in the bargaining unit, but less than a majority of the employees in the bargaining unit, the Board shall call and hold a representation election within 45 days from the date of the posting of the notice to determine whether an employee organization shall be the exclusive representative for the unit.

(3) Neither an election nor certification by a showing of interest shall occur if:

(a) There is currently in effect a lawful written agreement between the city and an exclusive bargaining representative for the bargaining unit involved; or

(b) Within the preceding 12 months there has been held a representation election or a decertification election for the

bargaining unit; or

(c) In the opinion of the Board after holding such hearing as may be appropriate, the bargaining unit described in the request for representation is not an appropriate unit in accordance with this article, or that such appropriateness has not yet been determined by the Board. If the Board subsequently determines that the requested bargaining unit is appropriate, the Board shall then certify the employee organization's showing of support or call and hold a representation election as provided above.

(4) In the event an employee organization fails to be certified as the exclusive bargaining representative after a showing of interest and/or election, employees in that bargaining unit may be included in an alternate bargaining unit for the purposes of a new organizational effort by that employee organization. Each such alternate unit shall be in itself an appropriate bargaining unit.

(E) The Board shall call and hold all elections within the time limits established by this article. The ballot shall contain the name of any labor organization submitting a petition containing signatures of at least 30% of the city employees in the appropriate bargaining unit. The ballot shall also contain a provision allowing city employees to indicate whether they do not desire to be represented by a labor organization. An election shall only be valid if 40% of the eligible employees in the bargaining unit vote in the election.

(F) *Election disputes shall be resolved by the Board.*

(1) In the event of an election involving more than one employee organization, wherein no choice on the ballot receives the vote of a majority of the city employees voting, then and in such event a runoff election shall be held within 30 days with a choice consisting of the two choices receiving the largest number of votes cast. The determination of representative status in such runoff election shall be governed by the provisions set forth in division (D) above.

(G) The exclusive bargaining representative shall represent all employees covered by the terms of the collective bargaining agreement.

(H) The decertification of any employee organization which has been recognized as the exclusive bargaining representative of employees in an appropriate bargaining unit may be affected by the filing of a written request for decertification supported by a showing that 30% of the employees in the bargaining unit seek to have a decertification election. If the showing of interest in support of such a petition is sufficient, the Board shall call and hold a decertification election within 45 days from the date of the receipt of the request. If a majority of the city employees in the bargaining unit vote in favor of decertification of an employee organization, the Board shall decertify that employee organization as the exclusive bargaining representative for the bargaining unit.

(I) No decertification election shall be held if within the preceding 12 months the Board has held a representation election or a decertification election for the bargaining unit.

(J) No petition for representation or decertification shall be entertained by the Board unless such petition and the requisite showing of support therefor shall have been filed with the Board during the 30-day period between the 120th day and the 90th day immediately preceding the expiration date of the contract.

(K) The existence of an exclusive bargaining representative shall not prevent city employees in or out of the bargaining unit from taking their grievances to their supervisor or the City Human Resources Department. Any action by the city government in connection with grievance handling shall not be inconsistent with this article or the terms and conditions of employment established by an exclusive bargaining representative and the city for the bargaining unit involved.

('74 Code, § 2-2-6) (Ord. 153-1971; Am. Ord. 69-1973; Am. Ord. 4-1977; Am. Ord. 4-2001; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-8 DUTY TO BARGAIN.

The city government and any employee organization recognized as the exclusive representative for a unit, through their designated agents, shall bargain concerning hours, salary, wages, working conditions and other terms and conditions of employment not in violation of law or local ordinance and not in conflict with the provisions of §§ 3-1-1 et seq., the Merit System establishing classified and unclassified service, and methods of initial employment, provided, however, that the provisions of a collective bargaining agreement which has been ratified and approved by the Mayor shall, where in conflict with any other provision of §§ 3-1-1 et seq. govern. This duty includes an obligation to confer in good faith with respect to terms and conditions of employment.

('74 Code, § 2-2-7) (Ord. 153-1971; Am. Ord. 218-1972; Am. Ord. 4-1977; Am. Ord. 54-1978; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-9 DETERMINATION OF BARGAINING UNITS.

(A) The appropriateness of the bargaining unit will be investigated and determined by the Board.

(B) Appropriate bargaining units shall be established on the basis of occupational groups or a clear and identifiable community of interest in employment terms, employment conditions, and related personnel matters among the employees involved. Occupational groups shall generally be identified as blue collar, secretarial clerical, technical, paraprofessional, professional, corrections, firefighters, and police officers. Department, craft, or trade designations other than as specified above shall not determine bargaining units. The parties, by mutual agreement and approval of the Board, may further

consolidate occupational groups.

(C) The essential factors in determining appropriate bargaining units shall include the principles of efficient administration of government, the history of collective bargaining, and the assurance to employees of their rights guaranteed by the ordinance.

(D) A bargaining unit shall not include both professional and non-professional city employees nor shall it include supervisors, or confidential employees.

('74 Code, § 2-2-8) (Ord. 153-1971; Am. Ord. 69-1973; Am. Ord. 4-1977; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 3-2-10 PROHIBITED PRACTICES.

(A) The city government is prohibited from:

(1) Discriminating against an employee in regard to the terms and conditions of employment because of the employee's membership in a labor organization.

(2) Interfering with, restraining or coercing city employees in the exercise of their rights under this article or use public funds to influence the decision of its employees regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization; provided however, that this subsection does not apply to activities performed or expenses incurred:

(a) addressing a grievance or negotiating or administering a collective bargaining agreement;

(b) allowing a labor organization or its representatives access to the city's facilities or properties;

(c) performing an activity required by federal or state law or by a collective bargaining agreement;

(d) negotiating, entering into or carrying out an agreement with a labor organization;

(e) paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement; or

(f) representing the city in a proceeding before the board or a local board or in a judicial review of that proceeding;

(3) Interfering with or dominating the formation or administration of any employee organization, interfering with the selection of an agent or representative for bargaining or adjustment of grievances;

(4) Discrimination in regard to hiring or conditions of employment for the purpose of encouraging or discouraging membership in any employee organization;

(5) Refusing to negotiate in good faith with a certified exclusive bargaining representative of an employee organization;

(6) Discharging or discriminating against a city employee because he has signed or filed an affidavit, petition, grievance, complaint, or charges or given testimony under the provisions of this article or because a city employee is forming, joining, or choosing to be represented by a labor organization;

(7) Violating a written agreement in force which was negotiated under the provisions of this article;

(8) Causing, instigating, or engaging in an employee lockout;

(9) Refusing or failing to comply with a provision of this article or the Board’s Rules.

(B) An employee organization, a group of city employees, or a city employee individually is prohibited from:

(1) Interfering with, restraining, or coercing employees in the exercise of their designated duties or their rights under this article;

(2) Restraining, coercing, or interfering with the city in the selection of its agent for bargaining or for adjustment of grievances;

(3) Causing or attempting to cause a city supervisor to discriminate against a city employee because of membership or lack of membership in an employee organization;

(4) Refusing to negotiate and/or conduct business in good faith with the designated representative of the city government.

(5) Violating the provisions of any written agreement in force;

(6) Picketing the homes or private businesses of officials, administrative officers, or representatives of city government;

(7) Engaging in, inducing, or encouraging any city employee or group of employees to engage in a strike, a work stoppage, or work slowdown;

(8) Discriminating against a city employee with regard to labor organization membership, race, color, religion, creed, age, sex, or national origin;

(9) Refusing or failing to comply with a provision of this article or the Board’s Rules.

(C) It shall be a prohibited practice for any elected or appointed official of the city government or for any employee organization, group of city employees or individual city employee to attempt to influence negotiations or to interfere with the normal progress of negotiations between the duly authorized negotiating teams of the city government and of the employee organization.

(D) Any controversy concerning prohibited practices will be submitted to the Board within the time period required by the Board's Rules. Proceedings against the party alleged to have committed a prohibited practice shall be commenced by service upon the accused party and the Board of a written notice together with a copy of the charges. The accused party shall have ten work days within which to serve on the opposing party and the Board a written answer to such charges.

('74 Code, § 2-2-9) (Ord. 153-1971; Am. Ord. 4-1977; Am. Ord. 4-2001; Am. Ord. 2020-045; Am. Ord. 2021-019)

§ 9-4-4-1 SHORT TITLE.

Sections 9-4-4-1 et seq. may be cited as the "Emergency Medical Services (EMS) Ordinance."

('74 Code, § 6-28-1) (Ord. 38-1989; Am. Ord. 12-1991; Am. Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-2 FINDINGS AND PURPOSE.

(A) The City Council finds that:

(1) The EMS system provides a satisfactory level of service to the community at present.

(2) The EMS system should be based on objectively stated and measurable performance standards and monitored by the Authority Having Jurisdiction (hereinafter "AHJ").

(3) The 911 Emergency System is a basic governmental function providing emergency responses through the City Police and City Fire Departments.

(4) The City, through its 911 System, is the focal point for the receipt of requests for emergency transport of sick and injured persons within the City.

(5) The City, through its 911 System, is the focal point for the dispatch of responses to requests for emergency transport of sick and injured persons within the city.

(6) In order to provide satisfactory emergency transport of sick and injured persons within the City, it is necessary to establish a procedure for ambulance transport service under contract with the City.

(7) The provisions of this Ordinance and any regulations promulgated pursuant to this Ordinance are in addition to those standards and/or requirements promulgated by the state agencies as the standards and/or requirements for ambulance services and prehospital providers, which as minimum standards may not be sufficient for the requisite standard of care in the city.

(8) The EMS system should ultimately be a regional system to include the City, County, and other governmental entities located within the county.

(B) The purposes of §§ 9-4-4-1 et seq. are:

(1) To serve the community through the promotion of clinical excellence, reliable response time performance, long range stability of service, and cost containment of the EMS system within the city; and

(2) To protect the public safety and health through prehospital emergency care and to ensure consistency of ambulance transport services within the city; and

(3) To establish reasonable rates for cost recovery in dispatching functions, consumable medical supplies, and staff time of personnel assisting the contractor(s) in the performance of transport duties through contractual agreements with the City.

('74 Code, § 6-28-2) (Ord. 38-1989; Am. Ord. 12-1991; Am. Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-3 DEFINITIONS.

For the purpose of §§ 9-4-4-1 et seq., the following definitions shall apply unless the context clearly indicates or requires a different meaning. The word ***SHALL*** is always mandatory and not merely directory.

911 EMERGENCY SYSTEM. A publicly supported and funded system for delivering EMS, public fire protection, and law enforcement.

ADVANCED LIFE SUPPORT (ALS). Advanced prehospital and interfacility care and treatment including basic and intermediate life support, as prescribed by state regulation, which may be performed only by a person licensed as a Paramedic by the Primary Care and Emergency Medical Services Bureau of the Public Health Systems Division of the New Mexico Department of Health and operating under medical direction.

AMBULANCE. Any vehicle, including motor vehicles, watercraft, and aircraft, assigned, used, or intended to be used to transport sick or injured persons, and operated by an ambulance service certificated as such by the New Mexico Public Regulation Commission.

AMBULANCE TRANSPORT PROVIDER. Any appropriately certified and contracted person providing emergency transport of sick or injured persons by ambulance within the city.

BASIC LIFE SUPPORT (BLS). Prehospital and interfacility care and treatment, as prescribed by state regulation, which can be performed by all appropriately licensed Emergency Medical Technicians, as provided by state law.

BOARD. The Medical Control Board.

BUREAU. The Emergency Medical Services Bureau of the Community Health Systems Division of the New Mexico Department of Health.

CHIEF. The Chief of the Albuquerque Fire Department.

CITY. The City of Albuquerque as a govern-mental entity.

city. The City of Albuquerque as geographically defined.

COMMISSION. The County Commission of Bernalillo County, New Mexico.

CONTRACTOR. A provider or providers of emergency ambulance transport services who is appropriately certified and bound by contractual agreement to the City to engage in ambulance services.

COUNCIL. The governing body of the City of Albuquerque.

DRIVER. An individual who is qualified as an ambulance or rescue vehicle driver.

EMERGENCY MEDICAL DISPATCHER. A person who is trained and certified, pursuant to state law, to receive calls for emergency medical assistance, pro-vide dispatch life support (DLS), pre- arrival medical instructions, dispatch emergency medical assistance, and coordinate its response.

EMERGENCY MEDICAL SERVICES (EMS). The services rendered by licensed Emergency Medical Technicians, certified Emergency Medical Services First Responders or Emergency Medical Dispatchers in response to an individual's need for immediate medical care in order to prevent loss of life or aggravation of physical or psychological illness or injury.

EMERGENCY MEDICAL SERVICES SYSTEM (EMS SYSTEM). A coordinated system of health care delivery that includes centralized access and emergency medical dispatch, trained first responders, medical-rescue services, ambulance services, hospital emergency departments, and specialty care hospitals that respond to the needs of the acutely sick and injured.

EMERGENCY MEDICAL TECHNICIAN (EMT). A health care provider, licensed as such by the Emergency Medical Services Bureau of the Community Health Systems Division of the New Mexico Depart-ment of Health.

MAYOR. The Chief Executive of the City of Albuquerque.

MEDICAL CONTROL. Supervision provided by or under the direction of physicians to providers by written protocol or direct communications.

MEDICAL DIRECTION. Guidance or supervision provided by a physician, licensed to practice in New Mexico and Board certified in emergency medicine with current experience in the practice of emergency medicine, including authority over and responsibility for emergency medical dispatch, direct patient care and transport of patients, arrangements for medical control, and all other aspects of patient care delivered by a provider.

MEDICAL DIRECTOR. A physician, licensed to practice in New Mexico and Board certified in emergency medicine with current experience in the practice of emergency medicine, who is responsible for all medical aspects of an EMS system dealing with the provision of patient care as defined in the New Mexico Department of Health Regulations Governing Emergency Medical Services Medical Direction. This includes the extension of his or her license to prehospital providers; the development, implementation, and evaluation of all medical aspects of an EMS system; and other functions specified in §§ 9-4-4-1 et seq.

OPERATOR. Any person, firm, corporation, or public agency who is the owner or proprietor of EMS response vehicles.

PATIENT. An individual who is sick, injured, wounded, or otherwise incapacitated.

PREHOSPITAL PROVIDER. Any person who has the duty of caring for a sick, ill, or injured person, who is certified at the EMT-Basic level or higher and who is licensed by the State of New Mexico.

PROTOCOL. A predetermined, written medical care plan including standing orders.

RESCUE SERVICE. Any ALS and BLS service, municipal, county, or private, excluding law enforcement agencies that are not otherwise providing rescue, that is subject to being dispatched to the scene of an injury or illness to provide rescue and immediate emergency medical care.

SUBSTANTIAL FINANCIAL INTEREST. That at the present or in any year within the past two years, a person derived more than $1,000 per year income from employment by, or business dealings with, one or more EMS operators within Bernalillo County or a contracting organization of such provider.

('74 Code, § 6-28-3) (Ord. 38-1989; Am. Ord. 12-1991; Am. Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-4 STATE REGULATION.

(A) It is recognized that certain state agencies, such as the New Mexico Public Regulation Commission and the State EMS Bureau, regulate certain ambulance services and prehospital providers in the community.

(B) It is also recognized that certificates, permits, and/or licenses issued by those state agencies can be suspended and/or revoked only by those state agencies.

(C) It is also recognized that the establishment of rates for ambulance services, certificated by the New Mexico Public Regulation Commission, is solely within the purview of the New Mexico Public Regulation Commission.

(D) It is also recognized that the State EMS Bureau regulates EMS Medical Direction for prehospital providers in the community.

(E) It is intended that any regulations promulgated pursuant to §§9-4-4-1 et seq. are in addition to those standards promulgated by the state agencies as the standards for ambulance services and prehospital providers. The standards promulgated by the state agencies are minimum standards which may not be sufficient for the requisite standard of care in the city.

(F) It is intended that the city may enter into joint powers agreements and other arrangements with governmental entities as may be necessary to carry out the purposes of §§ 9-4-4-1 et seq.

('74 Code, § 6-28-4) (Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-5 MEDICAL DIRECTOR OF THE AHJ.

(A) Shall maintain medical direction pursuant to the regulations of the Primary Care and EMS Bureau of the New Mexico Department of Health, or as otherwise provided by state law.

(B) The functions of the Medical Director of the AHJ include but are not limited to the following:

(1) Managing the day-to-day activities of the EMS system pursuant to protocols written by the Medical Control Board (hereinafter "Board").

(2) Acting to restrict all or part of an individual's patient care activities in accordance with existing state regulations.

(3) Liaison with, oversee, and coordinate the activities of the EMS providers.

(4) Taking direction from and being responsible to the Board concerning matters related to patient care and the delivery of medical services.

(5) Acting as a member and chairperson of the Board.

(6) Provides Board report to the Providers Advisory Committee.

(7) Acting as a liaison with physicians, nurses, other health care professionals, and the public at large.

(8) Auditing and overseeing medical issues as they pertain to training, quality improvement, and service delivery.

(9) Performing other duties as designated by the Fire Chief or his designee.

(10) Acting as a liaison between the EMS system and local community, medical facilities, and regional/state medical directors.

(11) Providing educational opportunities when appropriate.

The Medical Director of the AHJ shall be an independent contractor and shall comply with the City purchasing ordinance.

(Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-6 MEDICAL CONTROL BOARD.

(A) *Membership and Terms.* The members shall consist of licensed physicians engaged in the practice of emergency medicine. The membership of the Board shall consist of one emergency department physician or his or her designee from each hospital organization operating a full service, 24-hour emergency department in the city. The Board shall meet no less than once every two months as determined by its membership. Members other than the Medical Director of the AHJ shall have staggered terms, the term of appointment shall be for two years, and there shall be no limit on consecutive terms. The Medical Director of the AHJ shall serve as a member and chairperson of the Board without term of appointment.

(B) *Functions.* The Board shall be responsible for all aspects of medical control related to patient care and the delivery of medical services. The Board shall meet at the call of its Chairperson. The Board shall address the following matters but not be limited to these topics:

(1) Medical control over the delivery of EMS and ambulance services including the medical control communication system.

(2) The effectiveness of the EMS dispatch communication system.

(3) Medical protocols (which are the responsibility of all Board members) to serve as the required standard of care as required by state regulation.

(C) *Medical Audits.* The Board shall perform medical audits with regard to the provision of EMS when requested by the Medical Director of the AHJ.

('74 Code, § 6-28-7) (Ord. 38-1989; Am. Ord. 12-1991; Am. Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-19-1 FINDINGS.

The City Council finds:

(A) The City of Albuquerque has unique wildland urban interface areas comprised of the Bosque Areas of the Rio Grande State Park, open space recreational areas and wildland areas that consist of 28,000 acres and over 100 miles of public-private border; and

(B) There are numerous days each year, due to high winds, lack of precipitation and low humidity when the fire danger throughout Albuquerque is high; and

(C) The Albuquerque Fire Department responds to numerous brush and Bosque fires each year within the city, responds to fires that threaten any areas for which the Fire Department has response obligation, and provides mutual aid to surrounding communities and agencies; and

(D) Should a fire occur during times of high fire danger, it may be necessary to evacuate and relocate residents of the city; and

(E) The affected areas consist of all areas within the municipal boundaries of the City of Albuquerque, and all lands for which the city has assumed control or management responsibilities by lease, easement or legal agreement.

(Ord. 18-2011)

§ 9-19-2 SHORT TITLE.

This article may be cited as the "Albuquerque Fire Restriction Ordinance".

(Ord. 18-2011)

§ 9-19-3 FIRE RESTRICTION AND BANS.

(A) The Fire Chief is hereby authorized during periods of increased fire danger in the city, both seasonal and unexpected, that pose a significant and immediate threat to the safety, health and welfare of the citizens, and a significant and immediate threat to property, to issue fire restrictions and fire bans as deemed necessary. The Fire Chief shall determine such restrictions and bans based on current fire indices, fire behavior predictions, current and expected weather conditions, drought indices, human factors, ignition factors and local factors which would put undue strain on local fire agencies should a fire start.

(B) The Fire Chief is further authorized during periods of increased fire danger to prohibit the issuance of permits and ban all open burning and other ignition sources in all public and private outdoor areas within the municipal boundaries of the City of Albuquerque, and on all lands for which the city has assumed control or management responsibilities by lease, easement or legal agreement. Examples of such open burning and other ignition sources include but are not limited to:

(1) Open burning;

(2) Bonfires;

(3) Recreational fires;

(4) The use of model rockets; and

(5) Open flame devices.

(Ord. 18-2011)

§ 9-19-4 IMPOSING, AMENDING AND LIFTING FIRE BANS AND RESTRICTIONS.

(A) A ban or stage of restriction shall be publicly declared by the Fire Chief and announced through all public and private media accessible to the Fire Chief.

(B) Once a ban or restrictions have been declared by the Fire Chief, it shall remain in effect until the Fire Chief determines that the increased fire danger has been alleviated.

(C) The Fire Chief will publicly announce that a ban or restriction has been lessened or removed using the same media used to declare the ban or restriction.

(Ord. 18-2011)

§ 9-19-5 FIRE RESTRICTION STAGES.

The following fire restriction stages are established for all open space areas in the municipal boundaries of the City of Albuquerque or owned by the City of Albuquerque. Increased fire restrictions shall be determined by the Fire Chief and shall be based upon current fire indices, fire behavior predictions, current and expected weather conditions, drought indices, human factors, ignition factors and local factors that would cause undue strain on local fire agencies in the event of a fire.

(A) *Stage I fire restrictions.* The goal of Stage I restrictions is to prevent the start of wildfires based on human activities that are known to be high risk. Based on climate and fuel conditions in the Albuquerque area, Stage I restrictions shall be in

effect at all times within all open space areas as defined herein unless a more restrictive stage has been imposed.

(B) *Stage II fire restrictions.* Stage II restrictions will be imposed when the threat of fire danger increases from conditions requiring Stage I restrictions. This stage intensifies the restrictions from Stage I by focusing on activities that, although normally managed under permit or contract, have a relatively high risk of causing a fire to start. Stage II restrictions limit the activities of contractors, permittees and other wildlands users in open space areas. The costs and benefits of imposing Stage II restrictions upon such contractors, permittees and wildlands users and the general public will be taken into account by the Fire Chief prior to determining to impose Stage II restrictions.

(C) *Stage III closure.* Stage III results in the closure of specific open space areas. This stage will be implemented when ongoing emergencies pose a risk to the health and welfare of the public or when the ability to mitigate risks using Stage I or II restrictions is no longer viable. The need to protect the public at this stage outweighs the impacts of implementing a partial or complete closure.

(Ord. 18-2011)

ARTICLE 20: FIREWORKS

Section

§ 9-20-1 FINDINGS.

The Council finds:

(A) Pursuant to Section 60-2C-7 NMSA 1978, Permissible Fireworks, a municipality may regulate or prohibit the sale and use of fireworks known as aerial devices and ground audible devices.

(B) Fireworks that are considered "safe and sane" are those that do not fly or explode. Aerial devices and ground audible devices are not "safe and sane" firework devices. Once ignited, aerial devices (aerial shell kit- reloadable tubes, aerial spinners, helicopters, mines, missile-type rockets, multiple tube devices, roman candles, shells, and stick-type rockets) take an unpredictable flight pattern, and pose a significant fire hazard to vegetation and structures. They also possess a considerable injury potential to the user and general public. Ground audible devices (chasers and fire crackers) are disturbing to the public peace and possess a considerable injury potential to the user and general public.

(C) Should the city experience a fire that burns out of control in the Bosque or other open space areas, the flora and fauna in those protected areas are at great risk of sustaining devastating loss and/or destruction.

(D) Should the city experience a fire that burns out of control in populated areas, it may be necessary to evacuate and relocate affected residents.

(E) The 4th of July weekend presents a greatly increased fire risk because of the widespread use of fireworks.

(F) The outdoor recreation program for model rocketry is considered a great educational opportunity for city youths. The rocketry program has prepared young participants with lifelong skills such as, persistence, reading instructions, following directions, teamwork and basic science. Model rocket launches under this program are conducted with safety as a priority, under strict adult supervision, and only as permitted by the Fire Department.

(Ord. 2012-022; Am. Ord. 2015-030)

§ 9-20-2 PROHIBITIONS.

The following acts are prohibited within the city:

(A) The sale and/or use of aerial devices within the municipal limits of Albuquerque. Aerial devices are defined as: aerial shell kit-reloadable tubes, aerial spinners, helicopters, mines, missile-type rockets, multiple tube devices, roman candles, shells, and stick- type rockets;

(B) The sale and/or use of ground audible devices within the municipal limits of Albuquerque. Ground audible devices are defined as: chasers and fire crackers; and

(C) The use of any fireworks within open space areas as defined in the Albuquerque Fire Restriction Ordinance, §§9-19-1 et seq. ROA 1994.

(Ord. 2012-022) Penalty, see § 9-20-99

§ 9-20-3 USE OF PERMISSIBLE FIREWORKS.

The use of any permissible fireworks not prohibited by this article should be confined to areas that are paved or barren or that have a readily accessible source of water for use by the homeowner or the general public.

(Ord. 2012-022)

§ 9-20-4 EXEMPTION.

Nothing within this article shall prohibit public displays of fireworks as defined in the Fire Code as adopted in §§14-2-1 et seq. ROA 1994, so long as those displays are in strict conformance with the requirements and conditions for public displays as set forth in that code and as approved by the City Fire Chief. Furthermore, nothing within this article shall prohibit the building and launching of model rockets as part of the city summer rocketry program while fire restrictions and bans are issued, provided the launching of rockets is accomplished safely and only as permitted and inspected by the Albuquerque Fire Department.

(Ord. 2012-022; Am. Ord. 2015-030)

§ 9-20-99 PENALTY.

Any individual, firm, partnership or other entity found violating this article shall, upon conviction, be subject to a fine not exceeding $500 or by imprisonment not exceeding 90 days or both. Each separate violation shall constitute a separate offense and upon conviction, each day of violation shall constitute a separate offense.

(Ord. 2012-022)

120 N.M. 562
Supreme Court of New Mexico.

STATE of New Mexico ex rel. Guy CLARK, Max Coll, and George Buffett, Petitioners,
v.
The Hon. Gary JOHNSON, Governor of the State of New Mexico, Respondent.

No. 22861
|
July 13, 1995.

Synopsis
Two state legislators and a voter and taxpayer sought writ of mandamus or prohibition and declaratory judgment to preclude governor from implementing gaming compacts and revenue-sharing agreements entered into with various Indian tribes and pueblos which would leave permitted Class III gaming activities on Indian lands under Indian Gaming Regulatory Act (IGRA). The Supreme Court, Minzner, J., accepted original jurisdiction and held that: (1) standing would be conferred on basis of fundamental importance of constitutional issues involved; (2) allegations supported use of prohibitory mandamus; (3) tribes and pueblos were not indispensable parties; (4) compacts authorized gaming that state law did not permit; (5) state constitutional separation of powers required legislative approval or ratification of compacts otherwise in conflict with gambling statutes; (6) governor was not a "state department or agency" within meaning of Joint Powers Agreement Act, which thus did not provide authority for compacts and revenue-sharing agreements; (7) fact that compacts had law enforcement provisions did not bring all of their terms within scope of Mutual Aid Act; (8) IGRA did not purport to expand state gubernatorial power and, thus, governor's power to negotiate and sign compacts derived from State Constitution and statutes; and (9) compacts were therefore without legal effect and did not exist to be implemented.

So ordered.

Attorneys and Law Firms

****14 *565** Victor R. Marshall & Associates, P.C., Victor R. Marshall, Alexis H. Johnson, Albuquerque, for petitioners.

Sutin, Thayer & Browne, P.C., Jonathan B. Sutin, Albuquerque, for respondent.

****15 *566** *OPINION*

MINZNER, Justice.

{1} Petitioners filed a verified petition for writ of mandamus or writ of prohibition and declaratory judgment from this Court directed at Respondent, who is the Governor of the State of New Mexico. Attached to the petition was a copy of the "Compact and Revenue Sharing Agreement" entered into by the Governor of New Mexico with the Governor of Pojoaque Pueblo. The petition alleges that the Governor of New Mexico has entered into similar compacts and revenue-sharing agreements with the Presidents of the Jicarilla and Mescalero Apache Tribes, as well as the Governors of Acoma, Isleta, Nambe, Sandia, Santa Ana, Santa Clara, San Felipe, San Ildefonso, San Juan, Taos, and Tesuque Pueblos pursuant to the Indian Gaming Regulatory Act (the Act or the IGRA). *See* 25 U.S.C.S. §§ 2701–2721 (Law.Co-op.Supp.1995).

{2} Petitioners generally contend that the Governor of New Mexico lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution. *See* N.M. Const. art. III, § 1; *see also State ex rel. Stephan v. Finney,* 251 Kan. 559, 836 P.2d 1169 (1992) (per curiam) (*Finney I*). Petitioners sought an order that would preclude the Governor of New Mexico from implementing the compacts and revenue-sharing agreements he has signed. *Cf. State ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977) (state highway engineer brought mandamus proceeding seeking an order directing the Governor to cease, desist, and refrain from removing or transferring petitioner or interfering with performance of his duties). This Court set the matter for hearing, *see* SCRA 1986, 12–504(C)(2) (Repl.Pamp.1992), but on motion of the Governor of New Mexico we vacated the original hearing date in order to give the Governor an opportunity to obtain counsel and to file a written response. After the Governor filed his response, Petitioners filed a brief, and the matter came before this Court for oral argument. Following oral argument, the matter was taken under advisement. *See* SCRA 12–504(C)(3)(d). Having determined that Petitioners' pleadings support an order granting a peremptory writ, we now grant that relief and explain our ruling. *See* SCRA 12–504(C)(3)(c).

BACKGROUND

{3} Congress enacted the IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In *Cabazon Band,* the Supreme Court upheld an Indian tribe's right to conduct bingo games free from interference by the State of California. *Id.* The *Cabazon Band* decision rested on the principle that Indian tribes are sovereign entities and that federal law limits the applicability of state and local law to tribal Indians on reservations. *Id.* at 207, 107 S.Ct. at 1087. The IGRA also recognized the sovereign right of tribes to regulate gaming activity on Indian lands. However, with the IGRA, Congress attempted to strike a balance between the rights of tribes as sovereigns and the interests that states may have in regulating sophisticated forms of gambling. *See* S.Rep. No. 446, 100th Cong., 2d Sess. 13 (1988).

{4} The IGRA establishes three classes of gambling: Class I gaming, social or ceremonial games; Class II gaming, bingo and similar games; and Class III gaming, all other gambling, including pari-mutuel horse racing, casino gaming, and electronic versions of Class II games. *Id.* at 3. The IGRA provides for a system of joint regulation of Class II gaming by tribes and the federal government and a system for compacts between tribes and states for regulation of Class III gaming. *See id.* at 13. The IGRA establishes a National Indian Gaming Commission as an independent agency with a regulatory role for Class II gaming and an oversight role with respect to Class III gaming. 25 U.S.C.S. §§ 2704, 2706. Under the IGRA, Class III gaming is lawful on Indian lands only if such activities are located in a state that "permits such gaming for any purpose by any person, organization, or entity, and [is] conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State." 25 U.S.C.S. § 2710(d)(1).

****16** ***567** {5} The IGRA provides that an Indian tribe may request negotiations for a compact, and that upon receipt of such a request, a state must negotiate with the tribe in good faith. *See* 25 U.S.C.S. § 2710(d)(3)(A). If a state and a tribe fail after negotiation and then mediation to agree on a compact, the Secretary of the Interior is authorized to prescribe procedures that are consistent with the proposed compact selected by the mediator, the IGRA, and the laws of the state. *See* 25 U.S.C.S. § 2710(d)(7)(B)(vii)(I).

{6} Litigation under the IGRA has resulted in a number of published opinions. These cases have arisen most frequently in federal court on suits brought by Indian tribes to compel negotiation. *See, e.g., Ponca Tribe of Oklahoma v. Oklahoma,* 37 F.3d 1422 (10th Cir.) (Indian tribes in New Mexico, Oklahoma, and Kansas sought injunctions requiring negotiation), *petition for cert. filed,* 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994) (Nos. 94–1029 & 94–1030). In these cases, one issue has been the effect of the Tenth and Eleventh Amendments of the United States Constitution.

{7} In *Ponca Tribe,* the Tenth Circuit affirmed district court decisions dismissing the tribes' suits against the Governors of Oklahoma and New Mexico. The Court of Appeals concluded that neither the Tenth nor the Eleventh Amendment barred the tribes' actions against the states, but determined that injunctive relief against the governors themselves was barred.

> In light of our Tenth Amendment analysis, IGRA does not require the states to regulate Class III gaming by entering into tribal-state compacts. Instead, the only obligation on the state is to negotiate in good faith. The act of negotiating, however, is the epitome of a discretionary act. How the state negotiates; what it perceives to be its interests that must be preserved; where, if anywhere, that it can compromise its interests—these all involve acts of discretion. Thus, injunctive relief against the governors is barred under *Ex parte Young* [, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)]....
>
> Additionally, the tribes' suits against the Governors are in reality suits against the respective states and thus not authorized under the doctrine of *Ex parte Young.*

Id. at 1436 (citations omitted).

{8} In November 1994, Respondent was elected Governor of New Mexico and formally assumed office on January 1, 1995. As part of his transition team, he appointed a negotiator to meet with various Indian tribal representatives to develop compacts and revenue-sharing agreements. The negotiations were successful. An affidavit by the Governor of San Felipe Pueblo, attached to the response of the Governor of New Mexico, indicates that the compact he signed was circulated in draft form to the media and members of the state legislature. The earliest of the compacts is dated February 13; the latest is dated March 1. The Governor of New Mexico's response to the petition also indicates that the Secretary of the Interior approved eleven of the compacts on March 22, 1995. The petition was filed on April 20. Two additional compacts were approved effective May 15, 1995.

{9} The compact with Pojoaque Pueblo is titled "A Compact Between the Pojoaque Pueblo and the State of New Mexico Providing for the Conduct of Class III Gaming." The Governor of New Mexico does not dispute that the compact and revenue sharing agreement with Pojoaque Pueblo are representative of the other compacts and agreements he signed. Because they are the only documents in the record, we will discuss them specifically, but also as illustrative of all the other compacts and agreements the Governor of New Mexico has signed.

{10} The Recitals in the Compact include the following:

> WHEREAS, the State permits charitable organizations to conduct all forms of gaming wherein, for consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, including but not limited to all forms of casino-style games, and others, pursuant to § 30–19–6, NMSA 1978 (1994 Repl.Pamp.); and
>
> WHEREAS, the State also permits video pull-tabs and video bingo pursuant to §§ 60–2B–1 to –14, NMSA 1978 (1991 Repl.Pamp.), ****17 *568** *Infinity Group, Inc. v. Manzagol,*, 118 N.M. 632, 884 P.2d 523 (1994); and
>
> WHEREAS, the State permits pari-mutuel wagering pursuant to § 60–1–1 to –26, NMSA 1978 (1991 Repl.Pamp.) and §§ 60–2D–1 to –18, NMSA 1978 (1991 Repl.Pamp.); and
>
> WHEREAS, such forms of Class III Gaming are, therefore, permitted in the State within the meaning of the IGRA, 25 U.S.C. § 2710(d)(1)(B); and
>
> ....
>
> WHEREAS, a Compact between the Tribe and the State for the conduct of Class III Gaming on Indian Lands will satisfy the State's obligation to comply with federal law and fulfill the IGRA requirement for the lawful operation of Class III Gaming on the Indian Lands in New Mexico....

{11} The compact further provides as follows:

> The Tribe may conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all Class III Gaming, that, as of the date this Compact is signed by the Governor of the State is permitted within the State for any purpose by any person, organization or entity, such as is set forth in the Recitals to this Compact[.]

{12} Other recitals describe the Governor's power to enter into the compact under the IGRA. They are:

> WHEREAS, the Joint Powers Agreements Act, §§ 11–1–1 to –7, NMSA 1978 (1994 Repl.Pamp.), authorizes any two or more public agencies by agreement to jointly exercise any power common to the contracting parties (§ 11–1–3), and defined "public agency" to include Indian tribes and the State of New Mexico or any department or agency thereof (§ 11–1–2(A)); and
>
> WHEREAS, the Mutual Aid Act, §§ 29–8–1 to –3, NMSA 1978 (1994 Repl.Pamp.), authorizes the State and any Indian tribe to enter into mutual aid agreements with respect to law enforcement; and
>
> WHEREAS, Article V, § 4 of the Constitution of the State of New Mexico provides that "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."

{13} These recitals indicate that in entering the compact, both the State and Tribal Governors believed that the Governor of New Mexico was authorized to bind the State of New Mexico with his signature. In challenging the Governor's actions, Petitioners have relied on the Kansas Supreme Court per curiam decision in *Finney I.* There the Kansas Supreme Court held that:

> [M]any of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws. The Kansas Constitution grants such power exclusively to the legislative branch of government ... we conclude the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative

> approval of the compact, the Governor has no power to bind the State to the terms thereof.

Id., 836 P.2d at 1185. For the reasons that follow, we conclude that New Mexico law is similar.

MANDAMUS

{14} We initially consider whether, in light of the procedural posture of this case, a writ of mandamus is an appropriate remedy. Specifically, we examine three subissues: (1) whether Petitioners have standing to bring this action; (2) whether this action is properly before this Court in an original proceeding; and (3) whether a prohibitive writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official to act.

{15} In the case of *State ex rel. Sego v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975 (1974), a state senator sought a writ of mandamus to compel the Governor and other officials to treat as void certain partial vetoes. In considering the petitioner's standing to bring that action, we said:

> [I]t has been clearly and firmly established that even though a private party may not have standing to invoke the power of this ****18 *569** Court to resolve constitutional questions and enforce constitutional compliance, this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.

Id. at 363, 524 P.2d at 979. Accordingly, we did not need to consider whether the petitioner's status as a legislator, taxpayer, or citizen conferred standing in that case. In the present proceeding, two of the Petitioners are state legislators, and all three are voters and taxpayers. However, as in *Sego,* we need not consider whether those factors independently confer standing to bring this action because, as in *Sego,* the issues presented are of "great public interest and importance." *Id.* Petitioners assert in the present proceeding that the Governor has exercised the state legislature's authority. Their assertion presents issues of constitutional and fundamental importance; in resolving those issues, we will contribute to this State's definition of itself as sovereign. "We simply elect to confer standing on the basis of the importance of the public issues involved." *Id.* More limited notions of standing are not acceptable. *See id.; Hutcheson v. Gonzales,* 41 N.M. 474, 491–94, 71 P.2d 140, 151–52 (1937); *see generally* Charles T. DuMars & Michael B. Browde, *Mandamus in New Mexico,* 4 N.M.L.Rev. 155, 170–72 (1974). We conclude that Petitioners have standing.

{16} We next consider whether this case should more properly be brought in district court or whether it is properly before this Court in an original proceeding. Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. In seeming contradiction, NMSA 1978, Section 44–2–3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:

> has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction ... [and SCRA 12–504(B)(1)(b)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."

DuMars & Browde, *supra,* at 157 (quoting the predecessor to SCRA 1986, 12–504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." *Thompson v. Legislative Audit Comm'n,* 79 N.M. 693, 694–95, 448 P.2d 799, 800–01 (1968).

{17} As we have said, this proceeding implicates fundamental constitutional questions of great public importance. Moreover, an early resolution of this dispute is desirable. The Governor asserts, and it has not been disputed, that several of the compacting tribes are in the process of establishing and building gambling resorts and casinos. These projects entail the investment of large sums of tribal money. Capital financing for these projects may well depend upon resolution of the issue presented in this case. Moreover, the relevant facts are virtually undisputed, we perceive no additional factual questions that could be or should be answered in the district court, and the purely legal issues presented would

have come eventually to this Court even if proceedings had been initiated in the district court. Accordingly, we conclude that the exercise of our original constitutional jurisdiction is appropriate in this case.

{18} The final procedural issue is whether mandamus, which normally lies to compel a government official to perform a non-discretionary act, is a proper remedy by which to enjoin the Governor from acting unconstitutionally. This Court has never "insisted upon ... a technical approach [to the application of mandamus] where there is involved a question of great public import," *Thompson,* 79 N.M. at 694, 448 P.2d at 800, and where other remedies might be inadequate to address that question.

{19} Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood. One nineteenth century ****19 *570** New Mexico judge characterized the authority to prohibit unlawful official conduct as implicit in the nature of mandamus. In the case of *In re Sloan,* 5 N.M. 590, 25 P. 930 (1891), the district court enjoined a board of county commissioners from certifying certain candidates as winners of a contested election and ordered the board to instead certify other candidates. The Territorial Supreme Court upheld the district court's granting of both a writ of mandamus and injunctive relief. Justice Freeman wrote: "It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining power to prevent a corresponding violation of duty." *Id.* at 628, 25 P. at 942 (Freeman, J., concurring). More recent cases illustrate Justice Freeman's insight. This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action. *See Stanley v. Raton Bd. of Educ.,* 117 N.M. 717, 718, 876 P.2d 232, 233 (1994); *State ex rel. Bird,* 91 N.M. at 282, 573 P.2d at 216; *State ex rel. Sego,* 86 N.M. at 363, 524 P.2d at 979; *State ex rel. State Bd. of Educ. v. Montoya,* 73 N.M. 162, 170, 386 P.2d 252, 258 (1963); *cf. McFadden v. Jordan,* 32 Cal.2d 330, 196 P.2d 787 (1948) (en banc) (issuing writ of mandamus to enjoin the secretary of state from submitting to the voters unconstitutional initiative proposal), *cert. denied,* 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1080 (1949); *Leininger v. Alger,* 316 Mich. 644, 26 N.W.2d 348 (1947) (same); Iowa Code § 661.1 (1995) (defining mandamus as either mandatory or prohibitory). "Mandamus would necessarily lie if the Governor's actions were unconstitutional...." *State ex rel. Bird,* 91 N.M. at 288, 573 P.2d at 222 (Sosa, J., dissenting) (distinguishing *Sego* as involving an unconstitutional use of the Governor's veto power).

{20} As the United States Supreme Court has observed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 2781, 77 L.Ed.2d 317 (1983). Although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature or the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution. As we said in *State ex rel. Hovey Concrete Products Co. v. Mechem,* 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer,* 104 N.M. 751, 726 P.2d 1381 (1986):

> [D]eeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.

We conclude that Petitioners' arguments raise allegations that support the use of prohibitory mandamus.

INDISPENSABLE PARTIES

{21} The Governor has argued that the Tribes and Pueblos with whom he signed the compacts and agreements are indispensable parties to this proceeding. We disagree. In a mandamus case, a party is indispensable if the "performance of an act [to be compelled by the writ of mandamus is] dependent on the will of a third party, not before the court." *Chavez v. Baca,* 47 N.M. 471, 482, 144 P.2d 175, 182 (1943). That is not the case here. Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials. Resolution of this case requires only that we

evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the compact.

****20** ***571** *GAMBLING IN NEW MEXICO AND 25 U.S.C.S. § 2710(d)(1)(B)*

{22} As an alternative to their argument that the Governor lacked authority to enter into the compact, Petitioners assert that the disputed compact violates limitations in the IGRA on the permissible scope of any gaming compact. We address this argument first because an analysis of New Mexico's gambling laws, and the public policies expressed therein, is relevant to the question of whether the Governor has infringed legislative authority in signing the compacts.

{23} Under the IGRA, Class III gaming activities are lawful on Indian lands only if such activities are conducted pursuant to a tribal-state compact and are "located in a State that permits *such gaming* for any purpose by any person, organization, or entity." 25 U.S.C.S. § 2710(d)(1)(B) (emphasis added). The Eighth and Ninth Circuits have interpreted "such gaming" to mean only those forms of gaming a state presently permits. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 41 F.3d 421, 426 (9th Cir.1994); *Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273, 279 (8th Cir.1993). For example, in *Rumsey Indian Rancheria,* the Ninth Circuit Court of Appeals held that the IGRA does not require the state to negotiate regarding one form of Class III gaming activity because the state had legalized another, albeit similar form of gaming. A federal district court made a similar determination. *See Coeur D'Alene Tribe v. Idaho,* 842 F.Supp. 1268 (D.Idaho 1994), *aff'd,* 51 F.3d 876 (9th Cir.1995).

{24} Petitioners argue that Section 2710(d)(1)(B) is not satisfied because the compact authorizes all forms of "casino-style" gaming. Although not stated in the compact, we assume this might include such games as blackjack and poker in all its forms, keno, baccarat, craps, roulette, or any other form of gambling wherein the award of a prize is determined by some combination of chance or skill. The Governor states that New Mexico permits charities to conduct all forms of gaming, including "casino-style" gaming, under the provisions of the permissive lottery exception to New Mexico's gambling laws. *See* NMSA 1978, § 30–19–6 (Repl.Pamp.1994).

{25} The question raised by Petitioners' argument is what forms of Class III gaming New Mexico "permits" within the meaning of 25 U.S.C.S. § 2710(d)(1)(B). This is ultimately a federal question. *See State of Kansas ex rel. Stephan v. Finney,* No. 93–4098–SAC, 1993 WL 192809 at *5 (D.Kan. May 12, 1993) (unpublished opinion). Nevertheless, it depends on an interpretation of New Mexico's gambling laws. *See State ex rel. Stephan v. Finney,* 254 Kan. 632, 867 P.2d 1034, 1038 (1994) (*Finney II*) (Kansas Supreme Court is proper forum to interpret use of term "lottery" in state constitution).

{26} We do not agree with the Governor's broad assertion that any and all forms of "casino-style" gaming, such as the ones we have described, would be allowed under Section 30–19–6. This provision allows charitable and other non-profit organizations to operate a "lottery" twice a year, and requires that the revenue derived be used for the benefit of the organization or for public purposes. *Id.* Neither this Court nor the Court of Appeals has construed this provision in order to decide specifically what forms of gaming or gambling the legislature may have intended to allow under this provision, and we will not undertake the task of attempting to catalogue those games now. This question has not been specifically addressed by the parties, and indeed its resolution is unnecessary to our decision in this case.

{27} It is true, as the Governor has asserted, that the statutory definition of a "lottery" in Article 19, Section 30 of the Criminal Code is extremely broad. "Lottery" is defined in the Criminal Code as "an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill." NMSA 1978, § 30–19–1(C) (Repl.Pamp.1994). However, Section 30–19–6(D) states that "nothing" in Article 19, Chapter 30 of the Criminal Code applies to any "lottery" operated by tax exempt organizations. In addition, the exception to hold a lottery for charitable purposes would in no way exempt the organization involved from other prohibitions against ****21** ***572** gambling in the Criminal Code. The general criminal prohibition against gambling in NMSA 1978, Section 30–19–2 (Repl.Pamp.1994), is applicable to both "making a bet" and participating in or conducting a lottery. Like the term "lottery," the term "bet" is also defined broadly as it relates to gambling. The term "bet" is defined 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 specified in the agreement." Section 30–19–1(B).

{28} We think that most of the forms of "casino-style" games we have described could just as easily fall within the definition and prohibition against "betting" as within the broad definition of "lottery." The question, as we see it, would be whether that form of gaming or gambling is more like "making a bet" or conducting or participating in a "lottery." If it was the former, the activity would still be illegal in all circumstances despite the effect of the permissive lottery statute. [1]

{29} Moreover, we think the term "lottery" as used in Section 30–19–6 should not receive an expansive definition and should be narrowly construed. New Mexico law has unequivocally declared that all *for-profit* gambling is illegal and prohibited, except for licensed pari-mutuel horse racing. *See* NMSA 1978, § 30–19–3 (Repl.Pamp.1994); NMSA 1978, § 60–1–10 (Repl.Pamp.1991). New Mexico has expressed a strong public policy against for-profit gambling by criminalizing all such gambling with the exception of licensed pari-mutuel horse racing. *See* § 30–19–3. The permissive lotteries allowed by Section 30–19–6 include church fair drawings, movie theater prize drawings, and county fair livestock prizes, as well as the twice-a-year provision for nonprofit organizations on which the Governor's argument depends. We think that any expansive construction of the term "lottery" in Section 30–19–6 that would authorize any of these organizations to engage in a full range of "casino-style" gaming would be contrary to the legislature's general public policy against gambling. We note that the Court of Appeals for similar reasons has rejected a broad definition of "raffles" under the Bingo and Raffle Act, NMSA 1978, §§ 60–2B–1 to –14 (Repl.Pamp.1991). *State ex rel. Rodriguez v. American Legion Post No. 99,* 106 N.M. 784, 786–88, 750 P.2d 1110, 1112–14 (Ct.App.), *cert. denied,* 106 N.M. 588, 746 P.2d 1120 (1987), *and cert. denied,* 107 N.M. 16, 751 P.2d 700 (1988); *see also American Legion Post No. 49 v. Hughes,* 120 N.M. 255, 259–60, 901 P.2d 186, 190–91 (Ct.App.1994) (rejecting broad construction of "game of chance" under the Bingo and Raffle Act), *cert. granted,* 119 N.M. 389, 890 P.2d 1321 (1995).

{30} We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances. We need not decide which forms New Mexico permits. The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy. That fact is relevant in evaluating his authority to enter into the compacts and revenue-sharing agreements. Further, even if our laws allowed under some circumstances what the compact terms "casino-style" gaming, we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer. To reach this conclusion, we first consider the separation of powers doctrine and then consider the general nature of the Pojoaque compact as representative of all of the compacts the Governor of New Mexico signed.

**22 *573 *SEPARATION OF POWERS UNDER THE NEW MEXICO CONSTITUTION*

{31} The New Mexico Constitution vests the legislative power in the legislature, N.M. Const. art. IV, § 1, and the executive power in the governor and six other elected officials, *id.* art. V, § 1. The Constitution also explicitly provides for the separation of governmental powers:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted....

N.M. Const. art. III, § 1. This provision reflects a principle that is fundamental in the structure of the federal government and the governments of all fifty states. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. *See Gregory v. Ashcroft,* 501 U.S. 452, 459, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). James Madison expressed this sentiment more than two hundred years ago when he wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." 1 Alexander Hamilton, James Madison & John Jay, *The Federalist, A Commentary on the*

Constitution of the United States No. XLVII, at 329 (1901 ed.).

{32} Despite the strict language of Article III, Section 1, this Court has previously said that "[t]he constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function." *Mowrer v. Rusk,* 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). This common sense approach recognizes that the absolute separation of governmental functions is neither desirable nor realistic. As one state court has said, separation of powers doctrine "does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government." *Sabre v. Rutland R. Co.,* 86 Vt. 347, 85 A. 693, 699 (1913). Recognizing, as a practical matter, that there cannot be absolute compartmentalization of the legislative, executive, and judicial functions among the respective branches, we must nevertheless give effect to Article III, Section 1. Accordingly, we have not been reluctant to intervene when one branch of government unduly "interfere [d] with or encroach[ed] on the authority or within the province of" a coordinate branch of government. *Mowrer,* 95 N.M. at 54, 618 P.2d at 892 (quoting *Smith v. Miller,* 153 Colo. 35, 384 P.2d 738, 741 (1963)).

{33} This Court has previously held that Article III, Section 1 mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws. *State v. Fifth Judicial Dist. Court,* 36 N.M. 151, 153, 9 P.2d 691, 692 (1932); *see also State v. Armstrong,* 31 N.M. 220, 255, 243 P. 333, 347 (1924) (recognizing that the Legislature has "the sole power of enacting law"). Our task, then, is to classify the Governor's actions in entering into the gaming compacts. Although the executive, legislative, and judicial powers are not " 'hermetically' sealed," they are nonetheless "functionally identifiable" one from another. *Chadha,* 462 U.S. at 951, 103 S.Ct. at 2784. If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer. If, on the other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority—the making of law—then the Governor has exceeded his authority.

APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS TO THE COMPACT WITH POJOAQUE PUEBLO

{34} The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law. *Cf.* ****23** ***574** *Texas v. New Mexico,* 462 U.S. 554, 564, 103 S.Ct. 2558, 2565, 77 L.Ed.2d 1 (1983) (holding that, upon approval by Congress, a compact between states becomes federal law that binds the states); *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 28, 71 S.Ct. 557, 560–561, 95 L.Ed. 713 (1951) (characterizing an interstate compact as a "legislative means" by which states resolve interstate dispute). However, that in itself is not dispositive. The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches. *See Board of Educ. v. Harrell,* 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). In *Nixon v. Administrator of General Servs.,* 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977), the United States Supreme Court said:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [the action by one branch prevents another branch] from accomplishing its constitutionally assigned functions. *United States v. Nixon,* 418 U.S. at 711–12 [94 S.Ct. at 3109–10]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

Id. (citation omitted). One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact with Pojoaque Pueblo and those of which it is representative cannot be said to be consistent with these principles.

{35} The terms of the compact with Pojoaque Pueblo give the Tribe a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement.

See Compact Between the Pojoaque Pueblo and the State of New Mexico, at 4. Arguably, even legislative change could not affect the Tribe's ability to conduct Class III gaming authorized under the original compact. The compact is binding on the State of New Mexico for fifteen years, and it is automatically renewed for additional five-year periods unless it has been terminated by mutual agreement. *Id.* at 27. Any action by the State to amend or repeal its laws that had the effect of restricting the scope of Indian gaming, or even the attempt to directly or indirectly restrict the scope of such gaming, terminates the Tribe's obligation to make payments to the State of New Mexico under the revenue-sharing agreement separately entered into between the Governor and Pojoaque Pueblo. *See* Tribal–State Revenue Sharing Agreement, ¶ 5(A). [2]

{36} We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. All of this has occurred in the absence of *any* action on the part of the legislature. While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA, *see* 25 U.S.C.S. § 2710(d)(3)(C), we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.

{37} Moreover, it is undisputed that New Mexico's legislature possesses the authority to prohibit or regulate all aspects of gambling on non-Indian lands. Pursuant to this authority, our legislature has, with narrow exceptions, made for-profit gambling a felony, ****24 *575** and thereby expressed a general repugnance to this activity. Section 30–19–3. Whether or not the legislature, if given an opportunity to address the issue of the various gaming compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a legislative policy decision. The compact signed by the Governor, on the other hand, authorizes Pojoaque Pueblo to conduct "all forms of casino-style games"; that is, virtually any form of commercial gambling. By entering into such a permissive compact with Pojoaque Pueblo and other Indian leaders, we think that the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority as this State's chief executive officer.

{38} Our conclusion that the Governor lacks authority to enter into the disputed compacts gains support from Justice Robert H. Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 634–55, 72 S.Ct. 863, 869–80, 96 L.Ed. 1153 (1952). In that case, the Supreme Court faced the issue of whether President Truman had exceeded his constitutional authority by issuing an executive order directing the Secretary of Commerce to assume control of a number of steel mills. The President issued this order during the Korean War when the mills became incapacitated by a labor dispute. President Truman justified the seizure on the grounds that (1) he was the commander in chief of the armed forces, and (2) various statutes gave the President special emergency war powers. The Court struck down the President's action, holding that it was beyond the scope of Presidential authority. *Id.* at 589, 72 S.Ct. at 867–68. Noting that the seizure was contrary to the will of Congress, Justice Jackson wrote in a famous concurring opinion:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637–38, 72 S.Ct. at 871 (Jackson, J., concurring) (footnote omitted).

{39} Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states. [3] These agreements encompass such widely diverse governmental purposes as interstate water usage and cooperation on

higher education. In every case, New Mexico entered into the compact with the enactment of a statute by the legislature. Apart from non-discretionary ministerial duties, [4] the Governor's role in the compact approval process has heretofore been limited to approving or vetoing [5] the legislation that approves the compact. This is the Governor's role with respect to all legislation passed by the legislature. *See* N.M. Const. art. IV, § 22.

{40} Residual governmental authority should rest with the legislative branch rather than the executive branch. The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue. *See Clinton v. Clinton,* 305 Ark. 585, 810 S.W.2d 923, 926 (1991). *Cf.* ****25** ***576** *Fair Sch. Fin. Council v. State,* 746 P.2d 1135, 1149 (Okla.1987) (under state constitution, a legislature may generally do "all but that which it is prohibited from doing"); *State ex inf. Danforth v. Merrell,* 530 S.W.2d 209, 213 (Mo.1975) (en banc) (state legislature "has the power to enact any law not prohibited by the constitution"); *House Speaker v. Governor,* 195 Mich.App. 376, 491 N.W.2d 832, 839 (1992) ("Any legislative power that the Governor possesses must be expressly granted to him by the constitution."). We conclude that the Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question.

NEW MEXICO STATUTORY AUTHORITY

{41} In *Willis v. Fordice,* 850 F.Supp. 523 (S.D.Miss.1994), *aff'd,* 55 F.3d 633 (1995) (No. 94–60299), the court upheld the governor's authority to enter into a gaming compact. There, however, the court specifically relied on a Mississippi statute that provides the governor with authority to transact " 'all the business of the state ... with any other state or territory.' " *Id.* at 532 (quoting Miss.Code Ann. § 7–1–13 (1972)). New Mexico has no such statute. In fact, in this case the Governor relies primarily on Article V, Section 4 of the New Mexico Constitution, which provides only that the governor shall *execute* the laws. To the extent that the Governor does rely on statutory authority, his reliance is misplaced.

{42} An analysis of the Joint Powers Agreement Act, NMSA 1978, §§ 11–1–1 to –7 (Repl.Pamp.1994), indicates that that statute does not enlarge the Governor's authority in the manner that he urges. That statute authorizes "public agencies" to enter into "agreements" with other public agencies. *Id.* § 11–1–3. The statute defines a "public agency" as "the federal government or any federal department or agency, this state, an adjoining state or any state department or agency, an Indian tribe or pueblo, a county, municipality, public corporation or public district of this state or ... any school district...." *Id.* § 11–1–2(A). The Governor's claim of authority seems to be premised upon the notion that he is a "state department or agency" within the meaning of this statute. [6] This claim is untenable. To be sure, the Joint Powers Agreement Act does authorize an agreement between the State and a sovereign Indian tribe. However, the statute expressly requires that such an agreement must be "authorized by [the public agency's] legislative or other governing bod[y]." *Id.* § 11–1–3. This language plainly mandates that the legislature must approve any agreement to which the State is a party. The statute expressly disclaims any enlargement of the authority of public agencies when it provides that agreements executed thereunder are "subject to any constitutional or legislative restriction imposed upon any of the contracting public agencies." *Id.* § 11–1–2(B). We conclude that the Joint Powers Agreement Act does not provide authority for the compacts and revenue-sharing agreements at issue.

{43} Likewise, the Mutual Aid Act, NMSA 1978, §§ 29–8–1 to –3 (Repl.Pamp.1994), does not provide authority for the compacts and revenue-sharing agreements. That statute does authorize tribal-state agreements; however, the scope of the statute is confined to "agreements ... with respect to law enforcement." *Id.* § 29–8–3. It is true that the compacts have some provisions regarding law enforcement, but this fact does not bring all of the terms within the scope of the Mutual Aid Act. The authority of an executive acting pursuant to a legislative grant of authority is limited to the express or implied terms of that grant. *See Worthington v. Fauver,* 88 N.J. 183, 440 A.2d 1128, 1140 (1982). *Cf. Rivas v. Board of Cosmetologists,* 101 N.M. 592, 593, 686 P.2d 934, 935 (1984) (an executive agency cannot promulgate a regulation that is beyond the scope of its statutory authority); *State ex rel. Lee v. Hartman,* 69 N.M. 419, 426, 367 P.2d 918, 923 (1961) (holding that a delegation of ****26** ***577** authority by the legislature must be express and provide clear statutory standards to guide the delegee). The Mutual Aid Act does not in any way pertain to gaming compacts and provides no statutory basis for the compact with Pojoaque Pueblo.

APPLICABILITY OF FEDERAL LAW

{44} The Governor argues that even if he lacked the authority under state law to enter into the compact, it is nonetheless binding upon the State of New Mexico as a matter of federal law. Along these same lines, he also argues that he possesses the authority, as a matter of *federal law,* to bind the State to the terms of the compact, irrespective of whether he has the authority as a matter of state law. We find the Governor's argument on these points to be inconsistent with core principles of federalism. The Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it. *Cf. Rapp v. Carey,* 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745, 750 (1978) (holding that the governor of New York "has only those powers delegated to him by the [state] Constitution and the statutes"). We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power. *Cf. Gregory,* 501 U.S. at 460, 111 S.Ct. at 2400 (recognizing that "[t]hrough the structure of its government ... a State defines itself as a sovereign"); *New York v. United States,* 505 U.S. 144, 176, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992) (striking down an act of Congress on the ground that principles of federalism will not permit Congress to " 'commandeer[ ] the legislative processes of the States' " by directly compelling the states to act (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981))); *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (striking down federal school gun ban on the ground that it is not substantially related to interstate commerce, and therefore unconstitutionally usurps state sovereignty).

{45} We entertain no doubts that Congress could, if it so desired, enact legislation legalizing all forms of gambling on all Indian lands in whatever state they may occur. *See Morton v. Mancari,* 417 U.S. 535, 551–52, 94 S.Ct. 2474, 2483–84, 41 L.Ed.2d 290 (1974). That is, however, not the course that Congress chose. Rather, Congress sought to give the states a role in the process. *See* S.Rep. No. 446, 100th Cong., 2d Sess. 13. It did so by permitting Class III gaming only on those Indian lands where a negotiated compact is in effect between the state and the tribe. 25 U.S.C.S. § 2710(d)(1)(C). To this end, the language of the IGRA provides that "Any State ... may enter into a Tribal–State compact governing gaming activities on the Indian lands of the Indian Tribe." *Id.* § 2710(d)(3)(B). The only reasonable interpretation of this language is that it authorizes state officials, acting pursuant to their authority held under state law, to enter into gaming compacts on behalf of the state. It follows that because the Governor lacked authority under New Mexico law to enter into the compact with Pojoaque Pueblo, the State of New Mexico has not yet entered into any gaming compact that the Governor may implement. *Cf. Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176–79, 2 L.Ed. 60 (1803) (holding that an unconstitutional act of Congress has no legal effect).

CONCLUSION

{46} Under federal law as expressed in the IGRA, Class III gaming activities are lawful on Indian land only if the State permits such gaming "for any purpose by any person, organization, or entity." The compacts negotiated and signed by the Governor authorize gaming that New Mexico law does not permit. For example, New Mexico law does not permit "all forms of casino-style games" as stated in the recitals in the compact with Pojoaque Pueblo.

{47} In addition, the New Mexico Constitution requires legislative approval or ratification of compacts that are otherwise in conflict with state gambling statutes. Under state constitutional separation of powers, the Governor may neither infringe upon legislative authority with respect to existing law nor with respect ****27** ***578** to the power of the legislature to change law in the future. Residual governmental power rests within the legislature. The specific enabling legislation on which the Governor relies is not applicable.

{48} The IGRA does not purport to expand state gubernatorial power. The Governor's power to negotiate and sign the compacts derives from the state constitution and state statutes.

{49} Based on our interpretation of state gambling laws as making casino-style gaming illegal, state constitutional law as limiting the authority of the executive branch, and the IGRA as not purporting to expand state gubernatorial power, we conclude that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.

{50} For these reasons we now issue the peremptory writ and stay. We stay all actions to enforce, implement, or enable any and all of the gaming compacts and revenue-sharing agreements executed by the Governor, and we direct the

Governor and all other state officials subject to his authority to proceed in conformity with the views of this Court expressed herein concerning (1) the legality of casino-style gaming; (2) the limitations imposed on the executive branch by Article III, Section 1 of the New Mexico Constitution; and (3) the compacts' lack of legal effect.

{51} IT IS SO ORDERED.

BACA, C.J., RAMSOM and FRANCHINI, JJ., and DONNELLY, J., court of appeals, sitting by designation, concur.

APPENDIX A: INTERSTATE COMPACTS

1. 1923 N.M.Laws, ch. 6, § 1 (now codified at NMSA 1978, § 72–15–5 (Repl.Pamp.1985)). Colorado River Compact.

2. 1923 N.M.Laws, ch. 7, § 1 (now codified at NMSA 1978, § 72–15–16 (Repl.Pamp.1985)). La Plata River Compact.

3. 1933 N.M.Laws, ch. 166 (now codified at NMSA 1978, § 72–15–19 (Repl.Pamp.1985)). Pecos River Compact. (*See Texas v. New Mexico,* 462 U.S. 554 (1983)).

4. 1937 N.M.Laws, ch. 10, § 1 (now codified at NMSA 1978, § 31–5–1 (Repl.Pamp.1984)). Compact Relating to Convicts on Probation or Parole.

5. 1939 N.M.Laws, ch. 33, § 1 (now codified at NMSA 1978, § 72–15–23 (Repl.Pamp.1985)). Rio Grande Compact.

6. 1945 N.M.Laws, ch. 51, § 1 (now codified at NMSA 1978, § 72–15–10 (Repl.Pamp.1985)). Costilla Creek Compact.

7. 1949 N.M.Laws, ch. 5, § 1 (now codified at NMSA 1978, § 72–15–26 (Repl.Pamp.1985)). Upper Colorado River Basin Compact.

8. 1951 N.M.Laws, ch. 4, § 1 (now codified at NMSA 1978, § 72–15–2 (Repl.Pamp.1985)). Canadian River Compact.

9. 1951 N.M.Laws, ch. 138, § 3 (now codified at NMSA 1978, § 11–10–1 (Repl.Pamp.1994)). Compact for Western Regional Cooperation in Higher Education.

10. 1959 N.M.Laws, ch. 112, § 1 (now codified at NMSA 1978, § 31–5–4 (Repl.Pamp.1984)). Western Interstate Corrections Compact.

11. 1967 N.M.Laws, ch. 201, § 2 (now codified at NMSA 1978, § 31–5–10 (Repl.Pamp.1984)). Interstate Compact on Mentally Disordered Offenders.

12. 1969 N.M.Laws, ch. 20, § 2 (now codified at NMSA 1978, § 18–2–20 (Repl.Pamp.1991)). Interstate Library Compact.

13. 1969 N.M.Laws, ch. 40, § 1 (now codified at NMSA 1978, § 11–9–1 (Repl.Pamp.1994)). Western Interstate Nuclear Compact.

14. 1969 N.M.Laws, ch. 57, § 1 (now codified at NMSA 1978, § 72–15–1 (Repl.Pamp.1985)). Animas–La Plata Project Compact.

15. 1971 N.M.Laws, ch. 270, § 1 (now codified at NMSA 1978, § 31–5–12 (Repl.Pamp.1984)). Agreement on Detainers.

16. 1972 N.M.Laws, ch. 19, § 1 (now codified at NMSA 1978, § 16–5–1 (Repl.Pamp.1987)). Cumbres and Toltec Scenic Railroad Compact.

****28** ***579** 17. 1973 N.M.Laws, ch. 238, § 2 (now codified at NMSA 1978, § 32A–10–1 (Repl.Pamp.1993)). Interstate Compact on Juveniles.

18. 1977 N.M.Laws, ch. 151, § 2 (now codified at NMSA 1978, § 32A–11–1 (Repl.Pamp.1993)). Interstate Compact on the Placement of Children.

19. 1982 N.M.Laws, ch. 89, § 1 (now codified at NMSA 1978, § 11–11–1 (Repl.Pamp.1994)). Interstate Mining Compact.

20. 1983 N.M.Laws, ch. 20, § 2 (now codified at NMSA 1978, § 11–9A–2 (Repl.Pamp.1994)). Rocky Mountain Low–Level Radioactive Waste Compact.

21. 1985 N.M.Laws, ch. 133, § 1 (now codified at NMSA 1978, § 40–7B–1 (Repl.Pamp.1994)). Interstate Compact on Adoption and Medical Assistance.

22. 1987 N.M.Laws, ch. 239, § 1 (now codified at NMSA 1978, § 11–12–1 (Repl.Pamp.1994)). Interstate Compact on Agricultural Grain Marketing.

All Citations

120 N.M. 562, 904 P.2d 11, 1995-NMSC-048

Footnotes

1 The legislature appears to have intended to make these two categories, betting versus lotteries, mutually exclusive; a lottery is specifically excluded from the definition of betting. *See* § 30–19–1(B)(3). Thus, a particular form of gaming or gambling would necessarily fall under one or the other of these definitions. In most cases involving the prosecution of illegal gambling whether the activity was considered "making a bet" or participating in a "lottery" would be unimportant; both represent criminal activity, and they are treated equally under the law. *See* NMSA 1978, §§ 30–19–2 & –3 (Repl.Pamp.1994). However, in attempting to categorize what form of gaming was allowable under the permissive lottery exception we would be required to decide whether a particular form of gaming fell into one category or the other.

2 Under this agreement, three to five percent of the "net win" derived from Class III gaming on the Pojoaque Pueblo would be paid to the State of New Mexico and divided between state and local government.

3 Appendix A includes a listing of these compacts.

4 For example, the legislation whereby New Mexico entered into an interstate compact regarding parole and probation provided: "The Governor of this state is hereby authorized and directed to execute a compact on behalf of the State of New Mexico ... in the form substantially as follows...." 1937 N.M.Laws ch. 10, § 1.

5 The Governor of New Mexico has vetoed at least one interstate compact. In 1925, the governor vetoed the Pecos River Compact after it had been approved by the legislatures of Texas and New Mexico. *See* Letter from A.T. Hannett, Governor, to the New Mexico Senate (March 14, 1925) (reprinted in *Senate Journal of the Seventh Legislature* 423 (1925)).

6 The list includes neither the Governor nor executive officers. Application of the principle of *expressio unius est exclusio alterius* supports the conclusion that the framers of this statute did not intend to include the Governor as a "public agency." *See Bettini v. City of Las Cruces,* 82 N.M. 633, 635, 485 P.2d 967, 969 (1971).

107 N.M. 439

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of New Mexico.

STATE of New Mexico, ex rel. Max COLL and Ben D. Altamirano, Petitioners,
v.
Hon. Garrey CARRUTHERS, Governor of the State of New Mexico, and Willard Lewis, Secretary of the Department of Finance and Administration of the State of New Mexico, Respondents.

No. 17587
|
Aug. 2, 1988.

Synopsis

Legislature passed a General Appropriation Act which was then sent to Governor, who sent back a message with several portions that were vetoed by him. Chairman of the House Appropriations and Finance Committee, and Chairman of Senate Finance Committee petitioned for a writ of mandamus directing Governor and Secretary of Finance to administer the Act as originally passed without reference to various "line-item" vetoes made by Governor. The Supreme Court held that: (1) governor's veto of language which prohibited funds appropriated to district attorney from being expended for rental of parking space was valid; (2) legislature had power to impose conditions on purchase of automation and data processing equipment; (3) veto of provision that appropriation to commodities bureau could not be expended to contract with nongovernmental contractor for warehousing and delivery was valid; (4) veto of cost-of-living increases for certain private employees of community based providers of mental health services was valid; and (5) veto of requirement that appropriation for center for women be used for training of inmates in motel-hotel and restaurant management was valid.

Writ made permanent in part and quashed in part.

Sosa, Senior Justice, dissented in part and filed an opinion.

Attorneys and Law Firms

****1382 *441** Carpenter & Goldberg, Joseph Goldberg, David J. Stout, Albuquerque, for petitioners.

Campbell and Black, Jack M. Campbell, Michael B. Campbell, Bradford B. Berge, John H. Bemis, Alex Valdez, Gen. Counsel Office of the Governor, Sp. Asst. Atty. Gen., Ted Apodaca, Gen. Counsel Dept. of Finance & Admin., Sp. Asst. Atty. Gen., Santa Fe, for respondents and real parties in interest.

OPINION

PER CURIAM.

{1}The Chairman of the New Mexico House Appropriations and Finance Committee, Max Coll, and the Chairman of the New Mexico Senate Finance Committee, Ben Altamirano, petitioned the Supreme Court for a writ of mandamus directing Governor Garry Carruthers and Secretary of Finance and Administration, Willard Lewis, to perform their respective duties and administer the General Appropriation Act of 1988 (General Appropriation Act) as originally passed without reference to various "line-item" vetoes made by the Governor.

{2} The General Appropriation Act was duly passed in the New Mexico State Senate and House of Representatives during the 1988 legislative session. The Act was then sent to Governor Carruthers for his approval or veto. Governor Carruthers sent back a message with several portions that were vetoed by him. Coll and Altamirano challenge the Governor's vetoes on the grounds they employ the partial veto power allowed by the New Mexico Constitution article IV, section 22 to illegally create new legislation or appropriations, distort legislative intent, and create legislation inconsistent with that enacted by the legislature by selectively striking words, phrases, clauses, or sentences.

{3} At a hearing on the petition, and with the agreement of counsel, we held that with respect to the vetoes contained in subparagraphs D, E, and H of paragraph VII, the petition was denied. An alternative writ of mandamus issued with respect to the remaining vetoes which we now consider. We hold that all of the remaining vetoes, with the exception of Item B, are valid. [1]

{4} The separation of powers doctrine, as embodied in the New Mexico Constitution, states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1.

{5} The legislative power of New Mexico is vested in the Senate and House of Representatives ****1383 *442** which are designated as the legislature. N.M. Const. art. IV, § 1. With few exceptions, money shall be paid out of the public treasury only upon appropriations made by the legislature. "Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied." N.M. Const. art. IV, § 30. The Constitution of New Mexico does not define, describe, or limit the contents of a general appropriation bill. However, the constitution to the extent here material has expressed the condition that "[g]eneral appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments.... All other appropriations shall by made by separate bills." N.M. Const. art. IV, § 16.

{6} The governor of New Mexico is the state's chief executive officer and has constitutional powers conferred upon him including veto power as set forth in article IV, section 22. Although the governor has no authority to appropriate money, he does have the power to exercise a partial veto where appropriations are concerned: "The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto, as herein provided." N.M. Const. art. IV, § 22. This power of partial veto is only a negative power to disapprove; it is not the power to enact or create new legislation by selective deletions. *State ex rel. Sego v. Kirkpatrick,* 86 N.M. 359, 365, 524 P.2d 975, 981 (1974).

{7} The judicial branch is constitutionally empowered to resolve conflicts between the legislative and executive branches when brought before the Supreme Court by a petition for writ of mandamus. N.M. Const. art. VI, § 3. Furthermore, the court has the authority to review the Governor's vetoes under a theory of checks and balances. The Supreme Court of New Mexico recognizes that

> [t]he power of veto, like all powers constitutionally conferred upon a governmental officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever. The very concept of such absolute and unrestrained power is inconsistent with the concept of 'checks and balances,' which is basic to the form and structure of State government created by the people of New Mexico in their constitution, and is inconsistent with the fundamental principle that under our system of government no man is completely above the law.

Sego, 86 N.M. at 362, 524 P.2d at 978. (citation omitted).

{8} Many state constitutions give the chief executive item-veto powers. The major factors which prompted drafting of constitutions to include the item-veto were: To prevent corruption, to prevent hasty and ill-conceived legislation, and most importantly, to prevent "logrolling" tactics by the legislature. *Colorado Gen. Assembly v. Lamm,* 704 P.2d 1371, 1383 (Colo.1985). Before the item-veto was incorporated into constitutions, a common practice of legislators was to include riders which were controversial or did not have adequate support to be passed on their own in general legislation. *Id.* A governor was then forced to veto the entire appropriation act in order to prevent the one objectionable portion from becoming law. To counter that effect governors were given the item-veto power. *Id.* New Mexico differs from most other states with item-veto provisions because it allows the broadest possible veto authority by additionally providing authority to veto "parts", not only "items".

{9} We recognize that the normal course of action for the legislature to pursue in response to an executive veto is to

attempt an override. N.M. Const. art. IV, § 22. Nevertheless, it is not the only recourse and, as we carefully explained in *Sego,* mandamus is a proper procedure "to test the constitutionality of vetoes or attempted vetoes by the governor." 86 N.M. at 363, 524 P.2d at 979. As was noted in *Colorado Gen. Assembly,* 704 P.2d at 1377, "the delicate constitutional balance between the executive and the legislative branches of government" would be upset if ****1384 *443** we were to hold that the legislature may not challenge a gubernatorial veto until it has attempted by a two-thirds vote to enact a law which it initially was authorized to accomplish by a simply majority. However, a veto override is no substitute for unsound legislative enactments.

{10} The first legislative restriction on appropriated funds we consider is Item A, which reads: "Funds appropriated to the second judicial district attorney shall not be expended for rental of parking space." The governor vetoed this language with the following specific objection: "This language could result in state vehicles being parked in completely unsecured areas, susceptible to extensive damage, and is therefore vetoed." In exercising his veto power, the governor utilized the line-item veto authority of article IV, section 22 of the New Mexico Constitution.

{11} In restricting the expenditure of funds appropriated to the office of district attorney, the legislature performs not merely an appropriation oversight function, but it attempts to make detailed, miniscule, inconsequential executive management decisions. In this instance, the legislature should have limited itself to addressing matters of "significant financial impact" such as those we specifically approved in *Sego,* 86 N.M. at 367, 524 P.2d at 983. Counsel for both parties noted that approximately $4,000 was earmarked for rental of parking space if the legislature had not attempted its restriction. The total appropriation to the second judicial district attorney was $4,500,000. By attempting to detail the district attorney's expenditure, the legislature intruded into the executive managerial function. Such intrusion is inappropriate under our constitutional form of government and comes into conflict with the separation of powers doctrine.

{12} In *Anderson v. Lamm,* 195 Colo. 437, 442, 579 P.2d 620, 624 (1978), the Colorado legislature was specifically prohibited from attaching "conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character." This statement of law agrees with our own views on the subject. Although the facts before us are somewhat different than those in *Anderson,* we believe the proposition there stated provides persuasive authority for our position as well. In selecting a line which should not be crossed lest the legislature intrude on the executive managerial function, we realize our subjective evaluation of the facts underlies the principles and tests we espouse and rely upon. However, a line must be drawn. It appears to us the legislature has clearly crossed that line and trespassed into the executive domain.

{13} The legislature's imposition of a limitation on the expenditure of funds for rental of parking space also falls into the category of general legislation. New Mexico Constitution article IV, section 16, specifically provides that "[g]eneral appropriation bills shall embrace nothing but appropriations...." *State ex rel. Delgado v. Sargent,* 18 N.M. 131, 137, 134 P. 218, 220 (1913). By including the condition that no money be expended on rental of parking space, the legislature has attempted to enact policy which is better addressed by general legislation and is not suitable for inclusion in the general appropriation bill. N.M. Const. art IV, § 16.

{14} Petitioners next argue that the governor has, by vetoing the parking condition and keeping the appropriated funds, exercised his item-veto power in such a manner as to distort legislative intent and in effect to appropriate money by executive order for purposes unintended by the legislature. Petitioners claim the governor must veto not only the parking condition, but also the entire appropriation to the Office of the District Attorney in order for the veto to be effective. The petitioners consider both the condition and the appropriation to constitute a single "item of appropriation" as that term is used in article IV, section 22 of the New Mexico Constitution. Any change in legislation is a distortion of sorts. Article IV, section 22 prohibits only unreasonable changes.

{15} We decline to adopt petitioners' argument that the total budget appropriation of $4,500,000 and the parking condition be ****1385 *444** treated as an "item of appropriation" for veto purposes. Neither article IV, section 22 nor *Sego* requires that the entire appropriation be vetoed in order to delete the parking condition. The legislature may not artfully draft conditions or restrictions that would force the governor to veto an entire appropriation to a particular agency in order to reach a limitation or condition he finds constitutionally offensive. If this line of reasoning were followed the governor would be left with the option of either vetoing the entire appropriation of $4,500,000 or accepting the restriction. The

restriction was not a proper restriction or condition and as such was subject to veto by the governor. The legislature left the governor no reasonable alternative. The veto was valid.

{16} We next examine an attempt by the governor to veto a conditional appropriation to the district attorneys. The language in Item B which the governor vetoed provides as follows:

> None of the funds appropriated to the district attorneys shall be used to purchase automated data processing or word processing equipment until a system is reviewed by the department of finance and administration and by the legislative finance committee which has also been certified by the administrative office of the courts to be compatible with a statewide computer system that has been developed under the direction of the supreme court.

The governor stated as his reasoning for the veto:

> This language is vetoed because it violates the principle of separation of governmental powers. It does not constitute a reasonable condition on appropriated funds and exceeds the legislature's ability to regulate the use of funds during a period in which the legislature is not in session. Administration of appropriations is the function of the executive. Once an appropriation has been made the legislative prerogative ends and the executive responsibility begins.

{17} We have consistently maintained that the "Legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated." *Sego,* 86 N.M. at 366, 524 P.2d at 982; *State v. State Bd. of Fin.,* 69 N.M. 430, 367 P.2d 925 (1961); *State ex rel. L. v. Marron,* 17 N.M. 304, 128 P. 485 (1912). Only the legislature is authorized by the constitution to appropriate funds for the purchase of automated data processing equipment by the district attorney.

{18} The governor argues that the imposition of conditions on the purchase of automation and data processing equipment unreasonably injects the legislature into the executive managerial function. The executive function does not commence until after administrative approval for the purchase of the equipment is first obtained from several state agencies. We are dealing with a condition precedent to the expenditure of appropriated funds, not with the details of managing the expenditure once approval is granted.

{19} The vetoed language also requires the administrative office of the courts to certify that the automation system to be purchased by the district attorneys is "compatible" with a statewide computer system that has been developed under the direction of the supreme court. The governor argues that there is an absence of guidelines defining "compatible." We are not impressed with this argument. Verification of compatibility is easily ascertainable and is a commonly understood term to those familiar with computers. The governor also argues that the absence of standards and procedures for the certification process to be conducted by the administrative office of the courts is "unworkable" because there is presently no existing computer system. The absence of standards does not render the scheme "unworkable." It is obvious the legislature assumes that a statewide automation system will be developed by the administrative office of the courts before funds shall be used to purchase data processing equipment. Once the system has been established, standards for certification will follow as a matter of course. Clearly, the purpose of the condition ****1386 *445** is to provide an interlocking statewide system that will avoid expensive and extensive modifications by various state agency users in the future. It is not an unreasonable provision or condition.

{20} The third legislative restriction vetoed by the governor, Item C, requires the Information Processing Bureau, General Services Department, to finance capital outlay expenses from internal services funds, and specifically prohibits using moneys from the equipment replacement fund to fund a statutory five-year funding scheme described in the Information Systems Act, NMSA 1978, §§ 15–1–1 to 15–1–13 (Repl.Pamp.1986). This restriction is in direct conflict with similar funding provisions in existing legislation. NMSA 1978, § 15–1–10(B) and (C) (Repl.1986). The vetoed language, if left unchallenged by the governor, would repeal

by implication conflicting provisions in the Information Systems Act. Such limitation and repeal is more appropriately addressed in separate or general legislation. Article IV, section 16 of the New Mexico Constitution prohibits the inclusion of general legislation in the General Appropriation Act. The General Appropriation Act may not be used as a vehicle by which to nullify general legislation. The legislature is not free to override or repeal general legislation in this fashion. Since language seeking to accomplish this objective has been improperly included in the Act, it is subject to veto by the governor.

{21} Coll and Altamirano also argue that this veto allows the Information Processing Bureau to "expend capital outlay funds from funds appropriated by the legislature in other categories." They argue that the Information Processing Bureau will be able to obtain money from the "equipment replacement fund" without their approval unless the restriction is upheld. We agree this result may follow; nevertheless, we uphold the governor's veto. The existing statutory scheme, the Information Systems Act, provides that changes in the five-year plan must be submitted and approved by the Information Systems Council. NMSA 1978, § 15–1–10(C) (Repl.Pamp.1986). The legislature has failed to follow its own mandate. Instead, it chose to reach funding objectives through the General Appropriation Act that conflict with existing provisions of general law. As we have noted, it is not free to pursue this course of action. The governor may strike general legislation in the appropriation bill.

{22} Petitioners also object that the governor retained the $2,000,000 appropriation for capital outlay expenses, but struck only the limitations on the appropriation. We do not read *Sego* to require the entire item of appropriation, including the condition and the money, to be stricken in this instance because we are not dealing with a "proper" legislative condition. We find support for this proposition in *Henry v. Edwards,* 346 So.2d 153, 158 (La.1977), where it was held that "when the legislature inserts inappropriate provisions in a general appropriation bill, such provisions must be treated as 'items' for purposes of the Governor's item veto power over general appropriation bills." The governor's veto of this "item" is valid.

{23} We next consider conditions placed upon the appropriation of funds for data processing services in Item F. The conditions are as follows:

> There is also appropriated the sum of two million seven hundred twenty-two thousand nine hundred ninety-five dollars ($2,722,995) to administrative services division of the human services department to be matched with three million three hundred twenty-eight thousand one hundred five dollars ($3,328,105) in federal funding to be expended only for data processing services ~~to be purchased from the general services department for the ISD 2 system~~ .

The language that has been lined-out was vetoed by the governor. He gave his reason for the veto in the following statement:

> The Legislature lacks authority to appropriate federal funds or control the use thereof (*Sego v. Kirkpatrick*). In addition to the legal impediment, the practical consequence of this language is other necessary computer systems would not be funded. This language could ****1387 *446** jeopardize current and future funding and therefore is vetoed.

The governor's main objection to the conditions imposed by Item F is that the legislature seeks to appropriate federal funds or "control the use thereof" by means of conditions or limitations imposed in the General Appropriation Act. We specifically rejected this attempt in *Sego,* 86 N.M. at 370, 524 P.2d at 986. But we also held that the legislature "has the power, and perhaps the duty, in appropriating State monies to consider the availability of Federal funds for certain purposes...." *Id.* 86 N.M. at 370, 524 P.2d at 986. In *Sego,* the legislature actually limited its appropriation only to those funds "matched" to federal funds.

{24} The governor also objects, however, to the detailed nature of the oversight function which the legislature has assumed in the appropriation process in connection with the expenditure of funds for data processing services. He argues

that such supervision violates article III of the New Mexico Constitution and justifies the use of his item-veto powers as to Item F. The Governor relies on the affidavit of Paul D. Stewart, Chief of the Automated Data Processing Bureau of the Administrative Services Division for Human Services Department. The affidavit attached to the pleadings have been considered by this Court without objection. Stewart says in the affidavit that if state funding of data processing services goes only to the ISD–2 system, there will be no funds available for operational support for several other programs which are not part of the ISD–2 program, including programs needed by the Office of the Human Services Department Secretary. We have previously observed in our discussion of Item A that conditions and restrictions on appropriations which reserve to the legislature "powers of close supervision" over the executive function are not looked upon with favor. *Anderson,* 579 P.2d at 624. In Item F, the legislature created the appropriation for data processing services, and limited the expenditure of appropriated funds to a specific system and a specific contractor. The executive management function has been largely swallowed up by the legislature. There remains no meaningful executive discretion to exercise. In addition, the legislature has eliminated funds for existing data processing services in the Office of the Secretary of Human Services Department, including the elimination of systems which provide the Secretary an automated general ledger and payroll. The governor's veto was valid. By upholding the veto, we leave intact the basic legislative oversight and appropriation function while assuring the executive a reasonable degree of freedom and discretion over the expenditure of appropriated funds. In this fashion, we seek to provide a balanced allocation of powers between the executive and legislative branch of government as contemplated in article III, section 1 of the New Mexico Constitution. For these reasons, we conclude the legislature overstepped its traditional oversight and appropriation functions when it used the appropriation process to name the General Services Department as the contracting party and the ISD–2 system as the system to be contracted for.

{25} We next consider conditions placed upon the appropriation of funds for the Commodities Bureau in Item G. The conditions are as follows:

> It is the intent of the legislature that the appropriation of six hundred forty thousand dollars ($640,000) to the commodities support bureau shall not be expended to contract with a nongovernmental contractor for warehousing and delivery in the commodities support program.

That language was vetoed by the governor. His reason for the veto is explained in the following statement:

> This language is vetoed because it will result in the unnecessary expenditure of taxpayer dollars for storage and delivery of food commodities by the Human Service Department.

{26} The basic purpose for this appropriation is to provide commodities to qualified recipients. Petitioners and respondent both agree that the condition imposed on the expenditure of funds here appropriated to the Commodities Bureau of the Human Services Department is intended to prevent ****1388 *447** the Department from contracting with a nongovernmental contractor for warehousing and delivery of commodities. The condition hampers the governor's control over the expenditure of these funds to accomplish the purpose for which the funds were appropriated, a result we find unacceptable. The governor's veto "did not change the [basic] purpose for which the ... fund was established." *Sego,* 86 N.M. at 367–68, 524 P.2d at 983–84. The veto struck only the condition limiting the manner and means by which the commodities were to be delivered.

{27} If we uphold the inclusion of legislation of a general nature in a general appropriation bill, the governor is denied his constitutional right to exercise his general veto power. We hold that the veto is valid.

{28} Items I and J provide for cost-of-living increases for certain private employees of community based providers of mental health services as follows:

> Included in the general fund appropriation to the developmental disabilities component of the community programs is six hundred ninety thousand five hundred dollars ($690,500) to stabilize the underfunded unit of service rates ~~including three hundred twenty seven~~

~~thousand five hundred dollars ($327,500) to provide a three and one half percent cost of living increase for the community based providers' employees~~ .

Included in the general fund appropriation to the mental health component of the community programs is three hundred fifty-eight thousand two hundred dollars ($358,200) ~~to provide a three and one half percent cost of living increase for the community based providers' employees~~ .

{29} The governor explained that for both items the language was vetoed because:

> This language requires the Department to give a cost-of-living salary increase for the community-based providers' employees. These providers are independent contractors, paid through the Unit Price System. The Department has no control over the budgets of these contractors and thus cannot mandate a cost-of-living increase and therefore the language is vetoed.

{30} In these two items, the legislature appropriated money to the Health and Environment Department to be used to provide a cost-of-living increase to employees of mental health providers who contract with the Health and Environment Department (HED). Respondent argues that the cost-of-living increases violate article II, section 19 of the New Mexico Constitution, which provides that "no ... law impairing the obligation of contracts shall be enacted by the legislature." The governor vetoed the employee cost-of-living increase, but kept the appropriation. Petitioners argue that the governor seeks to spend the money appropriated by the legislature for the cost-of-living increase for purposes other than those intended by the legislature. The mental health providers whose employees will receive the cost-of-living increase have contracted with HED to provide community based mental health services. Their contracts specifically provide that the contractor is an independent contractor who shall set his own employment policies. The legislature has no authority to alter the terms of existing employment contracts between HED and its providers. N.M. Const. art. II, § 19. Under this section of the Constitution, an existing employment contract cannot be changed by subsequent legislation. It follows that the legislature may not attempt to alter the terms of these contractual relationships through the appropriation process. Such matters are better dealt with in separate legislation where the subject of an act is stated in its title and where the act is open to public debate. *State ex rel. Prater v. State Bd. of Fin.*, 59 N.M. 121, 128, 279 P.2d 1042, 1046 (1955).

{31} The legislature has intruded far too deeply into the executive function in mandating a cost-of-living increase to private sector employees in the General Appropriation Act. Efforts to dictate the specific terms of an existing employment contract between HED and its providers are subject to challenge and veto by the governor. Since the condition itself is improper, we decline to adopt petitioners' argument that the appropriation ****1389** ***448** must also fail. The legislature left the governor little choice but to strike the offensive language and save the HED appropriation. The veto was valid.

{32} The next provision we consider is Item K which concerns transfer of funds in the corrections system. The governor vetoed the following language:

> The appropriation to the field services division shall not be transferred to any other division or program of the corrections department or to any other department or program.
>
> The appropriations to the Los Lunas correctional center shall not be transferred to any other institution, division or program of the corrections department or to any other department or program.
>
> The appropriations to the Roswell correctional center shall not be transferred to any other institution, division or program of the corrections department or to any other department or program.
>
> The appropriations to Camp Sierra Blanca shall not be transferred to any other institution, division or program of the corrections department or to any other department or program.

{33} The language which the governor vetoed prohibits the intradepartmental transfer of funds within the Corrections Department. This language was vetoed by the governor because it "unnecessarily restricts the management prerogatives of the Corrections Department." The Department of Corrections operates seven adult facilities. Four of these facilities are maximum and medium security

facilities which are under federal court supervision by reason of the consent decree entered in *Duran v. Apodaca,* No. 77–721–C (D.N.M. July 14, 1980). *See also Silva v. State,* 106 N.M. 472, 745 P.2d 380 (1987). The Los Lunas, Roswell, and Camp Sierra Blanca facilities dealt with in Item K are minimum security facilities which are not subject to the provision of the Duran decree.

{34} Inmates are frequently moved between the maximum, medium, and minimum security facilities. Under the budget restraints attempted to be imposed by the legislature in the Appropriations Act, each facility is prohibited from transferring funds to another regardless of the demands made upon the Corrections Department by the federal courts under the Duran decree and regardless of the number or location of inmates within the system. The blanket prohibition against *intra*correctional department transfers of funds could paralyze the department and make effective management impossible. Such restraints are an unreasonable intrusion into the executive managerial function.

{35} Petitioners argue that the language vetoed by the governor prohibited the transfer of funds by departments and facilities within Corrections Department to departments or programs outside the Corrections Department. Respondent admits that such a transfer has never occurred, but we decline to reach this issue. The reasons assigned by the governor for his veto of the restrictions contained in Item K of the General Appropriation Act lead us to conclude that he knew that no *inter*department transfers were involved. The veto is valid.

{36} Finally, we consider Item L. The governor vetoed the following language that appears as overstricken:

> Included in the general fund appropriation to the New Mexico center for women is fifty thousand dollars ($50,000) to be used for providing a training program for female inmates ~~in motel/hotel and restaurant management~~ .

The governor's reasoning for the veto was that "[t]he language pertaining to training for female inmates is vetoed to allow their participation in a variety of training programs." The legislature here attempts an improper intrusion into the executive managerial function. The legislature may not restrict the use of funds exclusively for hotel/motel restaurant management training in the General Appropriation Act. It is for the executive to decide which programs are best suited for female inmates. There is no need for an executive function if the legislature is free to define every detail of appropriation use. The legislature is authorized to define the basic purpose for which funds are appropriated, but the selection ****1390 *449** and identification of specific programs is the responsibility of the executive branch of government. N.M. Const. art II. The veto is valid.

{37} The alternative writ of mandamus is made permanent as to Item B and quashed as to Items A, C, F, G, I, J, K and L.

{38} IT IS SO ORDERED.

SOSA, Senior Justice, dissenting.

{39} Concurring in the per curiam opinion with respect to certain items vetoed by the governor, I must respectfully dissent with respect to Item F. Item F reads as follows:

> There is also appropriated the sum of two million seven hundred twenty-two thousand nine hundred ninety-five dollars ($2,722,995) to the administrative services division of the human services department to be matched with three million twenty-eight thousand one hundred five dollars ($3,328,105) in federal funding to be expended only for data processing services [to be purchased from the General Services Department for the ISD 2 system].

State of New Mexico, *Laws 1988, Chapter 13,* at 105 (Vetoed language bracketed).

{40} In my opinion the governor's veto of this item is opposed to our holding in *State ex rel. Sego v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975 (1974), in the following particulars:

(1) The veto does not eliminate or destroy the whole of the item or part, but instead distorts the legislative intent by creating legislation inconsistent "with that enacted by the

Legislature, by the careful striking of words, phrases, clauses or sentences." *Id.* at 365, 524 P.2d at 981.

(2) "Regardless of whether or not the governor's judgment as to this item is better than that of the Legislature, the fact remains it was for the legislature to determine the condition or contingency under which the [General Services Department] could spend this appropriation for contract services." *Id.* at 366, 524 P.2d at 982.

(3) The governor's veto implicitly authorizes funding to agencies not intended by the Legislature, or as the court in *Sego* put it, "the effect of [this veto] was to conditionally appropriate additional funds, or at least authorize their appropriation" to an agency other than the General Services Department. *Id.* at 368, 524 P.2d at 984.

{41} In short, the governor by this veto accomplishes by indirection what he is otherwise prohibited from doing directly by our holding in *Sego,* and I cannot participate in the majority's decision as to item F precisely for this reason.

{42} Further, I disagree with the majority's characterization of the General Services Department as a "contracting party" (*Majority Opinion* at 447, 759 P.2d at 1388) or as "a specific contractor." *Id.* at 446, 759 P.2d at 1388. How is it that the majority can say, "The executive management function has been largely swallowed up by the legislature," *id.,* when it is precisely an organ of the executive branch (the General Services Department) from which the ISD 2 System was to be purchased? I hardly think it overbearing on the part of the legislature to allow the executive branch to "contract" with itself.

{43} It seems to me that, with respect to Item F, the majority opinion is a house divided. It disagrees with the governor's "main objection," *id.* at 446, 759 P.2d at 1388 to Item F (controlling federal funds), as violative of *Sego v. Kirkpatrick,* but then upholds the veto on grounds that the legislature abuses its "oversight function," *id.* at 446, 759 P.2d at 1387. In reality, however, the legislature simply directs, in common-sense fashion, that the General Services Department control the purchase of the ISD 2 System, precisely as the General Services Department controls the everyday purchase of countless other items to be owned by the state.

{44} For the foregoing reasons I dissent as to Item F.

All Citations

107 N.M. 439, 759 P.2d 1380, 1988-NMSC-057

Footnotes

1 The letters used in this opinion refer to lettered items in the petition and correspond to items in the General Appropriation Bill.

125 N.M. 343
Supreme Court of New Mexico.

STATE of New Mexico, ex rel., J. Paul TAYLOR, Murray Ryan, Mary Jane Garcia, Rita Harrington, Jeanette Jordan, Dorothy Martinez, Norma Ruiz, Patricia Quintana and Roberta Vasquez, Petitioners,
v.
Hon. Gary JOHNSON, Governor of the State of New Mexico, and William H. Johnson, Secretary of the New Mexico Human Services Department, Respondents.

No. 24547
|
May 29, 1998.

Synopsis
Petitioners brought original proceeding seeking writ of mandamus, in which they challenged validity of overhaul of New Mexico public assistance system, which had been effected through executive action by Governor and Secretary of New Mexico Human Services Department. The Supreme Court, Baca, J., held that: (1) Supreme Court would exercise its original jurisdiction over action; (2) mandamus was appropriate form of relief; (3) overhaul of system implemented type of substantive policy changes reserved to Legislature, and thus violated doctrine of separation of powers under State Constitution; and (4) appropriate contempt sanction for Governor and Secretary, who had initially failed to comply with order precluding them from implementing overhaul, was order directing them to cease and desist immediately from implementing program within seven days, with further sanctions to be considered if compliance did not occur.

So ordered.

Attorneys and Law Firms

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***345** *OPINION*

BACA, Justice.

{1} The Constitution of the State of New Mexico commands that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others ****771** ***346** ...."...." N.M. Const. art. III, § 1. The case before us does not concern the merits of public assistance reform or conflicts of political ideology. Rather, it concerns only the sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principles therein. "It is the function of the judiciary ... to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution." *State v. Mechem,* 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer,* 104 N.M. 751, 726 P.2d 1381 (1986). It is with this yardstick that we take the measure of this case.

{2} This case began as a challenge of the power of the Executive to effect an extensive overhaul of the state's public assistance system without legislative participation. In the course of the proceedings before this Court, two issues presented themselves. First, the question arose whether Respondents had exceeded their constitutional powers in enacting and implementing certain welfare regulations. Subsequently, after this Court ruled Respondents had violated the constitutional provisions established by the separation of powers doctrine, the question arose whether Respondents had honored this Court's order. This question implicated an even more fundamental concept: respect for the rule of law. We address both questions in this opinion.

{3} Petitioners filed a Verified Petition for a Writ of Mandamus directed at Governor Gary Johnson and the Secretary of the New Mexico Human Services Department [1] (Respondents). Petitioners alleged that Respondents exceeded their constitutional authority by implementing significant public assistance policy changes without legislative approval. This Court, in a decision

rendered from the bench on September 10, 1997, held that Respondents violated the separation of powers provision in Article III, Section 1 of the New Mexico Constitution. Pursuant to this holding, we issued a Writ of Mandamus requiring Respondents: 1) to desist from the implementation of their public assistance changes; and 2) to administer the public assistance program in full compliance with existing law until it is constitutionally altered or amended by legislation signed into law by the Governor.

{4} On October 24, 1997, Petitioners filed a motion to hold Respondents in contempt of court, alleging that Respondents were continuing to implement their public assistance changes. On December 10, 1997, the Court held a hearing requiring Respondents to show cause why this Court should not hold them in contempt for failing to comply with the Writ.

{5} We first restate the holding and fully articulate the reasoning behind our September 10, 1997, decision holding that Respondents violated Article III, Section 1 of the state constitution. Second, we determine that Respondents have not complied with the Writ and, therefore, hold Respondents in indirect civil contempt.

I.

{6} Congress enacted the federal Aid to Families with Dependent Children program (AFDC) as part of the Social Security Act of 1935. *See* 42 U.S.C. §§ 601–687 (1994). AFDC created a new federal-state public assistance partnership. The federal government established the primary framework for public assistance programs and offered funding for states that implemented their programs consistent with federal guidelines.

{7} Soon after the federal government passed AFDC, New Mexico elected to join the federal program, passing implementing legislation now called the Public Assistance Act (NMPAA), NM Laws 1937, ch. 18. [2] The ****772 *347** NMPAA authorizes administration of the AFDC program and sets the basic formula for determining eligibility. NMSA 1978, § 27–2–5(A) (1982). The Legislature also created the New Mexico Human Services Department (HSD), NMSA 1978, § 27–1–1 (1977), to work with the federal government in administering public assistance programs. NMSA 1978, §§ 27–1–2 (1937), 27–1–3 (1982), 27–2–15 (1937).

{8} In the decades following passage of federal AFDC, Congress made major adjustments to the program. In such instances, the New Mexico Legislature passed, and a governor signed into law, bills adopting the federal changes in New Mexico. *See, e.g.,* NMSA 1978, § 27–2–10 (1973) (food stamp program); NMSA 1978, § 27–2–12 (1973, as amended 1993) (medical assistance); NMSA 1978, § 27–2–6.2(A) (1988) (work requirements).

{9} The most recent change in federal AFDC occurred with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996(PRA), Pub.L. 104–193, 110 Stat. 2105 (codified at 42 U.S.C.A. §§ 601–19 (West Supp.1997)). The PRA repealed federal statutory and regulatory constraints on state administration of public assistance, permitting the states to create their own programs. To increase states' flexibility, the PRA replaced the former AFDC funding structure with a block grant program called Temporary Assistance to Needy Families (TANF). States now are eligible to receive TANF funds and use them as they wish in their own programs, subject only to minimal federal PRA guidelines. [3]

{10} The PRA's passage spurred legislative and executive action in New Mexico. Anticipating federal public assistance reform legislation in 1995, Governor Johnson submitted a state public assistance reform bill to the New Mexico Legislature in the 1996 legislative session. However, the bill died after failing to reach the floor of the New Mexico House of Representatives. After Congress passed and the President signed the PRA in 1996, the New Mexico Legislature, this time on its own initiative, began considering public assistance reform during its 1997 session. The New Mexico House of Representatives and Senate both passed substantially identical bills both known as the Family Assistance and Individual Responsibility Act (FAIR). The Act would have created a new NMPAA section to accommodate the TANF block grant program requirements and would have authorized HSD to administer the program.

{11} Soon thereafter, Governor Johnson vetoed the FAIR Act and line-item vetoed language in the General Appropriations Act that allotted money for the FAIR program. He stated in his veto messages that, as the Executive, he possessed authority to exercise the discretion left to the states under the PRA. House Executive Message No. 14 (3/19/97). The Governor argued that the proposed state legislation encroached upon the executive's authority. *Id.*

{12} Immediately following his veto, Governor Johnson announced the creation of his own public assistance reform plan, a program he labeled "PROGRESS." His proposed plan modified aspects of public assistance eligibility, support services, and delivery in New Mexico. Governor Johnson also stated that he intended to implement the program's public assistance changes through administrative regulation. Subsequently, HSD held public hearings regarding the proposed regulatory changes, and Respondents' program was adopted, taking effect on July 1, 1997.

{13} On July 21, 1997, Petitioners filed a Verified Petition for Writ of Mandamus. The Petitioners asserted that Governor Johnson and then-Secretary of HSD, Duke Rodriguez, unlawfully implemented Respondents' ****773 *348** program without seeking legislative approval, in violation of both state statute and the New Mexico Constitution's separation of powers provision. This Court held oral argument on September 10, 1997. In a unanimous decision, the Court ruled from the bench that Respondents had violated the New Mexico Constitution, Article III, Section 1. The Court ordered Respondents to:

> a) desist from the implementation of their PROGRESS program, and b) to administer the Public Assistance Program in full compliance with New Mexico statutes until such time as existing law is altered or amended by the passage of a bill by the state legislature which is then signed into law by the governor in accordance with the provisions of the New Mexico Constitution.

Transcript of Oral Argument at 36 (9/10/97). When announcing the holding, the Chief Justice also asked the parties, "Are there any questions from counsel?" *Id.* There were none, and the Court issued the Writ.

II.

{14} As a threshold matter, we address whether the Verified Petition for Original Writ of Mandamus is properly before this Court. Specifically, we consider two sub-issues: 1) whether this action is properly before this Court as an original proceeding; and 2) whether a writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official act.

{15} This Court has original jurisdiction in this proceeding pursuant to Article VI, Section 3 of the New Mexico Constitution. The Court may invoke original jurisdiction even when a matter might have been brought first in the district court. *See* Rule 12–504(B)(1)(b) NMRA 1998 (party seeking mandamus must set forth circumstances making Supreme Court's exercise of original jurisdiction necessary and proper); *see also State ex rel. Clark v. Johnson,* 1995–NMSC–051, 120 N.M. 562, 569, 904 P.2d 11, 18 (discussing the criteria relevant to the exercise of original jurisdiction).

{16} In *State ex rel. Clark,* two state legislators and a taxpayer sought a declaratory judgment and either a writ of mandamus or a writ of prohibition to preclude Governor Johnson from implementing Indian gaming compacts and revenue-sharing agreements that were entered without legislative consent. *See State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 566, 904 P.2d at 15. This Court exercised original jurisdiction because: 1) the issue presented a fundamental question of great public concern; 2) the relevant facts were virtually undisputed and no further factual questions existed for the district court to decide; 3) the purely legal issue eventually would have come before this Court; and 4) the petitioners and the respondents desired an early resolution of the dispute. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 569, 904 P.2d at 18.

{17} We conclude that similar facts in this case provide a basis for our exercise of original jurisdiction. The Respondents' actions implicate the doctrine of separation of powers. The balance and maintenance of governmental power is of great public concern. Also, no factual issues require further clarification; this dispute concerns a purely legal question —the limits upon executive and legislative power under the state constitution. Moreover, because of these questions' significance to the balance of power among government branches, we have no doubt that they eventually would have reached this Court. Last, early resolution of this case is desirable. As public assistance reform proposals are made, it is important that both the legislative and executive branches clearly understand their constitutional obligations and limitations. Furthermore, since the conclusion of this case affects numerous citizens and the efficient administration of public assistance, an immediate hearing of these issues benefits all concerned parties. Therefore, it is both necessary

and proper for this Court to exercise original jurisdiction in this case.

{18} We also note that "mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 570, 904 P.2d at 19. As our courts have held since territorial days, the authority to prohibit unlawful official conduct is implicit in the nature of mandamus. *See* ****774 *349** *In re Sloan,* 5 N.M. 590, 25 P. 930, *cited in State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 569–70, 904 P.2d at 18–19. New Mexico courts commonly use forms of prohibitory mandamus. *See State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 570, 904 P.2d at 19; *see also Stanley v. Raton Bd. of Educ.,* 117 N.M. 717, 718, 876 P.2d 232, 233 (1994); *State ex rel. Bird v. Apodaca,* 91 N.M. 279, 282, 573 P.2d 213, 216 (1977). Since Petitioners are alleging that the Respondents engaged in unlawful or unconstitutional official acts, Petitioners may request mandamus as the necessary relief.

III.

{19} Next we address whether the Respondents' actions constituted a violation of the New Mexico Constitution's separation of powers provision. Respondents contend that implementation of Respondents' program does not unconstitutionally infringe upon the Legislature's authority. Instead, they argue first that, as agents of the executive branch, they may implement the policy changes without seeking the direct participation of the Legislature. Respondents also contend that the Legislature conferred discretionary authority upon HSD to construct plans, make rules, and enact all regulations necessary to secure federal public assistance funds and to comply with federal law. As part of this position, Respondents assert not only that they were given discretionary authority to make such adjustments, but also that New Mexico and federal law compelled them to make the policy changes. We disagree.

A.

{20} Article III, Section 1 of the New Mexico Constitution prohibits any branch of government from usurping the power of the other branches:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others....

NM Const. art. III, § 1. This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty. *See Gregory v. Ashcroft,* 501 U.S. 452, 458–59, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *The Federalist* No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu).

{21} Within our constitutional system, each branch of government maintains its independent and distinct function. *See State v. Fifth Judicial Dist. Court,* 36 N.M. 151, 153, 9 P.2d 691, 692 (1932) (noting that "[t]he Legislature makes, the executive executes, and the judiciary construes the laws."). We have said that only the legislative branch is constitutionally established to create substantive law. *See State ex rel. Sofeico v. Heffernan,* 41 N.M. 219, 230–31, 67 P.2d 240, 246 (1936) (stating that the Legislature, rather than the State Game Commission, has the power to define what constitutes a game animal, because only the Legislature constitutionally "can create substantive law"); *State v. Armstrong,* 31 N.M. 220, 255, 243 P. 333, 347 (1924) (stating that the Legislature possesses the sole power of creating law). We also have recognized the unique position of the Legislature in creating and developing public policy. "[I]t is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature." *Torres v. State,* 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (discussing the judiciary's role in determining the existence of a tort duty).

{22} A governor's proper role is the execution of the laws. NM Const. art. V, § 4. Public assistance programs must be administered, and we recognize that such administration involves discretion by executive agencies. Yet, such discretion is not boundless. Generally, the Legislature, not

the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority,* 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative ****775 *350** agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. *See, e.g., Chalamidas v. Environmental Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit),* 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) (stating that an " agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue,* 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct.App.1972).

{23} While recognizing the specific roles of each branch of government, we also note that absolute separation of powers is "neither desirable nor realistic," *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22, and that the constitutional doctrine of separation of powers permits some overlap of governmental functions, *Mowrer v. Rusk,* 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). Nonetheless, this Court must give effect to Article III, Section 1, and will not be reluctant to intervene where one branch of government unduly encroaches or interferes with the authority of another branch. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22; *Rusk,* 95 N.M. at 54, 618 P.2d at 892. Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 574, 904 P.2d at 23 (citing *Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 433, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)).

{24} "The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 574, 904 P.2d at 23. If a governor's actions infringe upon "the essence of legislative authority—the making of laws—then the [g]overnor has exceeded his authority." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22. A violation occurs when the Executive, rather than the Legislature, determines "how, when, and for what purpose the public funds shall be applied in carrying on the government," *State ex rel. Schwartz v. Johnson,* 1995–NMSC–083, ¶ 14, 120 N.M. 820, 907 P.2d 1001 (quoting *State ex rel. Holmes v. State Bd. of Fin.,* 69 N.M. 430, 441, 367 P.2d 925, 933 (1961)). In addition, infringement upon legislative power may also occur where the executive does not "execute existing New Mexico statutory or case law [and rather attempts] to create new law ." *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 573, 904 P.2d at 22.

B.

{25} We have no doubt that Respondents' program implements the type of substantive policy changes reserved to the Legislature. Their changes substantially altered, modified, and extended existing law governing the structure and provision of public assistance in New Mexico. *See Chalamidas* 102 N.M. at 66, 691 P.2d at 67; *Rainbo,* 84 N.M. at 306, 502 P.2d at 409. Furthermore, by refusing to permit legislative participation in fashioning public assistance policy changes, Respondents "attempt to foreclose legislative action in [an] area[ ] where legislative authority is undisputed." *State ex rel. Clark,* 1995–NMSC–05 120 N.M. at 574, 904 P.2d at 23. We hold that Respondents' program constitutes executive creation of substantive law, and as such, is an unconstitutional encroachment upon the Legislature's role of declaring public policy.

{26} The substantial nature of the Respondents' adjustments to public assistance policy are best illustrated: 1) by comparing existing New Mexico public assistance standards with Respondents' changes; and 2) by placing those changes in the context of the range of policy options available to the New Mexico Legislature.

{27} First, federal AFDC statutes required that a child be "dependent" to qualify for assistance. Generally, this meant that a child had to be from a one-parent household to be eligible for benefits. 42 U.S.C. § 606(a). The PRA eliminated this federal requirement and gave the states the option to use TANF funds to support needy children in two-parent families as well. Pub.L. 104–193, § 103, 110 Stat. 2105, 2113 (Sec.401(a)(4)), 2134 (Sec.408(a)(1)(A)). Although ****776 *351** New Mexico had the option under federal law to maintain its existing "dependent" requirement, Respondents eliminated the requirement in New Mexico through the new administrative regulations. Income Support Division Financial Assistance Program, NM Human Serv. Dep't, 8 NMAC 3.FAP.407 (July 1, 1997). Respondents' actions effectively denied the Legislature any participation in this decision.

{28} Second, the old federal AFDC program contained ancillary job training and limited work requirements. *See* Pub.L. 104–193, § 103, 110 Stat. 2105, 2133 (Sec.407(e)).

New Mexico's current law reflects this. NMSA 1978, § 27–2–6.2 (1988). The PRA replaced these programs with mandatory work requirements. *Id.* Respondents' program imposed a mandatory work requirement through regulations and adopted work schedules that exceed those included in the PRA. 8 NMAC 3.FAP.415.3 and 415.5 (July 1, 1997). Again, the Legislature had no participation in deciding the extent of work requirements appropriate for New Mexico.

{29} Third, under the old federal framework, eligible individuals were deemed "entitled"to benefits. This meant that states were not free to make waiting lists or establish limits on the duration of assistance. The new PRA permits states to limit or end this entitlement. Pub.L. 104–193, § 103, 110 Stat. 2105, 2113 (Sec.401(b)). Respondents' program eliminated the entitlement in New Mexico. 8 NMAC 3.FAP.419 (July 1, 1997). The Legislature had no influence in deciding, as a matter of public assistance policy, whether an entitlement should have been maintained in New Mexico.

{30} Finally, federal AFDC did not impose any durational limits on eligibility for benefits. However, according to the PRA, states cannot use TANF block grant money to provide assistance to persons for more than five years. Pub.L. 104–193, § 103, 110 Stat. 2105, 2137 (Sec.408(a)(7)(A)). Hence, if a state chooses, it may provide assistance without durational limits, but public assistance payments exceeding five years must be funded entirely by state coffers. Pub.L. 104–193, § 103, 110 Stat. 2105, 2138 (Sec.408(a)(7)(F)). Respondents' program set a durational limit of three years in New Mexico. 8 NMAC 3.FAP.419 (July 1, 1997). The Legislature, had it been given the option, might have chosen not to impose a durational limit. Or alternatively, it might have chosen to set a limit of shorter or longer duration. Promulgation of the new program's three year limitation denied the Legislature any participation in deciding what, if any, time limits would be appropriate for New Mexico.

{31} Although this is not a complete list of the changes affected by Respondents' regulations, these examples represent a substantial change in New Mexico's public assistance eligibility or delivery standards without the participation of the Legislature. Indeed, little of New Mexico's public assistance program remains intact in the wake of Respondents' changes. Such results, by their very nature, set fundamental standards and make vital policy choices, a role reserved for the Legislature. See NM Const. art. IV, § 1; *State ex rel. Sofeico,* 41 N.M. at 230–31, 67 P.2d at 246; *Armstrong,* 31 N.M. at 255, 243 P. at 347.

{32} We also believe that the past practices of the New Mexico Legislature and Executive are instructive on these issues. In the past, when states were given the option to adopt federal public assistance policy changes, such changes were examined and adopted through the full legislative process and eventually signed into law by a governor. *See, e.g.,* NMSA 1978, § 27–2–10 (authorizing a food stamp program to carry out the federal Food Stamp Act and associated regulation); NMSA 1978, § 27–2–12 (authorizing the medical assistance division to provide medical assistance by regulation); NMSA 1978, § 27–2–6.2(A) (limiting employment and training requirements in programs established or conducted by the Human Services Department). Thus, the Respondents' unilateral implementation of the public assistance changes represents a substantial break with past practice, ignoring the New Mexico Legislature's consistent role in creating state public assistance policy.

{33} In sum, when the federal government enacted the PRA, New Mexico faced ****777 *352** three questions: 1) whether to continue to use the state's existing public assistance framework; 2) whether to create a new program for the delivery of public assistance services, and if so, the identification of its essential structure and elements; and 3) whether to administer a program with federal funding which would be subject to new federal restrictions. These issues go to the core of public assistance policy. By implementing their plan through HSD regulations rather than through the required legislative process, Respondents made these core policy choices themselves, thereby preventing the constitutionally required input of the people's elected law-making representatives.

C.

{34} The NMPAA does not confer upon Respondents discretionary authority to implement the PROGRESS program changes. Respondents cite to eight primary sections of the NMPAA that they contend confer discretionary authority upon HSD.[4] As a general matter, Respondents make much of the language calling for "consistency with federal law" included in some of these cited sections. Respondents argue that this language indicates that the New Mexico Legislature has delegated expansive authority to HSD to promulgate any necessary regulations which will maintain conformity between New Mexico and federal public assistance law. We disagree.

{35} Taken as a whole, these references to consistency merely recognize that HSD acts with the federal government to cooperatively administer certain public assistance programs such as AFDC and Medicaid. Such "boilerplate" language recognizing the cooperative nature of the federal and state relationship cannot be used to justify the unfettered discretionary authority that Respondents urge. Nor can this language be used to ignore the substantive commands of the New Mexico Legislature.

{36} The language invoked by Respondents is a limitation on HSD, not a *carte blanche* grant of discretionary authority. The language indicates that where joint federal/state programs are involved, New Mexico's regulation of the programs cannot violate federal guidelines. The phrases "must be consistent" or "as required by federal law" by their very nature suggest that, even though the programs are administered jointly, there are aspects of the programs that are regulated solely by federal law. The states are at liberty to determine some elements of the subject programs, but state power is limited in that the states cannot contradict federal controls over a program. Viewed in this context, we have no doubt that the "consistency" language is a limitation on HSD discretion and not a delegation of legislative power.

{37} This Court used similar "consistency" language in ****778 *353** *Katz v. New Mexico Department of Human Services,* 95 N.M. 530, 624 P.2d 39 (1981). We stated in *Katz* that:

> Compliance with the federal requirements is a condition to the receipt of federal funds. Section 27–2–12, N.M.S.A.1978, therefore requires that [HSD] must operate the [Medicaid] program *consistent with the federal act.*

Id. at 532, 624 P.2d at 41 (emphasis added). Respondents contend that this language supports their argument that HSD has broad discretionary authority to do whatever is necessary to conform New Mexico's public assistance programs to federal guidelines. We disagree.

{38} In *Katz,* a patient applied to the New Mexico Human Services Department seeking Medicaid coverage for medical treatment rendered by a chiropractor and a physical therapist. *Id.* at 531, 624 P.2d at 40. The patient appealed HSD's denial of Medicaid funding for her treatment arguing that state and federal regulations required that HSD pay for the services. *Id.*

{39} Analyzing first the federal statutes governing Medicaid, this Court ruled that "payment of services of chiropractors and physical therapists under the Medicaid program is optional [by the states] and not mandated by federal law ...." *Id.* at 532, 624 P.2d at 41. The Court then turned to an analysis of New Mexico regulations to determine whether New Mexico had opted to cover such services. *Id.* It concluded that New Mexico regulations did not cover them. *Id.* Thus, according to state and federal law, HSD was not required to pay for the chiropractic services and physical therapy received by the claimant.

{40} Contrary to Respondents' assertion, *Katz* was not decided as a matter of HSD discretionary authority. The claimant's arguments were rejected because federal and state law did not list or provide for payment of chiropractic services and physical therapy. If anything, *Katz* stands for the proposition that HSD discretion is strictly limited by the state and federal statutes and regulations which govern Medicaid services. Thus, Respondents' arguments with regard to *Katz* are without merit.

{41} Respondents also assert that, aside from the provisions referring to consistency with federal law, other NMPAA provisions empower them with the discretionary authority to implement the new regulations.[5] However, the NMPAA contains significant evidence of a legislative intent to limit HSD's authority. Section 27–2–4 lists specific eligibility requirements and appears to be an exclusive listing. Within that provision, subsection 27–2–4(C) states that a benefits recipient must "meet all qualifications for *one of the public assistance programs authorized by the Public Assistance Act.* " (emphasis added). The NMPAA only authorizes the implementation of four programs: AFDC, Medicaid, the General Assistance Program, and the Food Stamp Program. In addition, the Legislature specifically directs that HSD not act "inconsistent with the provisions" of the NMPAA. Section 27–1–3(D). Given the general principles that the Legislature is the policy-making body, that it may create agencies to carry out legislative initiatives, and that, in creating an agency, it sets boundaries for the agency's exercise of the authority granted by the Legislature, we conclude that, in its efforts to cooperate with federal authorities, HSD has no mandate to ignore existing New Mexico statutes. In the

present circumstances, the NMPAA constrains, rather than enlarges, HSD's authority.

{42} In addition, we reject any notion that the PRA confers authority upon the executive branch to ignore duly enacted state legislation or to make the legislative policy choices embodied in the new public assistance changes. The PRA confers upon the states the essential choices of public assistance ****779 *354** policy. Pub.L. 104–193, § 103, 110 Stat. 2105, 2113 (Sec.401(a)(I)), 2124 (Sec.404(a)), 2138 (Sec.408(a) (7)(E), (F)). The PRA neither explicitly or implicitly gives that authority solely to the executive of the state. Furthermore, federal law cannot enlarge state executive power beyond that conferred by the state constitution. *State ex rel. Clark,* 1995–NMSC–051, 120 N.M. at 577, 904 P.2d at 26 (finding an identical argument by the Governor to be "inconsistent with core principles of federalism"); *cf. New York v. United States,* 505 U.S. at 176, 112 S.Ct. 2408 (striking act of Congress requiring states to act).

{43} In a similar vein, Respondents also argue that the PRA imposes conditions on New Mexico and that the Legislature's acceptance of TANF funds, absent required changes in the NMPAA, leaves the implementation of those obligatory changes to the Executive. It is true that "under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.' " *New York v. United States,* 505 U.S. 144, 167, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *South Dakota v. Dole,* 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987)). However, as indicated above, we conclude that many provisions contained in Respondent's program were not required by the PRA.

{44} Finally, we reject Respondents' contention that if the Legislature disagrees with Respondents' program, the appropriate remedy is for the Legislature to redirect HSD's discretionary authority with new statutes during the next legislative session. This argument has no merit. Only a simple majority is required to pass a bill through both legislative chambers. NM Const. art. IV, § 17. A governor is constitutionally entitled to veto the legislation if he does not agree with it. NM Const. art. IV, § 22. The Legislature then has the option of attempting to override the veto, by securing a two-thirds majority. *Id.* The counterbalance of a governor's veto power against the Legislature's ability to override the veto is the mechanism that forces the two branches to compromise and work together to create law.

{45} The alleged remedy that Respondents' urge is impractical, and more importantly, it would subvert the system of checks and balances of the New Mexico Constitution. Through HSD regulation, Governor Johnson implemented new public assistance policies in exactly the form that he deemed appropriate for New Mexico. If the Legislature were now to pass statutory amendments by a simple majority in an attempt to "redirect" HSD's discretion, the Governor's signature would still be required for such changes to become law.

{46} Respondents' position is impractical because the Governor would have no reason to accept, or even consider, such changes. He already has the public assistance policies in place that he favors via administrative regulation. Therefore, no incentive exists for him to consider any public assistance changes suggested by the Legislature. Consequently, the Governor could, and almost certainly would, veto any bill submitted to him altering the program that he already put in place unilaterally.

{47} With the administrative changes to public assistance already in place and a veto of any proposed amendments assured, the Legislature could convince the Governor to compromise only if, from the outset, the Legislature had the necessary votes for a veto-override. This scenario, in effect, would force the Legislature to garner a veto-override majority of two-thirds to bring about any consideration of amendments to the existing public assistance regulations.

{48} Respondents' recommendation for further legislative action turns our constitutional system of checks and balances on its head. The New Mexico Constitution requires that the Legislature first have the opportunity to debate and vote on core policy changes; only then may the Governor exercise his veto powers and force the Legislature to consider a veto-override. In this case, the Governor already has usurped the legislative function, initiating public policy changes which should find their genesis only in the Legislature. Requiring legislative action to change the Governor's program now would place the Legislature in a position of responding to, rather than initiating, core public policy choices.

****780 *355** D.

{49} Because the substantive public assistance policy changes promulgated in Respondents' plan required legislative participation and because neither state statute nor federal

law conferred discretionary authority upon Respondents to institute the policy changes, we conclude that Respondents violated Article III, Section 1 of the New Mexico Constitution. From this conclusion, a writ of mandamus was issued September 10, 1997.

IV.

{50} In the months that followed the Writ, Respondents made no attempt to comply with the Writ and openly defied this Court. During this time, Respondents were advised by several legal authorities that they should comply with this Court's Writ. The New Mexico Attorney General assured Respondents that no irreconcilable conflicts existed between state and federal law and stressed the importance of relinquishing the Respondents' public assistance program. HSD's general counsel also advised Respondents to return to New Mexico's existing program until the Legislature passed a bill and the Governor signed it into law. Despite this overwhelming advice to comply with the Court's Order, Respondents continued implementation of their public assistance program.

{51} After several failed attempts to seek Respondents' compliance, Petitioners filed a Motion for Supplemental and Further Relief. Respondents did not deny that they were disobeying the Court's Writ. Respondents admitted that the Writ compelled them to cease their public assistance program and reinstate New Mexico's existing program. However, HSD continued to encourage implementation of Respondents' new public assistance regulations, except with respect to a waiver of the work requirement penalty.

{52} On October 24, 1997, Petitioners filed a motion to have this Court declare Respondents in contempt of court. The petition alleged that Respondents continued to carry out their public assistance program. Respondents replied that they could not comply with the Court's Writ because the existing state statutes were contrary to federal PRA guidelines. Specifically, Respondents asserted that state statutes: 1) provided benefits to unqualified aliens, felons, and parole violators, and 2) did not include mandatory work requirements.

{53} Before considering contempt proceedings, the Chief Justice strongly encouraged the parties to engage in good-faith negotiations or mediation toward settlement. Despite the Chief Justice's encouragement, Respondents refused to consider any proposals, and they continued to implement their own public assistance program.

{54} On December 8, 1997, the Petitioners filed a Supplemental Memorandum concerning possible sanctions and urged the Court to consider imposing contempt sanctions against both the Governor, and newly-appointed HSD Secretary Bill Johnson. In response, Respondents only repeated the argument that they could not comply with the Court's Writ because NMPAA conflicted with federal law. Pursuant to motion, the Court then initiated contempt proceedings, setting a hearing for Respondents to show cause why they should not be held in contempt.

{55} At the contempt hearing, Respondents maintained that harmonizing the Court's Writ with the federal funding requirements in the PRA was impossible. Respondents reasoned that because the federal government no longer funds the federal AFDC program, HSD was unable to return to the existing New Mexico law. Respondents also asserted that the state would lose federal public assistance funds as a result of complying with the Court's Writ.

{56} Respondent's misrepresentation of the loss of federal funding was an attempt to mislead this Court. Respondents first asserted that reinstituting the prior AFDC program would result in the loss of the entire amount of federal welfare funding. Yet, the actual penalty for noncompliance with the PRA's requirements and penalties would be a loss of no more than 5% of the entire federal funding amount. Federal Register Vol. 62, No. 224, Nov. 20, 1997. Although this may be a substantial amount, it would not be the death knell for the state's welfare program that Respondents would have us ****781** ***356** believe. Second, Respondents suggested that New Mexico would suffer immediate funding consequences if they followed the Court's Writ. However, existing federal authority indicates that if any federal funds were going to be withheld from New Mexico, such a decision would not be made anytime in the near future. *Id.* Hence, the tone of urgency and desperation adopted by Respondents was at best unnecessary, and at worst, misleading. Third, contrary to Respondents' assertions, nothing in the record indicates that anyone from either HSD or the Governor's Office made any inquiries with federal agencies regarding the imposition of possible penalties or exceptions. We are not convinced that Respondents actually pursued this avenue as a possible solution to this case. Finally, Respondents' counsel misused legal authority in an attempt to mislead this Court. During oral argument, Respondents' counsel cited to a proposed rule,

treating it as applicable federal law. We specifically object to this misrepresentation and to counsel's attempt to lead this Court astray.

{57} FAIR, the Legislature's proposed public assistance program that the Governor vetoed, may not have been acceptable to the Governor, but it did comply with the PRA. The Governor has every right to veto legislation but he must be mindful of his veto's consequences. The Governor should have foreseen that vetoing the proposed public assistance program left the prior AFDC program as the only viable public assistance program. Implementing Respondents' own welfare program without legislative approval was not an option.

V.

{58} Next we address application of the appropriate contempt sanction. "Without question, the power of the judiciary to compel compliance with its orders, extends to the executive branch." *Westefield v. IRS,* 172 B.R. 178, 179–80 (Bankr.W.D.N.Y.1994) (quoting *McBride v. Coleman,* 955 F.2d 571, 581–82 (8th Cir.1992) (Lay, J. concurring in part, dissenting in part)). "The executive branch of government has no right to treat with impunity the valid orders of the judicial branch." *Nelson v. Steiner,* 279 F.2d 944, 948 (7th Cir.1960) (*quoted in McBride,* 955 F.2d at 582 (Lay, J. concurring in part, dissenting in part)).

{59} By statute, the New Mexico Supreme Court has the authority to hold an individual in contempt of court and to punish, by "reprimand, arrest, fine or imprisonment." NMSA 1978, § 34–1–2 (1929). In determining the appropriate punishment for civil contempt, the Court exercises its discretion. The Court considers the character and degree of harm threatened by continued contemptuous acts and whether contemplated sanctions will cause compliance with the Court's order. *State v. Pothier,* 104 N.M. 363, 369, 721 P.2d 1294, 1300 (1986). Courts consider the seriousness of the consequences of continued contemptuous behavior, the public's interest in ending defendants' defiance, and the importance of avoiding future defiance. *Case v. State,* 103 N.M. 501, 502, 709 P.2d 670, 671 (1985).

{60} A court may directly order an individual to comply with its order to purge himself or herself of contempt and may stay further sanctions if the individual complies with the order by a specified date. *See State ex rel. Dep't Corrections v. Pena,* 911 P.2d 48, 55 (Colo.1996) (en banc) (affirming a contempt order against an executive director and administrative officer of the Department of Corrections that had awarded damages to the party moving for contempt). Other state courts have used direct orders or injunctions to compel executive branch members to comply with court orders. *See Whitehead v. Nevada Comm'n on Judicial Discipline,* 110 Nev. 128, 906 P.2d 230, 236–37 (1994) (holding attorney general's action in counseling others to defy a court order proper subject of contempt proceedings but electing to defer adjudication until such time as the advisees, having been fully informed, continue to resist court order).

{61} Some state courts have fined executive branch members in their individual capacities when their actions were willful and performed in bad faith. *E.g., Ross v. Superior Court,* 19 Cal.3d 899, 141 Cal.Rptr. 133, 569 P.2d 727, 738 (1977) (en banc) (affirming trial court decision holding members of board ****782 *357** of supervisors individually in contempt of court and imposing a fine on each member); *but see United Mine Workers v. Faerber,* 179 W.Va. 77, 365 S.E.2d 357, 359–60 (1987) (denying motion to impose damages award for contempt against an executive officer in his personal capacity due to the absence of malice or a willful, knowing disobedience of court order, relying on two cases, *Class v. Norton,* 505 F.2d 123, 127–28 (2d Cir.1974); *Woolfolk v. Brown,* 358 F.Supp. 524, 537 (E.D.Va.1973) (involving state welfare officials; violation of court orders)); *In re S.C.,* 802 P.2d 1101, 1103–04 (Colo.Ct.App.1989) (holding juvenile court properly found four Colorado Department of Institutions officials in contempt of court for refusing to accept a juvenile committed to a receiving center and did not abuse its discretion in imposing fines as a sanction). Individual executive branch members have had to pay personal contempt fines when the individual has notice of the judgment and is able to comply with the court order and nonetheless refuses to comply with the judgment. *Ross,* 141 Cal.Rptr. 133, 569 P.2d at 730. Some states also have restricted an individual member from using certain state funds to pay the fine. *See Id.*

{62} Courts may also impose imprisonment in a civil contempt action to coerce compliance. *See State ex rel. Dept. of Human Servs. v. Rael,* 97 N.M. 640, 642, 642 P.2d 1099, 1101 (1982); *Niemyjski v. Niemyjski,* 98 N.M. 176, 177, 646 P.2d 1240, 1241 (1982). It is clear this Court has authority to implement the full extent of contempt sanctions against executive branch members, including fines and imprisonment.

{63} Petitioners urge this Court to consider appointing a special master to oversee the program and to ensure compliance. Under Petitioners' proposal, the special master would recommend to this Court the appropriate sanction. Petitioners suggest that if Respondents continue to refuse to comply with the Writ, then this Court could expand the special master's authority, assigning the special master to administer the entire public assistance program. However, we do not feel that such an appointment is appropriate.

{64} We hold that the most appropriate contempt sanction is an order directing Respondents to cease and desist immediately from implementing the Respondents' public assistance program within seven days. The Court will consider imposing further sanctions if Respondents do not comply. Here, the Court's Writ requires Respondents to stop implementing an unconstitutional program. Respondents do not have the discretion to continue an unconstitutional act. Moreover, Respondents had more than adequate notice and were advised to comply with the Writ.

{65} We hold that Respondents acted in defiance of this Court's Order and have shown no justification for failing to comply with it. Accordingly, we find Respondents in indirect civil contempt, and after reviewing all sanctions within our contempt power, we hold that the most appropriate sanction is a direct order to comply within a specified time, with further sanctions if Respondents do not immediately comply. We maintain jurisdiction to impose additional contempt sanctions if we later determine that they are necessary and appropriate.

{66} **IT IS SO ORDERED.**

FRANCHINI, C.J., and MINZNER, SERNA and McKINNON, JJ., concur.

All Citations

125 N.M. 343, 961 P.2d 768, 1998-NMSC-015

Footnotes

1 The petition named then-Secretary Duke Rodriguez as a party. Secretary Rodriguez resigned during the course of these proceedings. His replacement, Bill Johnson, as current HSD Secretary, is now a party to this matter and subject to this Court's decision.

2 The original 1937 legislative enactment was not entitled the “Public Assistance Act.” The Legislature, in amending the original enactment in 1973, created this title and designated various sections of Chapter 27, Article 2 for which the title applied, NMSA 1978, § 27–2–1 (1973), including some sections of the original enactment, *e.g.,* NMSA 1978, § 27–2–17 (1937). Other sections of the original enactment, *e.g.,* NMSA 1978, § 27–1–2 (1937), are not included within the scope of the officially-titled Public Assistance Act. Section 27–2–1.

3 The PRA limits TANF block grant eligibility to federally approved state plans that: 1) generally limit lifetime benefits using federal funds to a period no longer than five years; 2) reduce assistance for a recipient's failure to cooperate in establishing paternity or in payments of child support; 3) eliminate aid to teenage parents who do not attend high school or other equivalent training programs; 4) generally deny assistance to teenage parents who do not live in adult-supervised settings; 5) deny assistance to minor children who are absent from the home for a significant period; 6) impose mandatory work requirements; and 7) receive appropriated TANF grant funds from their state legislature. Pub.L. 104–193, §§ 103, 901, 110 Stat. 2105, 2134–42 (Sec.408), 2347.

4 The cited sections include:

NMSA 1978, § 27–1–3(D) (1937), which states that HSD may "formulate detailed plans, make rules and regulations and take action deemed necessary and desirable to carry out the provision of Chapter 27 NMSA1978 and which is not inconsistent with the provisions of that Chapter."

NMSA 1978, § 27–1–3(J) (1937), which authorizes HSD to "administer such other public welfare functions as may be assumed by the state after the effective date of the section;"

NMSA 1978, § 27–2–3 (1975), which requires that, "[c]onsistent with the federal act and subject to the availability of federal and state funds," HSD will set a standard of need which establishes "a reasonable level of subsistence;"

NMSA 1978, § 27–2–4 (1975), which sets out five specific conditions for public assistance eligibility. The section begins, "Consistent with the federal act, a person is eligible for public assistance grants under the Public Assistance Act if ...;"

NMSA 1978, § 27–2–5 (1982), which sets forth the methodology for determining the amount of grants, permitting across the board reductions, "as necessary," should the amount of federal and state funds be insufficient to provide maximum grants for all eligible persons;

NMSA 1978, § 27–2–10 (1973), which authorizes HSD to establish a food stamp program in New Mexico subject to the continuation of the federal program and availability of federal funds;

NMSA 1978, § 27–2–15 (1937), which designates HSD as the state agency that will cooperate with the federal government in the administration of the federal Social Security Act;

NMSA 1978, § 27–2–16 (1984), which authorizes HSD to administer programs for the aged, blind, and disabled in the "amounts consistent with federal law to enable the state to be eligible for Medicaid funding."

5 These provisions, in short, give HSD authority: 1) to adopt, amend and repeal bylaws, rules, and regulations, Section 27–1–2(E); 2) to establish, extend and strengthen public assistance programs for children, Section 27–1–2(L); 3) to establish and administer a program for relief, Section 27–1–2(M); 4) to formulate detailed plans, make rules and regulations and take action deemed necessary or desirable to carry out the provisions of [the NMPAA], Section 27–1–3(D); 5) to cooperate with the federal government in matters of mutual concern pertaining to public assistance, Section 27–1–3(E); and 6) to administer such other public assistance functions as may be assumed by the state after the effective date of this section, Section 27–1–3(J).

122 N.M. 495
Court of Appeals of New Mexico.

WEST OLD TOWN NEIGHBORHOOD ASSOCIATION, a New Mexico non-profit corporation, Judy Gossett, Lanny Tonning and Linda Thorne, Petitioners–Appellants,
v.
CITY OF ALBUQUERQUE, a New Mexico municipal corporation, Respondent–Appellee,
and
Julia Milloy and Construction Professionals, Inc., Interested Parties.

No. 16281
|
Sept. 6, 1996.
|
Certiorari Denied Oct. 23, 1996.

Synopsis
Neighborhood association petitioned for writ of certiorari to review city council's zoning decision and amendment of sector plan with regard to newly annexed property. The District Court, Bernalillo County, W. Daniel Schneider, D.J., affirmed city council's action. Neighborhood association appealed. The Court of Appeals, Bosson, J., held that: (1) city's sector development plan could establish zoning for land outside city's boundaries upon annexation even though plan was adopted by resolution and not ordinance; (2) city's sector development plan created zoning for land outside city's boundaries that became operative upon land's annexation by city, and therefore city council was not free to enact any zoning it wished for such property regardless of sector development plan and without following defined criteria for rezoning; and (3) city council's action in rezoning newly annexed property and amending zoning map and sector development plan to permit new zoning were arbitrary and capricious, given city council's failure to comply with requirements for such amendments.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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****531 *497** *OPINION*

BOSSON, Judge.

1. The opinion filed in this case on July 30, 1996, is hereby withdrawn and the following opinion is substituted. Respondent-appellee's motion for rehearing is denied.

2. West Old Town Neighborhood Association appeals a zoning decision of the Albuquerque City Council relating to newly annexed property. In the course of annexation and over the protest of some of the surrounding neighborhood, the City Council changed the zoning from that which had previously been designated in the sector development plan for the Old Town area. We are asked to review the City's zoning ordinances, regulations, policies and procedures and to determine the weight to be given a zoning designation in a sector development plan when it pertains to land initially located outside the City and then annexed. We also determine whether the defined criteria for rezoning set forth in the City's zoning code must be satisfied in an annexation situation. We conclude that the City did not comply with its own zoning code and reverse.

FACTUAL AND PROCEDURAL HISTORY

3. The property in question, a 6.3 acre tract owned by Julia Milloy and Construction Professionals, Incorporated (Milloy), is located in the West Old Town area of Albuquerque and was previously zoned County A–1 by Bernalillo County. In 1979 the County issued a special use permit for a 40 lot subdivision on the property, but it was never built. Milloy acquired the property later and petitioned for annexation into the City to obtain water and sewer services for the property. Milloy petitioned the City's Environmental Planning Commission (EPC) requesting that the property which was

zoned as RA–1 (two dwelling units per acre) be zoned at RA–2 density (four dwelling units per acre).

4. Although located outside the City, the property was within the boundaries of the City's Old Town Sector Development Plan (Sector Plan), which provided a zoning plan for land in the greater Old Town area. Under NMSA 1978, Section 3–19–5 (Repl.Pamp.1995), the City has authority to adopt plans for the development of areas outside its boundaries but within its planning and platting jurisdiction. In 1988 the City Council amended the Sector Plan to decrease the allowable density from RA–2 to RA–1, so that the Sector Plan then read: "As land in the area which is not in the City is annexed, it should be zoned RA–1 to maintain the existing character of the area." The existing character of the western portion of the area, where the Milloy property is located, was described in the Sector Plan as semi-rural. Milloy's request for RA–2 zoning conflicted with the RA–1 designation in the Sector Plan, and therefore Milloy's annexation petition also sought to amend the Sector Plan.

5. On January 20, 1994, after several hearings, the EPC recommended to the City Council's Land Use, Planning and Zoning Committee (LUPZ) that the annexation request be approved, but not the RA–2 zoning density. Instead, the EPC fashioned a compromise, proposing that the property be zoned SU–1 (special use) with a recommended density falling between RA–1 and RA–2. The EPC also advised the LUPZ that the Sector Plan would have to be amended to accommodate the SU–1 zoning for the property, because SU–1 was not a permitted zone in the Sector Plan. After a hearing, the LUPZ adopted the EPC recommendations, and the Milloy proposal was then ready for final approval by the City Council.

6. On May 16, 1994, the City Council accepted the recommendations and approved the annexation, rezoning, and Sector Plan amendment. The City Council adopted Ordinance 19, which annexed and rezoned the tract SU–1, and adopted Resolution 45 which amended the Sector Plan to permit the new SU–1 zoning for this particular property. The Resolution stated the SU–1 zoning category was not necessarily applicable to other vacant parcels in the area covered by the Sector Plan and was not a precedent for other zoning changes.

7. The West Old Town Neighborhood Association petitioned the district court for a writ of certiorari to review both the zoning decision and the amendment of the Sector Plan. *See* NMSA 1978, § 3–21–9 (Repl.Pamp.1995). ****532 *498** The annexation itself was not challenged. The district court affirmed the action of the City Council, concluding that the City's enactment of Ordinance 19 and Resolution 45 was not "arbitrary and/or capricious, was not otherwise contrary to law, and is supported by substantial evidence." The Neighborhood Association appeals.

DISCUSSION

8. If this were simply a case of rezoning land already within the City, all parties agree that to amend both the City zoning map and the Sector Plan, the City would first have to meet the defined criteria for rezoning set forth in the City zoning code. *See* Albuquerque, N.M., Zoning Code ch. 14, art. XVI, § 14–16–4–1 (1995 S–5); Resolution 270–1980. However, rezoning is only granted in limited circumstances, usually based on changes in the surrounding community. The question is whether those same rezoning procedures apply when land is being annexed into the City.

9. The Neighborhood Association contends that this is rezoning and the defined criteria do apply, emphasizing that the Sector Plan was specifically designed to deal with annexation. The Neighborhood Association takes the position that the Sector Plan creates zoning for any property located within its boundaries, effective upon annexation into the City, and any deviation from the zoning designated in the Sector Plan must follow the protocol for rezoning.

10. The City [1] rejects the Neighborhood Association's claim that the Sector Plan establishes the zoning status of the property. The City contends that the Sector Plan is merely advisory and does not create zoning for that part of the area located outside city boundaries. The City argues that because the annexed property had no prior city zoning, then this cannot be rezoning. The City takes the position that, upon annexation, the City Council is free to select an initial zoning regardless of the Sector Plan, and it may do so without adhering to the defined criteria for rezoning set forth in the City zoning code. Alternatively, the City argues that if the rezoning criteria do apply, they have been substantially satisfied in this instance. We turn initially to what criteria apply, if any, to the City's zoning determination upon annexation.

Standard of Review

11. As the City correctly points out, the City Council may enact the zoning it chooses when it authors a sector

plan. The City appears to argue that the challenged zoning action was legislative in nature and should be reviewed under the deferential standard described in *Thompson v. McKinley County,* 112 N.M. 425, 430, 816 P.2d 494, 499 (1991) (legislation is presumptively valid). *See Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct.App.1989) (enactment of zoning rules and regulations is a legislative function which must be reviewed with deference). However, legislative actions generally reflect public policy in relation to matters of a general nature, as when a determination is made regarding the zoning of a community or area without consideration to any particular piece of property. *See Dugger v. City of Santa Fe,* 114 N.M. 47, 51, 834 P.2d 424, 428 (Ct.App.), *writ quashed,* 113 N.M. 744, 832 P.2d 1223 (1992). In this instance, the City's amendments to the zone map and Sector Plan were intended to apply only to a single property, the tract belonging to Milloy. In New Mexico, zoning decisions involving the application of a general rule to a specific property are not legislative acts; rather they are deemed to be quasi-judicial in nature. *Id.* Because the challenged zoning actions are quasi-judicial, the administrative standard of review would be the appropriate standard. *See id.* at 54, 834 P.2d at 431. We apply a whole record standard of review to administrative decisions looking at all the evidence, favorable and unfavorable, bearing on a decision to determine if there is substantial evidence to support the result. *Fitzhugh v. New Mexico Dep't of Labor,* 122 N.M. 173, 180, 922 P.2d 555, 562 (1996). The decision will be affirmed if it is supported by the applicable ****533 *499** law and by substantial evidence in the record as a whole. *Id.* at 180, 922 P.2d at 562.

Sector Development Plans

12. Citing *Dugger,* the City argues that the Sector Plan did not establish zoning because it was adopted by City resolution, not by ordinance. *See Dugger,* 114 N.M. at 55, 834 P.2d at 432 (resolutions do not carry the weight of law, as do ordinances). In *Dugger,* this Court discussed the difference between resolutions and ordinances citing to *Williams v. City of Tucumcari,* 31 N.M. 533, 249 P. 106 (1926) and 5 Eugene McQuillin, *The Law of Municipal Corporations* § 15.02 (3d ed. 1088). *Id.* The distinction between our case and the circumstances of *Dugger* can be found in the cited material. In *Williams,* the Tucumcari city council had undertaken by informal order an action which local statute required to be accomplished by ordinance. *Williams,* 31 N.M. at 536, 249 P. at 107. The New Mexico Supreme Court said that when action by ordinance is required, "[a] resolution is not sufficient, except perhaps when passed with all the formalities required of ordinances, this being its legal equivalent." *Id.* The cited section of McQuillen also discusses the differences between resolutions and ordinances. Determining whether an action of a municipal legislative body is an ordinance or resolution depends less on what it is called, and more on what it seeks to accomplish. McQuillen, *supra,* § 15.02. When a resolution is "in substance and effect an ordinance or permanent regulation, the name given to it is immaterial. If it is passed with all the formalities of an ordinance it thereby becomes a legislative act, and it is not important whether it be called ordinance or resolution." *Id.*

13. The formalities involved in approving a sector plan are found in Section 14–16–4–1(E) of the Albuquerque zoning code which specifies that the actions taken to adopt a sector development plan must abide by the same provisions of the zoning code used for zone map amendments. These procedures include a public hearing conducted by the Planning Commission with notice by publication, notice by posting the property, and notice by mail to property owners within the area of proposed change. Depending on the nature of the proposed change, either the Planning Commission or the City Council determines whether to approve the change. When land is being concurrently annexed and zoned, the City Council has the sole authority to amend the zoning map and any related sector development plans. In this case the same procedures were used to amend the zoning map and the Sector Plan at the EPC meeting, the LUPZ meeting, and the meeting of the City Council. The Sector Plan, although passed by resolution, was passed with all the formalities of its companion legislation, Ordinance 19, which annexed the property and amended the zoning map. To make the distinction argued by the City would violate a basic tenet of judicial review by exalting form over substance. *See Dugger,* 114 N.M. at 52, 834 P.2d at 429.

14. Whether sector development plans create zoning for areas within their boundaries is a question best answered by the City planning and zoning code. The fundamental principle of construction for zoning ordinances is to determine and carry out the intent of the legislative body, in this case the Albuquerque City Council. 3A Norman J. Singer, *Sutherland Statutory Construction* § 75.07, at 440 (5th ed. 1992). The language and procedures employed by the planning and zoning code confer greater authority upon sector development plans than the City is willing to acknowledge.

15. The Albuquerque planning ordinance describes a hierarchy of planning measures used to manage urban

development. *See* Albuquerque Planning Ordinance §§ 14–13–1–1 to 14–13–1–3 (1994). Among those are sector development plans which are classified as Rank Three Plans. *See* § 14–13–1–2(C)(1) (1994). Sector development plans typically cover a large area with common characteristics and specify standards for maintaining the character of the area, including permitted uses and number of dwellings per acre. *Id.* The planning ordinance states that sector development plans "create special zoning regulations for the area covered." *Id.* The planning ordinance distinguishes between ****534** ***500** different kinds of Rank Three Plans, noting that sector development plans create zoning regulations while neighborhood development plans may only propose zoning. Section 14–13–1–2(C) (2).

16. As described above, the procedures for adopting a sector development plan are identical to those for adopting a zone map. The procedures for amending a sector plan are also the same as those for amending a zoning map. Further, if a requested zoning change conflicts with an existing sector plan, as in this case, the zoning code requires that two applications be submitted; one to amend the zoning map and the other to amend the sector plan. Section 14–16–4–1(C)(9)(a). A proposed zoning map amendment that is in conflict with a sector development plan cannot be processed by the city unless a proposed plan amendment is also submitted. Therefore, by the very language of the Albuquerque planning and zoning ordinances, the City has expressed the intention that sector development plans have the force of zoning. The record of the EPC proceedings in this case also indicates an awareness of the weight due the Sector Plan and a concern about departing from its provisions, particularly in light of the recent amendment by the City Council changing the zoning to RA–1.

17. Based on the foregoing, we conclude that the Sector Plan was intended to create zoning for the West Old Town area which became operative for this property at the time of annexation. We decline to follow the City's theory that the Council was free to enact any zoning it wished regardless of the Sector Plan and without following the defined criteria for rezoning. Such a theory would, in so many words, give the City one free pass when zoning annexed land. It would ignore one of the purposes of zoning ordinances, which is to protect comprehensive planning and zoning in anticipation of annexation. Accepting the City's position would undercut the carefully balanced compromises on which sector plans are based and would jeopardize the ability of residents living near city boundaries to rely on the zoning already designated in these plans. In this case, residents of Old Town were directly involved in fashioning and then amending the Sector Plan to limit annexed land to RA–1; they should be able to rely upon the Sector Plan for predictable, stable land use policies for their area. *Cf. Miller v. City of Albuquerque,* 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) (even though property owners have no vested right in a particular zoning classification, they have a right to rely on compliance with the proper procedures for amending a zoning ordinance).

Resolution 270–1980

18. Because the Sector Plan established RA–1 density for the area it covered, the change to SU–1 was a rezoning. Zoning maps and related sector development plans may be amended after a public hearing on the basis of plans, ordinances and policies adopted by the City Council. Albuquerque Zoning Code § 14–16–4–1(C)(9). Resolution 270–1980, promulgated by the City Council, contains the policies for deciding applications for zoning map changes and changes to other zoning regulations, including the following criteria upon which a rezoning decision must be based:

> B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.
>
> C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including privately developed area plans which have been adopted by the City.
>
> D. The applicant must demonstrate that the existing zoning is inappropriate because;
>
> (1) there was an error when the existing zone map pattern was created, or
>
> (2) changed neighborhood or community conditions justify the change, or
>
> (3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.

****535** ***501** 19. The record of the EPC meeting, at which the Milloy zoning change was first recommended, does not

reflect any attempt by the applicant to meet these standards. Nor does the record demonstrate that the EPC Commissioners considered these criteria in recommending the new zoning. Although the Commissioners discussed the conflict between SU–1 and the Sector Plan, they were more concerned about the history of this zoning request and whether past problems might expose the City to legal action.[2] The findings of fact adopted by the EPC in support of the Sector Plan amendment and zoning change reflect this concern, not the criteria defined in Resolution 270–1980.

20. As a rationale for both the zoning decision and for amending the Sector Plan, the EPC issued the following findings of fact:

1. This is a unique situation because of the previous actions that have taken place on this property *and does not constitute a changed condition.*

2. The special use zone is an appropriate zone category to apply to this annexation because of unique circumstances surrounding this annexation request and is not necessarily applicable on other vacant parcels in the sector development plan area.

(Emphasis added). In addition, the EPC tried to limit the new zoning to this property:

> 3. This zoning is being proposed as a compromise solution to a series of compounded errors over the past year and a half and is not in any way to be construed as setting a precedent for other lands in this immediate area.

Findings supporting the amendment of the Sector Plan also attempted to limit the zoning change to this one parcel of land:

> 3. This amendment [to] the Old Town Sector Development Plan is to apply to the Villa Del Rio Subdivision alone. It is not intended to apply to other lands within this sector plan. This is a special situation and this Commission reaffirms commitment to RA–1 zoning for lands annexed in this general area.

21. At the public hearing on the annexation and zoning changes, the City Council adopted the following finding in Resolution 45 to justify amending the Sector Plan:

> WHEREAS, the special use zone is an appropriate zone category to apply to Lots 1–40, Villa Del Rio Subdivision because of unique circumstances surrounding the previous County approvals for this subdivision and is not necessarily applicable on other vacant parcels in the sector development plan area.

Here again, the City gave no apparent consideration to the rezoning criteria defined in Section D of Resolution 270–1980, but instead attempted to limit the effect of the rezoning to this property alone as a unique situation. The findings of a unique circumstance and a compromise solution do not track the criteria necessary to justify rezoning. We would consider affirming the City if the record contained other evidence that the appropriate criteria were satisfied. *See Muller v. City of Albuquerque,* 92 N.M. 264, 266, 587 P.2d 42, 44 (1978). Unfortunately, the record of proceedings below fails to show substantial compliance with the City's own requirements. Nevertheless, the City maintains that the findings of fact made by the EPC and the City Council in support of the zoning change were sufficient to comply with the requirements of Resolution 270–1980, specifically with either Section D(2) or D(3).

Section D(2). Changed Neighborhood Condition

22. Under Resolution 270–1980, a rezoning proponent has the burden of showing that changes in neighborhood or community conditions have occurred that justify the proposed change. *Accord Davis v. City of Albuquerque,* 98 N.M. 319, 321, 648 P.2d 777, 779 (1982); *see Miller,* 89 N.M. at 506, 554 P.2d at 668. As the Court stated in *Miller,* the proponent must show that, since the original zoning, changes have occurred in the ****536 *502** character of the neighborhood extensive enough to justify the proposed change. 89 N.M. at 506, 554 P.2d at 668. In this case there was no evidence

of changed circumstances after the 1988 amendment to the Sector Plan that would justify a density greater than RA–1 zoning. The City does cite examples of existing higher density in the area, but these uses—mobile home parks and publicly subsidized apartment housing—were already in place when the Sector Plan was adopted and therefore cannot be "changed neighborhood or community conditions" within the meaning of Resolution 270–1980. In fact, the Sector Plan expresses concern about this same high density development, observing that the Old Town area already had the maximum number of subsidized housing units and that additional mobile home parks should not be permitted. Not only did the City fail to show the changed circumstances required by Resolution 270–1980(D)(2), the EPC's actual findings concede the contrary; namely, that the zoning change to SU–1 does *not* constitute a changed condition but is simply a response to a unique situation. No such criteria for rezoning exists in the City code.

23. The City maintains that *Miller* and *Davis* apply only to rezonings, specifically downzoning when the property owner complains, and thus are not applicable to this case. This case, the City argues, is controlled by *Watson v. Town of Bernalillo,* 111 N.M. 374, 805 P.2d 641 (Ct.App.1991). We reject the City's narrow application of *Miller* and *Davis* and consider its reliance on *Watson* to be unwarranted. *Watson* also involved an annexation and concurrent rezoning to permit the construction of a manufacturing plant, which was objected to by neighboring residents. *Watson,* 111 N.M. at 375, 805 P.2d at 642. The Court determined that the proposed rezoning would be in accordance with the comprehensive zoning plan for Bernalillo. *Id.* at 381, 805 P.2d at 648. In this case, unlike *Watson,* the increased density of the proposed SU–1 rezoning is not in accordance with the comprehensive plan for the area, the Sector Plan. The Sector Plan stated that land annexed into the city should be zoned RA–1 to maintain the existing semi-rural character of the western portion of the area. In contrast to *Watson,* the Sector Plan was amended to suit the City's purposes in approving this rezoning.

Section (D)(3). More Advantageous Use

24. The City contends that SU–1 zoning would be more advantageous to the community. To support this argument, the City compares the proposed SU–1 density, permitting approximately 19 lots, to that of the special use permit previously granted by Bernalillo County that would have permitted up to 40 lots on the property. For this argument to be credible, however, the County zoning would have to continue in effect after annexation. Clearly this is not the case.

25. As a general rule, zoning regulations and ordinances of the municipality extend to the newly added territory immediately upon annexation. *Sandoval County Bd. of Comm'rs v. Ruiz,* 119 N.M. 586, 590, 893 P.2d 482, 486 (Ct.App.1995) (after annexation into the village, defendants were no longer required to comply with county ordinances, but were subject to the village zoning subdivision ordinances). *See generally* N.M.Att'y Gen.Op. 83–6, at 37 (1983); E. LeFevre, Annotation, *What Zoning Regulations are Applicable to Territory Annexed to a Municipality,* 41 A.L.R.2d 1463 (1955). Upon annexation into Albuquerque the property lost its county zoning and became subject to the RA–1 zoning specified in the Sector Plan. The City did not show that SU–1 was more advantageous to the community than RA–1, the lower density selected in the Sector Plan. RA–1 density is the very advantage the citizens bargained for in 1988 when the Sector Plan was amended to reduce the allowable density upon annexation.

Deference Due the City's Zoning Decision

26. The City argues that zoning actions undertaken by the City Council are entitled to deference. *See Downtown Neighborhoods Ass'n,* 109 N.M. at 189, 783 P.2d at 965. Deference is generally accorded an agency's interpretation of its own enactments because of the agency's superior expertise, ****537 *503** knowledge, and resources. *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 119 N.M. 29, 39, 888 P.2d 475, 485 (Ct.App.), *certs. denied,* 119 N.M. 20, 888 P.2d 466 (1994). However, the deference given is only that which is due. As we stated in *High Ridge Hinkle Joint Venture,*

> a court should not defer if the agency, rather than using its resources to develop the facts relevant to a proper interpretation, ignores the pertinent facts, or if the agency, rather than using its knowledge and expertise to discern the policies embodied in an enactment, decides on the basis of what it now believes to be the best policy.

Id.; see also Miller, 89 N.M. at 507, 554 P.2d at 669 (the failure of the EPC to comply with its own published procedures was fatal to the decision). *Cf.* 2 E.C. Yokley, *Zoning Law and Practice* § 11–3, at 93 (4th ed. 1978)

("No proposition of zoning law is better settled than that a municipality has the right to amend its zoning ordinance where the amendment is reasonable and follows the procedure prescribed by the enabling legislation."). The City may not ignore or revise its stated policies and procedures for a single decision, no matter how well-intentioned the goal may be.

CONCLUSION

27. We hold that the City's actions were arbitrary and capricious because they failed to comply with the requirements for zoning map and sector plan amendments. Because of our holding we do not address the parties' arguments concerning spot zoning. For this reason, the judgment of the district court is reversed and we remand to the district court with instructions to remand to the City for further proceedings consistent with this opinion.

28. **IT IS SO ORDERED.**

ALARID and BUSTAMANTE, JJ., concur.

All Citations

122 N.M. 495, 927 P.2d 529, 1996-NMCA-107

Footnotes

1 For ease of reference, this opinion attributes to one party, the City, all arguments made in favor of the new zoning whether the arguments were actually made by the City or the Interested Parties.

2 There are references in the record to the parties wishing to avoid a lawsuit and the City desiring to correct what may have been an unfair representation to Milloy as to what zoning would apply upon annexation. Avoiding litigation appears to have been the driving force behind the City's efforts to achieve a compromise rezoning.