Albuquerque City Council Folder of Authorities

(0) Folder of Authorities Index

IN THE CITY OF ALBUQUERQUE
INTRAGOVERNMENTAL CONFERENCE COMMITTEE

MAYOR TIM KELLER,
in his official capacity,

Petitioner,

v.

ALBUQUERQUE CITY COUNCIL,

Respondent.

ALBUQUERQUE CITY COUNCIL'S FOLDER OF AUTHORITIES INDEX

DOCUMENT NUMBER	AUTHORITY
1	*Aguilar v. City Comm'rs of Hobbs*, 1997-NMCA-45, 123 N.M. 333
2	*Bd. of Cnty. Comm'rs v. Padilla,* 1990-NMCA-125, 111 N.M. 278
3	*City Council v. Eppihimer*, 835 A.2d 883 (Pa. Cmmw. Ct. 2003)
4	*Dugger v. City of Santa Fe*, 1992-NMCA-022, 114 N.M. 47
5	*Hubby v. Carpenter*, 350 S.E.2d 706 (W. Va. 1986)
6	*La Guardia v. Smith*, 41 N.E.2d 153 (N.Y. 1942)
7	*State ex rel. Chapman v. Truder*, 1930-NMSC-049, 35 N.M. 49
8	*State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562
9	*State ex rel. Coll v. Carruthers*, 1988-NMSC-057, 107 N.M. 439
10	*State v. Saltwater*, 2024-NMCA-018, 542 P.3d 783
11	*West Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, 122 N.M. 495
12	N.M. Const. art. III, § 1
13	N.M. Const. art. V, § 4
14	U.S. Const. art. II, § 3
15	ROA 1994, § 2-16-1(C)
16	ROA 1994, § 3-1-2
17	ROA 1994, § 3-2-8
18	ROA 1994, § 3-2-2

19	ROA 1994, § 9-4-4-10
20	ROA 1994, § 9-4-4-4(E)
21	ROA 1994, §§ 3-1-13 to -19, 23
22	ROA 1994, §§ 9-4-4-1 to -99
23	ROA 1994, § 3-2-5
24	City Charter art. I
25	City Charter art. IV, § 10(e) & (h)
26	City Charter art. IV, § 8
27	City Charter art. V, § 3
28	City Charter art. V, § 4(c)& (l)
29	City Charter art. XIX
30	City Charter art. XI, § 3

VIDEO AUTHORITY REFERENCES

Albuquerque City Council Hearing, May 2, 2016.

- Link: https://cabq.granicus.com/player/clip/151?view_id=2&redirect=true
- Timestamps: 2:29:00, 2:29:00–2:30:05, 2:30:25–2:30:55, 2:34:30–2:35:00, 2:35:05, 2:35:40, 2:39:00–2:40:00

Albuquerque City Council Hearing March 3, 2025.

- Link: https://cabq.granicus.com/player/clip/506?view_id=2&redirect=true
- 16, 2025).Timestamps: 3:00:00, 3:01:25–3:08:49, 3:02:00–3:03:00, 3:54:00–3:54:10, 4:24:05–4:24:38, 3:47:05–40, 5:17:50

(1) Aguilar v. City Comm rs of Hobbs

AGUILAR V. CITY COMM'N, 1997-NMCA-045, 123 N.M. 333, 940 P.2d 181

RAYMOND (TONY) P. AGUILAR, JR., as MUNICIPAL JUDGE of the CITY OF HOBBS, Plaintiff-Appellee,
vs.
THE CITY COMMISSION of the CITY OF HOBBS composed of RANDY OWENSBY, Mayor, DON BRATTON, PAT JONES, JIMMY WOODFIN and JOE CALDERON, Defendant-Appellant.

Docket No. 17,363

COURT OF APPEALS OF NEW MEXICO

1997-NMCA-045, 123 N.M. 333, 940 P.2d 181

March 25, 1997, Filed

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY. JAMES L. SHULER, District Judge.

COUNSEL

James W. Klipstine, Jr., Payne & Klipstine, P.A., Lovington, NM, for Appellee.

Paul J. Pusateri, City Attorney, Hobbs, NM, for Appellant.

JUDGES

M. CHRISTINA ARMIJO, Judge. WE CONCUR: RUDY S. APODACA, Judge, RICHARD C. BOSSON, Judge.

AUTHOR: M. CHRISTINA ARMIJO

OPINION

*{*334}* **OPINION**

ARMIJO, Judge.

{1} This case concerns the appointment of a temporary municipal judge for the City of Hobbs to act when the elected judge is absent or temporarily incapacitated. Judge Aguilar is the elected judge. He believes that he alone can appoint a replacement to serve as municipal judge during his temporary absence. The Hobbs City Commission (City Commission) contends, on the other hand, that the selection of a temporary municipal judge must conform with the procedures set forth in a city ordinance. The trial

court declared that ordinance unconstitutional. At issue here is whether the City Commission acted within its authority in establishing a procedure for filling a temporary vacancy on the municipal court and whether the ordinance in which this procedure is codified violates the New Mexico Constitution. We reverse and hold that the ordinance does not violate the Separation of Powers Clause of the New Mexico Constitution.

I. BACKGROUND

{2} The City Commission has statutory authority to create a municipal court for the City of Hobbs and to set the qualifications and salary for the municipal judge. **See** NMSA 1978, §§ 35-14-1, -3 (Repl. Pamp. 1996). Statutory authority also provides for the manner of filling temporary and permanent vacancies on the municipal court. NMSA 1978, §§ 35-14-4, -5 (Repl. Pamp. 1996). Pursuant to these authorities, the City Commission enacted an ordinance creating the Hobbs Municipal Court and setting the qualifications and salary of the municipal judge. Hobbs, N.M., Code §§ 9-23, 9-24, 9-25 (1995). This ordinance provides for the appointment of a municipal judge by the City Commission when there is a permanent vacancy, and sets forth the procedure for designating a municipal judge when there is a temporary vacancy caused by absence or temporary incapacity. Hobbs, N.M., Code § 9-27. According to the ordinance, "the municipal judge may appoint an acting municipal judge to serve during the temporary incapacity or absence of the elected municipal judge from a list of registered voters designated by the city commission[.]" Section 9-27(A). Each year, the City Commission is to prepare a list of persons qualified to act as "acting municipal judge," along with a determination of the compensation for the acting municipal judge. Section 9-27 (B), (C).

{3} The duly elected municipal judge, Judge Aguilar, filed a declaratory judgment action contending that the City Commission had no authority to require him to select the acting judge from the list that the City Commission compiles. He contended that such a requirement was an infringement on the power and authority of the judiciary and argued that it was within the inherent power of the judiciary to appoint temporary acting judges. He contended that he should be able to appoint whomever he wanted to act as his temporary replacement, so long as that person met the qualifications set by the legislature and the City Commission. Thus, Judge Aguilar argued that the Hobbs ordinance is unconstitutional because it violates the Separation of Powers Clause of the New Mexico Constitution. N.M. Const. art. III, § 1.

{4} The City Commission moved for summary judgment on the grounds that the ordinance was constitutional on its face, because the legislature gave the commission the authority under Section 35-14-5 to set up a procedure for selecting an acting temporary municipal judge. The City Commission argued that there was no authority under law for the municipal judge to appoint his own temporary replacement. Judge Aguilar made a counter-motion for summary judgment. Both parties agreed that there were no disputed questions of fact involved and that the district court was being asked to decide, as a matter of law, whether the ordinance providing the procedure for appointment of a temporary municipal judge was constitutional.

{5} *{*335}* After a hearing, the trial court determined that the City Commission did not have the authority to designate the list of individuals from which the temporary judge must be selected. The trial court ruled that it was within the control of the duly elected municipal judge to decide who would be the temporary judge. The declaratory judgment was granted to Judge Aguilar. The City Commission appealed.

II. DISCUSSION

{6} The City Commission argues that it properly exercised its statutory authority to establish the procedure for selecting a temporary municipal judge. The legislature has provided that "the governing body [of the municipality] may establish a procedure by ordinance for appointment" to the office of municipal judge when the duly elected judge is incapacitated or absent. NMSA 1978, § 35-14-5. The parties do not dispute that the City Commission is the governing body of the municipality in this case, or that the City Commission has the statutory authority to set the minimum qualifications for the temporary judge. The disagreement is over the list compiled by the City Commission from which the elected municipal judge must select his replacement.

{7} Judge Aguilar contends that, by creating a list from which the municipal judge must designate his temporary replacement, the legislative and executive power in Hobbs is, in effect, appointing the replacement. He argues that the City Commission should not be able to designate who will hold the judicial power in the City. To do so, he argues, violates the doctrine of separation of powers. He asserts that the doctrine of separation of powers applies to this case under the authority of **Mowrer v. Rusk**, 95 N.M. 48, 52-53, 618 P.2d 886, 890-91 (1980). The City Commission contends, on the other hand, that the separation of powers doctrine does not apply to this case, relying on case law which holds that the traditional doctrine of separation of powers does not apply to the distribution of power within local governments. **See State ex rel. Chapman v. Truder**, 35 N.M. 49, 52, 289 P. 594, 596 (1930); **Board of County Comm'rs v. Padilla**, 111 N.M. 278, 283, 804 P.2d 1097, 1102 .

{8} In **Mowrer v. Rusk**, 95 N.M. at 54-55, 618 P.2d at 892-93, the New Mexico Supreme Court determined that any statutory scheme that gave the executive and legislative branches of municipal government control over the inherent powers of the judiciary would violate the doctrine of separation of powers. The Court found that among these inherent powers are a municipal court's ability to control the hiring, firing and discipline of its personnel as well as the manner in which the municipal court performs its day-to-day administrative functions. **Id.** at 55, 618 P.2d at 893; **see also Southwest Community Health Servs. v. Smith**, 107 N.M. 196, 198, 755 P.2d 40, 42 (1988) (control of pleading, practice and procedure are within court's inherent powers). The Court also stated that any action of the executive or legislative branch of the municipal government which would preclude the Supreme Court or the district court from exercising their superintending or supervisory authority over the municipal court would violate the New Mexico Constitution. **Mowrer**, 95 N.M. at 52-53, 618 P.2d at 891-92.

{9} We recognize that the separation of powers doctrine applies to municipalities when the executive or legislative branch of the municipal government attempts to usurp the supervisory control of the Supreme Court or the inherent powers of the judiciary. However, we conclude that **Mowrer** is not controlling because the ordinance at issue in **Mowrer** is distinguishable from the ordinance at issue in the present case. In **Mowrer**, 95 N.M. at 54, 618 P.2d at 892, an ordinance enacted by the City of Albuquerque was found to be an unconstitutional infringement on the inherent powers of the judiciary because that ordinance gave the city's chief administrative officer broad powers to hire, fire and discipline municipal court employees and to control the day-to-day administrative functions of the municipal court. The ordinance enacted by the City Commission in the present case does not go this far; it merely gives the City Commission a role in selecting a temporary municipal judge by allowing the City Commission to supply a list of candidates from which the temporary judge must *{*336}* be selected. The ordinance does not give the City Commission the power to interfere with the municipal court's control over its employees or its day-to-day administrative functions, nor does the ordinance in any way preclude the Supreme Court or the district court from exercising their superintending or supervisory authority over the municipal court. For these reasons, we conclude that the ordinance at issue in the present case is not unconstitutional under the principles outlined in **Mowrer**.

{10} Apart from his reliance on **Mowrer**, Judge Aguilar cites no authority to support his contention that it is within his inherent power to be able to appoint his own temporary replacement. We find no authority under New Mexico law for the proposition that a municipal judge's inherent authority includes the power to appoint a replacement or temporary judge.

{11} We are not asked to decide whether a judge can appoint a temporary replacement from a pool of already qualified judges. For example, few would argue that a chief judge could not select one of his fellow judges to act as temporary presiding judge in his absence. To the contrary, Judge Aguilar proposes to bestow on himself the authority to create a new judge, conferring the mantle of judicial power on one previously unappointed where such authority has instead been delegated legislatively to municipalities such as the City of Hobbs in this appeal.

{12} "Judicial power can only be conferred upon a person by authority of the law." **State v. Doe**, 91 N.M. 57, 60, 570 P.2d 595, 598 (Ct. App.), **rev'd on other grounds**, 91 N.M. 51, 570 P.2d 589 (1977). Judicial power in this state is conferred by Article VI, Section 1 of the New Mexico Constitution. "Courts inferior to the district courts . . . may be established by law from time to time in any district, county or municipality of the state." N.M. Const. art. VI, § 1. While the constitutional power to establish such inferior courts by law generally falls upon the legislature, **see Stout v. City of Clovis**, 37 N.M. 30, 33, 16 P.2d 936, 938 (1932), in this case the legislature has delegated its authority to establish municipal courts to the governing bodies of certain municipalities themselves. **See** NMSA 1978, §§ 35-14-1, -3. The City Commission is the governing body of the municipality of Hobbs. Hence, the City Commission may confer judicial power by

establishing a list of candidates from which a temporary municipal judge must be appointed. **See** NMSA 1978, §§ 35-14-4, -5.

{13} If the City Commission fails to exercise this power of appointment, the power to appoint a temporary municipal judge falls to the district court which exercises supervisory control over the municipal court. **See** N.M. Const. art. VI, § 13; Rule 8-105 NMRA 1997. Hence, even if the City Commission failed to exercise its statutory authority to appoint a temporary municipal judge, that power of appointment would fall to the district court, not to Judge Aguilar. The constitution and laws of this State simply do not provide for a residuum of inherent power under which a municipal judge may appoint his own temporary replacement. Affording the municipal judge such an inherent power to appoint his own replacement would conflict sharply with this state's constitutional and statutory framework for conferring judicial power, as well as the framework established by our Supreme Court for exercising its power of superintending control. Hence, we conclude that the ability to appoint a temporary municipal judge is not within the inherent powers of an elected municipal court judge.

{14} This conclusion finds further support in the City Commission's statutory authority to make appointments to fill a permanent vacancy on the Hobbs Municipal Court. **See** NMSA 1978, § 35-14-4(C); Hobbs, N.M., Code § 9-23. Appointment of a temporary municipal judge would appear to fall within the broader authority to fill permanent vacancies. However, Judge Aguilar argues that there is a difference between filling a permanent vacancy and appointing a temporary replacement because the temporary appointment is analogous to the court's use of a special master to act in its place in certain proceedings. **Cf.** Rule 1-053 NMRA 1997 (allowing district courts to use special masters in civil cases); **Cooper v. Otero**, 38 N.M. 164, 173, 29 P.2d 341, 346 (1934) (courts *{*337}* have inherent power to select officers of the court such as receivers). We are not persuaded by that argument or analogy. During his or her appointment, the temporary judge has all the authority of the permanent, elected judge. NMSA 1978, §§ 35-14-5, -6. The temporary replacement judge is more than a mere representative or subordinate of the court who acts in a particular transaction. The replacement **is** the judge. Hence, we conclude that the power to appoint a temporary municipal judge does not fall within any authority that the elected municipal judge might have to appoint special masters or other officers of the court.

III. CONCLUSION

{15} For the foregoing reasons, we conclude that the procedure established by the City Commission for appointment of a temporary municipal judge falls within the Commission's statutory authority and does not infringe on the inherent powers of the judiciary at the municipal level. The provisions of the City Commission's ordinance regarding appointment of temporary municipal judges do not violate the Separation of Powers Clause of the New Mexico Constitution. The Judgment of the district court is reversed.

{16} IT IS SO ORDERED.

M. CHRISTINA ARMIJO, Judge

WE CONCUR:

RUDY S. APODACA, Judge

RICHARD C. BOSSON, Judge

(2) Bd. of Cnty. Comm rs v. Padilla

BOARD OF COUNTY COMM'RS V. PADILLA, 1990-NMCA-125, 111 N.M. 278, 804 P.2d 1097 (Ct. App. 1990)

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO, ET AL., AND NEW MEXICO PUBLIC EMPLOYEES COUNCIL 18 AND LOCAL 2260 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Plaintiffs-Appellees,
vs.
PATRICK J. PADILLA, BERNALILLO COUNTY TREASURER, Defendant-Appellant

No. 10721

COURT OF APPEALS OF NEW MEXICO

1990-NMCA-125, 111 N.M. 278, 804 P.2d 1097

December 04, 1990, Filed. As Corrected

Appeal from the District Court of Bernalillo County; Joseph F. Baca, District Judge.

COUNSEL

Mark Shapiro, Assistant District Attorney, Albuquerque, New Mexico, Attorney for Defendant-Appellant.

Tito D. Chavez, Ass't Bernalillo County Attorney, J. Edward Hollington, Ass't Bernalillo County Attorney, Albuquerque, New Mexico, Attorneys for Plaintiffs-Appellees Board of County Comm'rs of Bernalillo County.

Morton S. Simon, Jane B. Yohalem, Simon & Oppenheimer, Santa Fe, New Mexico, Attorneys for Plaintiffs-Appellees American Fed'n of State, County & Municipal Employees, AFL-CIO.

JUDGES

Harris L. Hartz, Judge. William W. Bivins, Judge, Rudy S. Apodaca, Judge.

AUTHOR: HARTZ

OPINION

*{*281}* **{1}** This case raises questions concerning the relative powers of an elected county treasurer and an elected board of county commissioners. The Bernalillo County

Treasurer (the Treasurer), initially Robbin Bishop and now Patrick J. Padilla, appeals the portion of a district court judgment requiring the Treasurer to comply with the merit personnel system and collective-bargaining agreements adopted by the Board of County Commissioners of the County of Bernalillo *{*282}* (the Board). The Treasurer also appeals the district court's determination that the Board, acting as the Bernalillo County Board of Finance, has sole responsibility for the investment policy of the county. We affirm the judgment with respect to the merit system and collective-bargaining agreements, and reverse on the investment-policy issue.

FACTS

{2} The Board, together with New Mexico Public Employees Council 18 and Local 2260 of the American Federation of State, County and Municipal Employees, AFL-CIO (Unions), filed a complaint against the Treasurer seeking declaratory relief and a writ of mandamus. The complaint alleged that the Treasurer had failed to comply with county-ratified collective-bargaining agreements, the county merit personnel system, and various county procedures regarding finance and administration. The Treasurer answered and filed a counterclaim for declaratory judgment in its favor with respect to essentially the same issues.

{3} Ultimately the parties submitted to the district court a statement of the issues that they wished to be resolved by the court and stipulated to certain general facts. Neither party offered into evidence the particulars of the county's merit system or collective-bargaining agreements. The district court was asked to determine whether the Board had any authority to adopt a merit system or enter into collective-bargaining agreements covering the Treasurer's employees.

{4} Because the specifics of the merit system and collective-bargaining agreements were not before the district court, it had no occasion to decide whether particular provisions exceeded the authority of the Board with respect to the Treasurer's office. At oral argument counsel for the Board and Unions agreed that the Treasurer was not foreclosed from a future challenge to the particulars of the merit system or collective-bargaining agreements insofar as they might be alleged to infringe improperly upon the powers of the Treasurer. Given the limited nature of the issues on appeal, we grant the Treasurer's motion to strike references in the briefs to the specific contents of the county's merit system ordinance.

COLLECTIVE-BARGAINING AGREEMENTS AND MERIT SYSTEM

{5} The Board possesses the "powers of a county as a body politic and corporate." NMSA 1978, § 4-38-1 (Repl. Pamp. 1984). The Treasurer does not dispute the general authority of the Board to enter into collective-bargaining agreements with county employees. Our supreme court has determined that legislation is not necessary to confer that authority upon public bodies. **See Local 2238 of the Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Stratton,** 108 N.M. 163, 769 P.2d 76 (1989). **Cf.** NMSA 1978, § 4-38-18 (Repl. Pamp. 1984) (board of county commissioners has

authority to "represent the county and have the care of... the management of the interest of the county").

{6} Nor does the Treasurer challenge the general authority of the Board to enact a merit personnel system. NMSA 1978, Section § 4-37-1 (Repl. Pamp. 1984) provides in part, "All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties." The Board can therefore rely upon NMSA 1978, Section § 3-13-4(A) (Repl. 1985), which provides in part, "Any municipality may establish by ordinance a merit system for the hiring, promotion, discharge and general regulation of municipal employees."

{7} The Treasurer contends, however, that to the extent that the Board attempts to impose a collective-bargaining agreement or merit system upon employees of the Treasurer, the Board exceeds its powers.

1. **Legislative History**

{8} We first consider the contention that legislative history establishes the Board's lack of authority to impose a merit system on the Treasurer's personnel. The legislation enabling municipalities to establish merit systems, Section § 3-13-4, was enacted in 1965. The legislation granting *{*283}* counties the same powers as municipalities, Section § 4-37-1, was enacted in 1975. The Treasurer contends that the legislature must have recognized that Section § 4-37-1 did not give boards of county commissioners authority to enact merit systems covering other county-wide elected officials, because otherwise it would not have also enacted in the same session NMSA 1978, Sections § 4-41-5 to -7 (Repl. Pamp. 1984). Those statutory provisions authorize counties to establish merit systems for deputies and employees of county sheriffs' offices. As the Treasurer states in the brief-in-chief, "If the county commissions already had that power by virtue of [Section] § 4-37-1, enacted in the same session, then the statute relating to sheriffs was superfluous."

{9} This argument fails to consider that the statute providing for merit systems covering sheriffs' employees was enacted before the statute giving boards of county commissioners the same powers as municipalities. **See** 1975 N.M. Laws, ch. 11, § 3 (sheriffs' merit system); 1975 N.M. Laws, ch. 312, § 1 (county commissioners have powers of municipalities). Thus, the statute relating to sheriffs' offices may have been proposed and passed because of doubt about whether the legislature would later enact a law granting more general powers to boards of county commissioners. In the absence of any authoritative legislative history, we can only speculate concerning the legislature's understanding and intention in this regard. The enactment of Sections § 4-41-5 to -7 does not assist in resolving the issue presented here.

2. **Separation of Powers**

{10} we also hold that traditional separation-of-powers doctrine does not apply to this case. Traditional doctrine derives from concern about the tyranny that can arise when one branch of government -- the executive, legislative, or judicial -- assumes the powers of another. **See** A. Hamilton, **The Federalist** Nos. 46 to 50 (H. Lodge ed. 1888). Apparently because this danger is diminished for a level of government whose powers are subordinated to higher levels of government or otherwise limited, the New Mexico Constitution's provision on separation of powers -- Article III, Section 1 (Cum. Supp. 1990) -- does not apply to the distribution of power within local governments. **See State ex rel. Chapman v. Truder,** 35 N.M. 49, 289 P. 594 (1930). **Cf. Mowrer v. Rusk,** 95 N.M. 48, 618 P.2d 886 (1980) (excessive control by city council over municipal court violates N.M. Const. Article III, Section 1 and Article VI, Section 1, which vests the judicial power of the **state** in various courts, including inferior courts). For example, the legislature has provided that the board of county commissioners -- which possesses the "legislative" power of the county -- may appoint the county manager, who exercises executive power. NMSA 1978, § 4-38-19(B) (Repl. Pamp. 1984). Any limitations on the Board's authority to impose a merit system or collective-bargaining agreement upon the Treasurer must derive from other sources.

3. **The Statutory Scheme for Apportioning Power**

{11} The statute providing counties with the same powers granted to municipalities limits those powers only insofar as they "are inconsistent with statutory or constitutional limitations placed on counties." § 4-37-1. Consequently, the sole restriction on applying a county merit system to employees of the Treasurer is that such application be consistent with statutory and constitutional provisions relating to the powers of boards of county commissioners vis-a-vis county treasurers.

{12} This is also the sole restriction on the power of the Board to apply a collective-bargaining agreement to the Treasurer's staff. If Section § 4-37-1 encompasses inherent powers of municipalities, as opposed to only statutory powers, then the county's inherent power to bargain collectively is limited in the same way as the county's statutory power to enact a merit system. In any event, even if Section § 4-37-1 does not cover collective bargaining, our supreme court has indicated that this inherent power must be exercised consistently with state law. *{*284}* **See Local 2238 of the Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Stratton,** 108 N.M. at 170-71, 769 P.2d at 83-84.

{13} What, then, is the relative authority of the Treasurer and the Board? The New Mexico Constitution is silent. Counties are recognized in the constitution, **see** Article X, but the constitution does not provide for the mechanisms of county government, and does not so much as mention county treasurers.

{14} Therefore, we look to the statutes defining the powers of county offices. The office of the county treasurer is established by NMSA 1978, Section § 4-43-1 (Repl. Pamp. 1984). The powers of the office appear in various statutory provisions, e.g., NMSA 1978, Sections § 4-43-2 to -4 (Repl. Pamp. 1984); NMSA 1978, Sections § 6-10-10

(Cum. Supp. 1990), -10.1, -23, -24, -36, -44, and -44.1 (Repl. Pamp. 1988); NMSA 1978, Sections 738-42, -53 (Repl. Pamp. 1990).

{15} A grant of power by the legislature to an elected local official in itself implies limitations on the power of other local officials with respect to that elected official. By granting the voters of a county the right to elect a person to an office charged with certain duties, the legislature implicitly provided that the electorate can hold that person responsible for the proper performance of the office. Yet that person cannot fairly be held accountable if other elected officials infringe too intrusively upon the performance of the duties of the office. In particular, the exercise by the Board of excessive power over the Treasurer would undermine the statutory scheme of providing the county electorate with the right to choose, and hold responsible, an official with the duty to perform the functions of the county treasurer. **See State ex rel. Miera v. Field,** 24 N.M. 168, 172 P. 1136 (1918) (county commission not empowered to hire someone to perform task of county assessor).

{16} On the other hand, the implicit grant of independent authority to local elected officials is subject to legislative grants of power to one official over another. As noted in the above discussion of separation-of-powers doctrine, there are no constitutional constraints on the state legislature's apportioning of authority between the Treasurer and the Board. Regardless of the impact on the Treasurer's performance of the duties of the office, the legislature can specify the relationship between the Treasurer and the Board. For example, Section § 4-38-19(A) provides:

A board of county commissioners may set the salaries of such employees and deputies as it feels necessary to discharge the functions of the county, except that elected county officials have the authority to hire and recommend the salaries of persons employed by them to carry out the duties and responsibilities of the offices to which they are elected.

The Board, not the Treasurer, sets the salaries of the Treasurer's employees.[1] Similarly, various provisions of NMSA 1978, Chapter 6, Article 10 (discussed more fully later in this opinion) delineate the relative powers of the Board and the Treasurer with respect to investing county funds.

{17} In sum, a board of county commissioners does not unlawfully infringe upon a county treasurer's prerogatives unless it undermines the treasurer's ability to perform the duties of the office by means that are not granted to the board by statute. We hold that ordinances providing for merit systems or collective-bargaining agreements can pass that test.

{18} Our conclusion with respect to collective-bargaining agreements follows from the statutory provision that the Treasurer can only "recommend" the salaries of subordinates. § 4-38-19(A). If the Board has the authority to set those salaries, the Board can collectively bargain for those salaries without violating the statutory scheme, at least so long as the Treasurer may participate in the bargaining to the extent of recommending salaries for employees of that office. We also believe that *{*285}*

restrictions imposed by a collective-bargaining agreement upon the Treasurer with respect to work hours and leave time for most employees would not ordinarily undermine the Treasurer's capacity to perform the duties of the office.

{19} Likewise, although "elected county officials have the authority to hire... persons employed by them to carry out the duties and responsibilities of the offices to which they are elected," § 4-38-19(A), merit systems do not necessarily infringe upon that authority or upon the ability of the Treasurer to perform the duties of the office. For example, we would see no violation of the statutory scheme if a personnel ordinance required certain procedural safeguards before a non-key employee could be discharged. **Cf. United States v. Perkins,** 116 U.S. 483 (1886) (power of Congress to vest appointment of inferior officers in heads of departments implies authority to limit, restrict, and regulate the power of removal, and such authority does not infringe upon constitutional prerogatives of the Executive).

{20} We exercise caution in suggesting what provisions could pass muster in a Board-mandated collective-bargaining agreement or merit system covering employees of the Treasurer, because any such comments would be essentially dictum. We do not have before us the specifics of a collective-bargaining agreement or personnel ordinance. The propriety of any particular provisions should be determined in the first instance by a district court after a hearing at which the parties can present evidence and argument concerning whether the provisions improperly infringe upon the prerogatives of the Treasurer. By stipulation the parties elected not to present this dispute to the district court in that manner.

{21} Our holding is only that there is no statutory impediment **in general** to the Board's adoption of a merit system or approval of a collective-bargaining agreement that includes at least some employees of the Treasurer. The Treasurer has failed to show that all such ordinances and agreements necessarily infringe improperly upon the authority of the Treasurer. The Board and Unions conceded at oral argument that this litigation does not foreclose future challenge by the Treasurer to specific provisions of a collective-bargaining agreement or merit system.

INVESTMENT POLICY

{22} In district court the parties framed the investment-policy issue in quite general terms. Their stipulation stated:

7. The County Treasurer, pursuant to statutory mandate, feels that she has the authority to make all investments of County funds.

8. The County Commission, as the designated Board of Finance, feels they should determine investment policy of the County and direct investment of County funds.

The district court's order was similarly general. The court ruled: "The County Commission is designated as the County Board of Finance and as such is responsible

for the investment policy of the County. This authority can not be delegated by the County Commission."

{23} The precise scope of the ruling is unclear, although the parties apparently agree in reading it to say that the Treasurer has only a ministerial role in the investment of county funds -- all matters of discretion being left to the Board in its exclusive policy-making role as the county board of finance. Because we hold that the authority of the Treasurer in investment policy is not merely ministerial, we reverse.

{24} By statute the board of county commissioners in each county constitutes a "county board of finance." NMSA 1978, § 6-10-8 (Repl. Pamp. 1988). The title provides little guidance concerning the division of responsibility between a county board of finance and a county treasurer. The term "board of finance" is not such a term of art that one can immediately infer a board's powers and duties. For that, one must look to the relevant statutory provisions. Reading the current statutes in light of their legislative history compels the conclusion that the Board's power is limited to reviewing investment decisions by the Treasurer and then either approving or vetoing them.

*{*286}* **{25}** The original legislation creating county boards of finance suggested that those boards controlled investment policy. 1915 N.M. Laws, Chapter 57, Section 5 stated that each board of county commissioners shall "constitute a county board of finance, and as such shall have **supervision of the deposit and safe keeping of the public monies of their respective counties,** as hereinafter provided." (Emphasis added.) **See State v. Fidelity & Deposit Co. of Maryland,** 36 N.M. 166, 9 P.2d 700 (1932) (suggesting that board of finance directs treasurer where to deposit money).

{26} In 1933, however, the legislature transferred that supervisory authority to the county treasurer, gave the board a more limited supervisory power, and restricted some of the treasurer's power by requiring it to be exercised only with the "advice and consent" of the board. 1933 N.M. Laws, Chapter 175, Section 1 (now § 6-10-8) revised the law to read that the county treasurers, rather than the boards of finance, "shall have supervision of the deposit and safe keeping of the public moneys of their respective Counties." The description of the supervisory power of county boards of finance was changed to "supervision over the determination of the qualifications of, and selection of, banks to receive the public moneys of their respective Counties." Instead of having supervision of the deposit and safekeeping of public money, the county boards of finance would merely determine which banks could be depositories for county funds. Under the new law the county treasurers would, "with the advice and consent" of their county boards of finance, "designate banks qualified to receive on deposit all moneys entrusted in their care." (The language was clarified by deletion of the word "qualified" in 1968 N.M. Laws, Chapter 18, Section 2.)

{27} The 1933 legislation made a similar change in the relative authority of the board of finance and the treasurer with respect to investments in government securities. 1925 N.M. Laws, Chapter 33, Section 1 provided that sinking funds, unexpended bond proceeds, and money not immediately necessary for public use could be invested by

the board of finance in government bonds and negotiable securities. 1933 N.M. Laws, Chapter 175, Section 4 (now Section § 6-10-10(F)) gave the same investment power to the county treasurer, "by and with the advice and consent" of the board of finance.

{28} The 1933 amendments make no sense if the county treasurer's role in the investment of county funds is merely a ministerial one. If the role is merely ministerial, what was the purpose of the legislature in giving powers to the county treasurer "with the advice and consent" of the board of finance when the powers had previously been granted solely to the board of finance?

{29} The relationship between the county treasurer and the county board of finance was undoubtedly intended to be the same as that between the President of the United States and the Senate when the former can act only with the "advice and consent" of the Senate. **See** U.S. Const. art. II, § 2. We are aware of no other usage of the phrase "advice and consent," and we can assume that the elected officials who enacted the 1933 legislation were thoroughly familiar with the meaning of that language in the United States Constitution. Thus, decisions concerning the placement of county funds in depository institutions and the investment of county funds in government securities are, in the first instance, a matter for the county treasurer; the board of finance has a veto power over every such decision, but it does not have the power of choice itself. **See** A. Hamilton, **The Federalist** No. 66, at 416 (H. Lodge ed. 1888); **Fourteen Diamond Rings v. United States,** 183 U.S. 176, 182 (1901) (Brown, J., concurring); **Murphy v. Casey,** 300 Mass. 232, 15 N.E.2d 268 (1938); **Commonwealth ex rel. Attorney General v. Lane,** 13 Weekly N.C. 29, 32 (Pa. 1883).

{30} The same relationship is described in other provisions governing investments of county funds. Legislation predating 1933 empowers the county treasurer, "with the approval of the proper board of finance," to invest excess funds temporarily *{*287}* in United States bonds or treasury certificates in compliance with rules of the state board of finance. 1925 N.M. Laws, ch. 123, § 10 (now § 6-10-44). We give the words "with the approval of" their common meaning and construe them as establishing an advice-and-consent relationship between the county treasurer and the board of finance with respect to such investments. **See** J. Harris, **The Advice and Consent of the Senate** at 34 (1953) (in debates of federal constitutional convention "the phrase 'advice and consent' was used... as synonymous with such terms as 'approval,' 'approbation,' and 'concurrence.'"); **Board of Comm'rs of Coltax County v. Department of Pub. Health,** 44 N.M. 189, 100 P.2d 222 (1940) (construing "with the approval of" as establishing a veto power).

{31} Likewise, 1988 legislation giving the county treasurer power, "with the consent" of the board of finance, to place county funds in the state treasurer's "local short-term investment fund," § 6-10-10.1, maintains the same relationship between the county treasurer and the board of finance. **Cf. In re Opinion of the Justices,** 190 Mass. 616, 78 N.E. 311 (1906) ("with the advice" and "with the advice and consent" have same legal effect).

{32} Two 1987 statutory provisions intended to give various public boards of finance and treasurers (not just **county** treasurers and **county** boards of finance)[2] power to deposit public funds in federally insured credit unions may seem to change the relationship between the county treasurer and the county board of finance because they permit the deposit by a "treasurer or board of finance," § 6-10-44.1, or "at the discretion of the designated board of finance or treasurer." § 6-10-36(D). We do not, however, read those provisions as giving the county treasurer and the board of finance co-equal powers with respect to such deposits. The same law -- 1987 N.M. Laws, Chapter 79 -- that added Sections § 6-10-36(D) and -44.1 also inserted a reference to credit unions in Section § 6-10-8, which now provides:

The county treasurer of each county in the state shall have supervision of the deposit and safekeeping of the public money of his county... and by and with the advice and consent of the [county board of finance]... shall designate banks, savings and loan associations **and credit unions**... to receive on deposit all moneys entrusted in his care. [Emphasis added.]

We reconcile the language in Sections § 6-10-36(D) and -44.1 with that in Section § 6-10-8 by construing the first two sections as not being intended to alter the relative authority of the county treasurer and the county board of finance. To do otherwise could create an absurd situation. If either the county treasurer or the board of finance could independently determine whether or not to deposit county funds in a credit union, then either party could overrule the other's prior decision, wreaking havoc with public finances. We make every effort to avoid statutory constructions that can create such absurd consequences. **See Wells v. County of Valencia,** 98 N.M. 3, 6, 644 P.2d 517, 520 (1982). Sections § 6-10-36(D) and -44.1 were intended to permit deposits in credit unions by treasurers and boards of finance of various public bodies (not just counties), leaving to other statutory provisions the question of the relative responsibilities of the two in making an investment decision.

{33} We take the same approach in dealing with NMSA 1978, Section § 6-10-31 (Repl. Pamp. 1988), which permits boards of finance to place public funds not "needed immediately for public purposes" on time deposit with various depository institutions. This provision was originally enacted by 1929 Laws, Chapter 92, Section 1, before the 1933 legislation transferring powers from the county board of finance to the county treasurer. The statute was not, *{*288}* however, amended in 1933. Perhaps this was the result of an oversight because it was codified in an article of the 1929 revised statutes different from the article containing the provisions amended in 1933. The provision remained unchanged until 1968, when it was amended to permit time deposits in savings and loan associations and to prohibit county and municipal boards of finance from making deposits outside of the county. 1968 N.M. Laws, ch. 18, § 7. Because the 1929 legislature certainly contemplated that the board of finance would be the body deciding whether to invest funds in time deposits, and because this particular section has not been revised in that respect since its enactment, one might conclude that time deposits are to receive unique treatment among all county investments -- time deposits alone are to be determined solely by the board of finance. We think it highly unlikely that

the legislature intended such a peculiar result. The provisions of the 1933 legislation governing "deposits" in banks and other depository institutions should be read to encompass "time deposits." Under that reasonable construction, the 1933 legislation and later amendments implicitly amended the 1929 provision. We interpret Section § 6-10-8 to provide that the county treasurer, "with the advice and consent" of the board of finance, "designates [the institutions] to receive on deposit [including time deposit] all moneys entrusted in his care."

{34} In sum, the county treasurer determines how to deposit and invest county funds. That decision must then be approved by the board of county commissioners, sitting as the county board of finance. The board of finance has no power to modify the county treasurer's decision without the treasurer's concurrence. On the other hand, the county treasurer cannot impose a unilateral decision upon the board of finance.

{35} Given this relationship between the Treasurer and the Board, it is inappropriate to speak of either as having the sole policy-making authority over county investments. Both the Treasurer and the Board would be well-advised to formulate an investment policy. Adoption of a policy by the Board would provide the Treasurer with fair warning that certain types of investments are preferred and certain investments are prohibited. The Treasurer's investment policy could serve as a useful tool to explain to the Board the Treasurer's investment decisions and obtain the necessary approval. Ultimately, the Board and the Treasurer must agree on any investment; negotiation of any differences in policy should expedite decision-making on any particular investment.

{36} Moreover, we see no statutory, prohibition against delegation to the Treasurer by the Board of specific investment decision-making. For example, the Board could adopt a policy and permit the Treasurer to make investment decisions that conform to the policy. Such delegation may be essential to enable the Treasurer to respond to sudden changes in the financial markets.

{37} Because the district court's order can be read as eliminating the authority of the Treasurer in investment decision-making and as prohibiting the Board from delegating authority to the Treasurer, we vacate the portion of the order relating to county investment policy. If either party wishes to press the district court for a declaratory order regarding investment policy, it may do so. The parties may, however, agree to abandon the issue on remand; this opinion may suffice, at least for the time being, to provide the guidance sought by the parties' petitions for declaratory judgment.

CONCLUSION

{38} We affirm the judgment of the district court with respect to the merit system and collective-bargaining agreement. We vacate the judgment of the district court with respect to county investment policy.

{39} IT IS SO ORDERED.

1 We need not consider whether this power is unlimited or whether the Board would be prohibited from setting salaries so low that the Treasurer could not obtain a competent staff. **Cf. Mowrer v. Rusk,** 95 N.M. at 54, 618 P.2d at 892 (right to hire staff implies right to have staff paid salaries commensurate with their responsibilities).

2 There are numerous boards of finance other than county boards of finance. For example, NMSA 1978, Section § 6-10-9 (Repl. Pamp. 1988) states: "The boards in control of the various public and educational institutions in this state, and all other boards handling funds in any manner whatever, except local boards of education, are hereby designated as boards of finance for such institutions and boards respectively."

(3) City Council v. Eppihimer

835 A.2d 883
Commonwealth Court of Pennsylvania.

CITY COUNCIL of the CITY OF READING
v.
Joseph D. EPPIHIMER, Mayor for the City of Reading, Jeffrey White, Managing Director for the City of Reading and David Cituk, City Auditor for the City of Reading, Appeal of Joseph D. Eppihimer, Mayor for the City of Reading and Jeffrey White, Managing Director for the City of Reading.

2921 C.D. 2002
|
Argued June 4, 2003.
|
Decided Nov. 17, 2003.

Synopsis
City council brought action against mayor and city's managing director, seeking declaration that city council had authority to fill positions of city council chief of staff and city council legislative coordinator. The Common Pleas Court for the County of Berks, No. 01-3624, Schmehl, J., found that the council had authority to hire and fire with regard to the two positions, and defendants appealed. The Commonwealth Court, No. 2921 C.D. 2002, Cohn, J., held that: (1) under city's home rule charter mayor and city's managing director rather than the city council had the power to hire and fire in regard to positions of city council chief of staff and city council legislative coordinator, and (2) as a matter of first impression, separation of powers doctrine did not apply to local government and require that positions fall within city council's purview.

Reversed in part.

West Headnotes (11)

[1] **Declaratory Judgment** Scope and extent of review in general

Declaratory Judgment Discretion of lower court

Standard of review in a declaratory judgment action is limited to determining whether the trial court's findings are supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion.

3 Cases that cite this headnote

[2] **Municipal, County, and Local Government** Evidence

A presumption exists that the exercise of power by a municipality that has chosen to adopt a home rule charter is valid if no restriction exists in the Constitution, the charter itself, or the acts of the Legislature. Const. Art. 9, § 2; 53 Pa.C.S.A. §§ 2901-3171.

1 Case that cites this headnote

[3] **Municipal, County, and Local Government** Home-rule powers in general

Municipal, County, and Local Government Relation Between State and Home-Rule Power in General

Home rule municipalities must act according to the parameters set by the legislature in the Home Rule Charter and Optional Plans Law (HRC & OPL). 53 Pa.C.S.A. §§ 2901-3171.

1 Case that cites this headnote

[4] **Municipal, County, and Local Government** Construction, operation, and effect in general

Commonwealth Court must presume that the drafters of a municipality's home rule charter did not intend a result which is absurd, impossible of execution, or unreasonable.

2 Cases that cite this headnote

[5] **Municipal, County, and Local Government** Positions, offices, and employees affected; classification

Municipal, County, and Local Government Authority to select

Municipal, County, and Local Government Authority to impose adverse action; manner and mode of imposition

Public Employment Creation of Relationship; Election, Appointment, and Hiring

Public Employment Authority to Select

Public Employment Authority to impose adverse action; manner and mode of imposition

City council did not have authority under city's home rule charter to hire and fire in regard to positions of city council chief of staff and city council legislative coordinator, which positions were created by city ordinance, where home rule charter explicitly provided that all positions in city's non-exempt career service were subject to the city's merit personnel system, charter specified what positions were exempt and such positions were not included, charter provided that mayor and managing director alone possessed administrative and executive authority over city's merit personnel system, nothing in charter limited power of mayor and managing director to only employees in city's administrative branch, and under charter city council only had explicit authority to hire and fire the city clerk. 53 Pa.C.S.A. §§ 2901-3171.

3 Cases that cite this headnote

[6] **Municipal, County, and Local Government** Home-rule powers in general

A municipality that governs by home rule charter cannot exercise any power that is denied by the Constitution. Const. Art. 9, § 2.

1 Case that cites this headnote

[7] **Municipal, County, and Local Government** Powers and functions of council or other governing body in general

Pennsylvania Constitution does not articulate a requirement that local, municipal governments have a separation of powers, and specifically provides that electors can determine for themselves what form of local government they wish. Const. Art. 9, § 2.

[8] **Municipal, County, and Local Government** Powers and functions of council or other governing body in general

The requirement of a separation of powers in local government exists only if dictated by the state constitution, or if set forth in the local government's charter; there is no natural law of the separation of powers.

[9] **Constitutional Law** Separation of Powers

Municipal, County, and Local Government Exclusive, Concurrent, and Conflicting Exercise of State and Local Powers

States are free to arrange the disposition of their powers as they wish as long as they do not violate the federal constitution, and this extends to a state's choice as to how the powers of local government are to be arranged.

[10] **Municipal, County, and Local Government** Creation and Existence of Entity

There exists no federal constitutional obligation for a state to provide local government.

[11] **Municipal, County, and Local Government** Legislative, executive, and administrative powers

Municipal, County, and Local Government Via agents, employees, or other persons

Municipal, County, and Local Government Positions, offices, and employees affected; classification

Public Employment Particular cases and contexts in general

Separation of powers doctrine did not require that positions of city council chief of staff and city council legislative coordinator fall within city council's purview, where such positions were non-exempt career service positions and city's home rule charter provided that mayor and managing director alone possessed administrative and executive authority over city's merit personnel system; neither Pennsylvania Constitution nor city's home rule charter required separation of power in city's government. Const. Art. 9, § 2.

3 Cases that cite this headnote

Attorneys and Law Firms

***884** Leonard A. Busby, Philadelphia, for appellants.

Andrew N. Howe, Reading, for appellee.

BEFORE: PELLEGRINI, Judge, and COHN, Judge, and FLAHERTY, Senior Judge.

Opinion

OPINION BY Judge COHN.

Joseph D. Eppihimer, Mayor of the City of Reading (Mayor), and Jeffrey White, Managing Director of the City of Reading (Managing Director),[1] appeal the order of the Court of Common Pleas of Berks County that granted the Complaint in Declaratory Judgment filed by the City Council of the City of Reading. The trial court held, *inter alia,* that City Council has the authority to create and fill the two newly created positions of City Council Chief of Staff and City Council Legislative Coordinator. Appellants claim that, in reaching this conclusion, the trial court violated explicit provisions of the Reading City Charter (Charter), Administrative Code and Personnel Code, deviated from the City's merit selection process and precluded the orderly and consistent administration ***885** of employment practices for City government.

On the November 2, 1993 ballot, the citizens of Reading voted to implement a Home Rule Charter with a "Strong Mayor–Council Form of Government with a Managing Director" in order to "make the government of the City of Reading more responsive to the needs of the citizens of Reading...." (Report and Recommended Home Rule Charter for The City of Reading, July 1993, page VI.) The Charter took effect on the first Monday in January 1996. The City, subsequently, enacted an Administrative Code and a Personnel Code, pursuant to Charter Sections 601 and 703.

The Charter specifically authorizes City Council to hire a "City Clerk" who is an exempt employee,[2] and subject only to the authority of City Council. City Council decided to create two new staff positions, which are not specified in the Charter: Chief of Staff and Legislative Coordinator.[3] Therefore, City Council included funding for these two new positions in the 2002 Fiscal Year Budget Ordinance and also amended the 2002 Full Time Position Ordinance to refer to the new positions. The Mayor vetoed both ordinances when City Council submitted them for his approval. City Council overrode the Mayor's vetoes.[4] It then filed an Amended Complaint ***886** in equity with the Court of Common Pleas of Berks County alleging that the Mayor and Managing Director unlawfully refused to recognize the two new positions created by City Council. City Council sought declaratory relief that, *inter alia,* Council validly created the two positions; the Mayor and Managing Director were to take any and all actions necessary to effect the subsequent creation and staffing of such positions; City Council validly hired Linda Kelleher to fill the Chief of Staff position; and, relevant portions of the 2001 and 2002 Amended Full Time Employee Position Ordinances were valid and binding upon the Mayor and Managing Director. The trial court entered an order granting City Council's Request for Declaratory Judgment. The judge held that City Council properly created and funded the two positions pursuant to its budgetary authority under Section 221 and Article IX of the Charter. Appellants do not challenge this portion of the trial court's holding on appeal. However, the judge also held that the doctrine of separation of powers dictates the conclusion that, in the home rule form of governance in existence in the City of Reading, City Council has the authority to hire and fire with regard to these two staff positions. Appellants disagree, and it is this portion of the holding that is the subject of their appeal.

[1] We are presented with the following issues for our review: (1) whether the Mayor and Managing Director alone

possess administrative and executive authority over Reading's merit personnel system; (2) whether the Charter authorizes City Council to appoint ONLY the City Clerk; (3) whether the employment authority of the Mayor and Managing Director is confined to the "Administrative Service" or "Administrative Branch"; and (4) whether the separation of powers doctrine requires that City Council have the power to hire and fire for these two positions.[5]

[2] **[3]** The issues must be addressed in the context of the City's Home Rule Charter, as it is the controlling document in this case. The Charter was enacted pursuant to the Home Rule Charter and Optional Plans Law (HRC & OPL), 53 Pa.C.S. §§ 2901–3171. Section 2961 of the HRC & OPL sets forth the powers granted to a municipality that has chosen to adopt a home rule charter, explaining that it "may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter." 53 Pa.C.S. § 2961. *See also* Pa. Const., art. IX, § 2; Charter § 102 (incorporates this provision of the HRC & OPL). Therefore, a presumption exists that the exercise of power is valid if no restriction exists in the Constitution, the charter itself, or the acts of the Legislature. *Fraternal Order of Police, Fort Pitt Lodge No. 1 v. City of Pittsburgh,* 165 Pa.Cmwlth. 83, 644 A.2d 246, 249 (1994), *petition for allowance of appeal denied,* 544 Pa. 637, 675 A.2d 1253 (1996). However, regardless of this expanded autonomy, home rule municipalities must act according to the parameters set by the legislature ***887** in the HRC & OPL.[6] *County of Delaware v. Township of Middletown,* 511 Pa. 66, 511 A.2d 811 (1986).

[4] In addition, this Court has held that general rules of statutory construction are applicable in interpreting provisions of a home rule charter. *Williams v. City of Pittsburgh,* 109 Pa.Cmwlth. 168, 531 A.2d 42, 44 (1987) (citing *Cottone v. Kulis,* 74 Pa.Cmwlth. 522, 460 A.2d 880 (1983)), *petition for allowance of appeal denied,* 518 Pa. 622, 541 A.2d 748 (1988). We must interpret statutes to ascertain and effectuate the intent of the legislature and, if possible, give effect to all of its provisions. Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(a). Further, if the words of a statute are clear and unambiguous, a court may not ignore the letter of the law under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b); *Ramich v. Workers' Compensation Appeal Board (Schatz Electric, Inc.),* 564 Pa. 656, 770 A.2d 318 (2001). This Court must presume that the drafters of the charter did not intend a result which is absurd, impossible of execution or unreasonable. *Cottone,* 460 A.2d at 882.

(I) *Merit Personnel System*

Appellants first contend that the Mayor and Managing Director alone possess administrative and executive authority over Reading's merit personnel system, which is mandated by the Charter. Defined in Section 702, the merit personnel system requires that personnel decisions for all non-exempt career service employees[7] be made solely on the basis of merit and qualifications. City Council agrees that, because neither the City Council Chief of Staff position nor the City Council Legislative Coordinator position is listed in the Charter as being exempt, both are considered non-exempt career service positions and are, thus, subject to the City's merit personnel system. (City Council Brief at 9.) Any appointment, promotion, transfer, demotion, suspension, dismissal or disciplinary action concerning any employee must be carried out in accordance with this system. The Charter mandates that, unless otherwise provided, the Mayor shall administer the City's merit personnel system for non-exempt career service personnel. (Charter § 308(m).) By implication, any decisions made by the Mayor relevant to employment of such personnel are to be made solely on the basis of merit and qualifications.

The Mayor carries out his responsibility for employment of personnel through the Managing Director, who is the chief administrative officer of the City. Section 406(b) states that the Managing Director shall "[d]irect and supervise the administration ***888** of all departments, offices, and agencies of the City, except as otherwise provided by this Charter or by law." Human Resources is one of six departments in the administrative service[8] of the City reporting to the Managing Director.[9] (Administrative Code § 8.01.) The Director of Human Resources is appointed by the Mayor and responsible to the Managing Director. (Charter § 705; Administrative Code § 8.48.) Section 8.47 of the Administrative Code states, in pertinent part, that the Department of Human Resources "shall be responsible for the administration of the City personnel system" of which the merit personnel system is a part. *See* Charter § 705. Thus, while they may not be directly involved on a day-to-day basis, the Mayor and the Managing Director are ultimately responsible for carrying out the City's merit personnel system through appointment and supervisory responsibilities.

City Council argues, to the contrary, that it, nonetheless, has the authority to hire and fire these new employees. First, City Council asserts that the Court's decision in *League of Women Voters of Greater Pittsburgh v. Allegheny County,* 819 A.2d 155 (Pa.Cmwlth.2003), is "extremely persuasive on this issue" and, under that holding, City Council would have hiring and firing authority because the new employees will work in confidential positions only for City Council, whose members are elected. (City Council Brief at 15.)

[5] In *League of Women Voters,* certain elected county Officers in Allegheny County (the Register of Wills, the Prothonotary, the Sheriff, the Recorder of Deeds and the Coroner) argued that the merit personnel system, which was prepared and administered by the county manager pursuant to the county charter, did not apply to them, and this Court agreed. However, although the facts in the case *sub judice* appear to be somewhat similar, the legal basis for our holding in the *League of Women Voters* case does not apply here. The positions of the elected officers in *League of Women Voters,* (colloquially known as "Row Offices"), "are units of local government created pursuant to section 401 of the Second Class County Code;[10] thus, the county offices are created pursuant to Commonwealth law." *Id.* at 157. Neither the officers nor the offices were specifically mentioned in the Allegheny County charter. *Id.* In the case *sub judice,* however, the Reading City Council is not created by state law, but by the Charter itself, which specifically establishes and defines its authority, creates the non-exempt employee category and defines the merit personnel system. Unlike in *League of Women Voters,* where the Allegheny County charter did not give the manager supervisory authority over "units of local government" created by state law, here the Charter explicitly provides that *all* positions in the *non-exempt career service* are subject to the City's merit personnel system pursuant to Charter § 702. Therefore, the analysis in *League of Women Voters* does not apply.[11]

***889** Next, City Council argues that Section 209, subsections (d) and (e), allows it to control its own employees because "these sections were drafted with the intention that City Council be free from interference by the Executive branch when dealing with and making personnel decisions about City Council employees." (City Council Brief at 12.) Section 209 is entitled "Prohibitions," and reads as follows:

* * *

(d) Except for the purpose of inquiry, the Council and its Members shall deal with the [sic] all departmental and bureau employees through the Mayor or the Managing Director.

(e) Neither the Council nor any of its Members shall in any manner dictate the appointment or removal of any City administrative offices or employees whom the Mayor or subordinates of the Mayor are empowered to appoint except as otherwise provided in this Charter.

City Council interprets these two provisions, which explicitly *limit* its authority to deal with non-exempt career service personnel, to be grants of authority allowing *it* to hire and fire non-exempt career service personnel working with City Council. However, Subsections 209(d) and (e) do not address City Council's authority to hire and fire such personnel.

In addition, City Council's argument concerning Sections 1.02B and 10.05 of the Administrative Code[12] also fails. It claims that these two sections bar City Council from "interfering" only with employees who report to the Administrative/Executive branch; therefore, City Council is free to deal with its own Legislative employees without interference. (City Council Brief at 13.) However, City Council cannot find affirmative authority by negative implication where City Council is not given this authority anywhere in the Charter, Administrative Code or Personnel Code. In fact, as made evident by Section 225 of the Charter, and its explicit grant of authority to City Council to appoint and "deal with" its own City Clerk, neither the Charter nor the associated Codes provide similar authority to City Council *for any other position.* Rather, that responsibility is assigned solely to the Mayor and Managing Director pursuant to Sections 308(m) and 406(b) of the Charter, as discussed previously.

Finally, City Council refers to Section 406, entitled "Powers and Duties." Subsection (c) states that the Managing Director shall "[a]ppoint, suspend, or remove any City employee, except as otherwise provided by this Charter or by law." City Council asserts that this subsection does not prevent it from making personnel decisions regarding employees not in the administrative service. This argument also fails for two reasons. First, the two positions at issue *are* categorized as non-exempt career service under the employment authority of the Managing Director. Therefore, the Managing Director's suspension and removal powers as described in Section 406(c) *would* apply to these two positions. Second, City Council has no authority to make personnel decisions regarding employees not in the administrative ***890** service

other than the City Clerk, described in Section 225 of the Charter.

In summary, City Council's arguments are based on interpretations of case law, and sections of the Charter and Administrative Code with which we do not agree, and, so, they do not support its position on this first issue.

(II) *Employment Authority of City Council*

Appellant's next issue concerns Section 225 of the Charter which states that:

> Within thirty (30) days of taking office, City Council shall appoint an officer of the City who shall have the title of City Clerk. .... The term of City Clerk shall be two (2) years with option to be re-appointed for successive terms. The City Clerk shall serve at the pleasure of Council.

Appellants argue, therefore, that the Charter authorizes the City Council to appoint ONLY the City Clerk. City Council claims, however, that Appellants' reliance on this Section is misplaced because the Section sets forth City Council's *appointment* powers only over an *exempt service* position, not the non-exempt career service positions at issue and, thus, can be distinguished.

Pennsylvania has long recognized the interpretive doctrine of *expressio unius est exclusio alterius,* which means the inclusion of a specific matter in a statute implies the exclusion of other matters. *Pane v. Department of Highways,* 422 Pa. 489, 495, 222 A.2d 913, 916 (1966) (citing *Cali v. City of Philadelphia,* 406 Pa. 290, 305, 177 A.2d 824, 832 (1962)). The Charter assigns City Council hiring or appointing authority only in Section 225, and this Section specifically refers only to appointing a City Clerk. The absence of any references to other hiring authority implies that there is no additional hiring authority on the part of City Council.[13] Furthermore, the City Clerk, over whom City Council enjoys appointment and removal power, does not belong to the career service of the City of Reading. In other words, nothing in the Charter, the Administrative Code, or the Personnel Code vests in City Council *any* power over the *employment* of any non-exempt career service employees, which would include the two newly created positions of City Council Chief of Staff and Legislative Coordinator.

(III) *Employment Authority of Mayor and Managing Director*

Next, Appellants argue that the employment authority of the Mayor and Managing Director is *not* confined to just the "Administrative Service" or "Administrative Branch." City Council, on the other hand, claims that Appellants' authority under ***891** the merit personnel system is *limited* to Executive Branch employees only, citing to case law and various sections of the Charter and Administrative Code.

There is no limiting provision in Section 308(m) of the Charter that confines the reach of the Mayor's **employment** authority to the administrative branch of the city government, as claimed by City Council. Rather, Section 308(m) gives the Mayor authority to employ **all** personnel necessary for the operation of the city government, including non-exempt career service City Council employees other than the City Clerk. Further, Section 406(c) states that the Managing Director, who reports to the Mayor, has authority over *all City employees*; this authority arises from the Managing Director's supervision of the Department of Human Resources. Pursuant to Sections 705 of the Charter and 8.47 of the Administrative Code, the Director of Human Resources administers the personnel system for the City, including the "recruiting, recommending, **hiring,** assignment, reassignment, bidding, training, performance evaluation, discipline and discharge ***of all employees.***" (Administrative Code § 8.47.) (Emphasis added.) Thus, the Mayor and Managing Director have personnel responsibilities for all non-exempt career service employees in the City's government.

However, City Council notes that, pursuant to Section 105(c) of the Charter, "titles shall be used to explain and understand the purposes of any given Chapter or Section." City Council then cites to Sections 301 and 309[14] of the Charter to support its argument that Appellants' authority under the merit personnel system is *limited* to Executive Branch employees only. City Council correctly notes that the Mayor controls, and is accountable for, the executive branch of the City government, and his appointment powers are limited to one City Solicitor, and members of boards, authorities and commissions. (Charter §§ 301, 309.) *See also* Administrative Code, art. III. City Council also correctly states that the Managing Director is the chief administrative officer of the City responsible to the Mayor for the administration of all City affairs. (Charter § 406.) *See also* Administrative Code, art. IV. From these sections, *inter alia,* City Council concludes that "it is clearly indicated by the Charter that the Mayor's

employment power (as well as other powers) is limited to the Executive branch and that his appointment powers are limited to the positions quoted above." (Appellee's Brief at 11.) Furthermore, since the City Council's Chief of Staff and Legislative Coordinator positions are within the non-exempt career service, but *not* in the Executive branch, City Council argues it has the authority to hire and fire for these positions.

We do not agree with City Council's arguments. While the Charter sections City Council cites show it to be a separate branch of Reading's city government that does not report to either the Mayor or Managing Director, they do not, in any way, limit the Mayor's and/or Managing Director's **employment authority** only to the administrative service or executive branch. Rather, Section 702 of the Charter ***892** defines all persons who are non-exempt career service employees and, as previously discussed, under Charter Sections 308(m) and 406(c), the Mayor and Managing Director have employment authority over all such employees. Further, relevant to these two sections and contrary to City Council's argument, nothing in the phrases "unless otherwise provided" (in Section 308(m)) or "except as otherwise provided" (in Section 406(c)), gives **employment authority** to City Council, except as pertains to the City Clerk, because the Charter has not provided otherwise for employees of City Council. *See* Charter § 225.

(IV) *Separation of Powers in Local Government in Pennsylvania*

Given that the Charter does not provide for City Council to hire the individuals to fill these positions, we must determine whether the constitutional separation of powers doctrine applies in this situation and would, nonetheless, require that these positions fall within City Council's purview, as determined by common pleas.

[6] It is axiomatic that a municipality that governs by home rule charter cannot exercise any power that is denied by the Constitution. *Appointment of District Attorney,* 756 A.2d 711 (Pa.Cmwlth.2000); Pennsylvania Constitution of 1968, Art. IX, § 2. The narrow issue presented here is whether the Constitutional doctrine of separation of powers is specifically applicable to local government entities in Pennsylvania. This question has not yet been answered by our state courts.[15]

[7] The Pennsylvania Constitution establishes that each branch at the *state* level, the legislative, executive and judiciary, possesses the power to control the employees within its branch. *See, e.g.,* Art. III, § 17, Appointment of Legislative Officers and Employees ("The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House,...."); Art. IV, § 2, The Executive ("The supreme executive power shall be vested in the Governor...."); Art. V, § 10, Judicial Administration ("The Supreme Court shall exercise general supervisory and administration authority over all the courts...."). However, the Constitution does not articulate a requirement that *local,* municipal governments have a separation of powers. In fact, it specifically provides that the electors can determine for themselves what form of local government they wish, *see* Article IX. Importantly, many of the permissible forms of local government in Pennsylvania do not, in fact, separate the legislative and executive functions. (*See, e.g.* The First Class Township Code, Act of June 24, 1931, P.L. 1206, *as amended,* 53 P.S. §§ 55101–58502; The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended,* 53 P.S. §§ 45101–48501). In ***893** fact, the City of Reading, before adopting the Charter, had a Commission form of government in which the executive and legislative functions were combined in the City Council.

[8] **[9]** **[10]** The requirement of a separation of powers in local government exists only if dictated by the state constitution, or if set forth in its charter.[16] As one court has phrased it, "there is no natural law of the separation of powers, and the powers of local government are separate only insofar as the State Constitution makes them." *Jordan v. Smith,* 669 So.2d 752, 756 (Miss.1996). Among the rationales expressed for this viewpoint are (1) that the purpose of the separation of powers doctrine is to provide a system of checks and balances for the three branches of government, and such a system is not needed at the local level because local government is kept in check by the various departments of state government, and (2) that official functions of local governments frequently overlap and, if the doctrine of separation of powers applied to local governments, the cost of government at the local level might become overly burdensome. *Ball v. Fitzpatrick,* 602 So.2d 873, 878 (Miss.1992) (Banks, J. concurring). In fact, were there an inherent, natural constitutional doctrine of separation of powers at the local level, many forms of local government in which the legislative and executive functions are merged, *such as the commission form of government in existence in Reading prior to enactment of the Charter,* and those in existence in many other Pennsylvania municipalities, would be unconstitutional.

[11] We are persuaded by the rationales expressed above and hold that, in Pennsylvania, because the State Constitution does not dictate the separation of powers at the local government level, there is no Constitutional separation of powers at the local government level. This conclusion is consistent with the conclusions of other jurisdictions.[17] Accordingly, although ***894** the Charter may deviate from the customary practice of providing supervisors with authority to hire and fire employees they supervise, the enabling legislation (HRC & OPL) provides the City with the authority to do so, *see Goldsmith v. City Council of the City of Easton,* 817 A.2d 565 (Pa.Cmwlth.2003), and such authority is not constitutionally infirm under a separation of powers theory.

For the reasons outlined in this opinion, we reverse, in part, the order of the trial court.

ORDER

NOW, November 17, 2003, the order of the Court of Common Pleas of Berks County in the above-captioned matter is hereby reversed, in part, in accordance with the foregoing opinion.

All Citations

835 A.2d 883

Footnotes

1 The Mayor and Managing Director will be referred to jointly in this opinion as "Appellants."

2 An exempt employee is not subject to the City's merit personnel system. *See* Footnote 8 for further discussion.

3 The Chief of Staff is to "serve[ ] as the chief administrative officer of City Council. This position performs highly responsible work involving the general oversight and coordination of Council's legislative action, policy, program and project management, procedure and operations ... and is responsible for making recommendations to Council relating to policy, regulations, practices, and issues concerning the City of Reading." (Job Description, January 25, 2001.) The Chief of Staff supervises the Legislative Coordinator and the City Clerk, and is to report to City Council. *Id.* The Legislative Coordinator performs administrative work of a confidential nature for City Council and the Chief of Staff, and reports to both. (Job Description, January 18, 2001.) Other responsibilities include "considerable public contact in dealing with City organizations, elected officials, and department directors and coordinating Council's initiatives and direction with the aforementioned." *Id.*

4 Based on allegations in City Council's Amended Complaint in Equity, this process actually began in December, 2000, when City Council submitted the 2001 Amended Full Time Position Ordinance to the Mayor for approval. (¶ 13.) This amended ordinance, in relevant part, is where they first created the positions of Chief of Staff and Legislative Coordinator. (¶¶ 13, 14.) The Mayor vetoed the amended ordinance, but City Council overrode the Mayor's veto. (¶¶ 15–16.) Following the enactment of the amended ordinance, job descriptions were created for the two positions and, shortly thereafter, City Council appointed Linda Kelleher (City Clerk) to the position of Chief of Staff. (¶¶ 17, 18.) Ultimately, however, the Mayor's Budget, and not City Council's Budget, became the Official Fiscal Year 2001 Budget for the City pursuant to a court order dated March 28, 2002. In the order, the trial judge noted that City Council's pre-adoption Budget Amendment triggered the resubmission requirements of Section 905(b) of the Charter, which were subsequently not followed. Section 905(b) states: "If the amended Budget increases, decreases, or readjusts funding requirements by more than five (5) percent, or adds or deletes a program, the Budget shall be returned to the Mayor immediately for comment and resubmission to the Council within three (3) normal City work days."

In the last quarter of 2001, City Council passed the fiscal year 2002 Operating Budget and a Full Time Employee Position Ordinance with Amendments, which included a continuation of the two aforementioned positions for City Council. (¶¶ 23–24, 26.) The Mayor vetoed both the budget and the ordinance, and City Council overrode the Mayor's vetoes. (¶¶ 28–29.) Notwithstanding, the Mayor and Managing Director "refused and continue[d] to refuse" to recognize those portions of the budget package which created and funded the positions for City Council. (¶ 30.) The Mayor and Managing Director also refused to recognize the hiring of Linda Kelleher to the position of Chief of Staff. (¶ 31.) City Council has not sought to fill the position of Legislative Coordinator while this controversy is ongoing. (¶¶ 31–32.)

5 Our standard of review in a declaratory judgment action is limited to determining whether the trial court's findings are supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion. *Allegheny County Detectives Association v. Allegheny County and The Allegheny County Retirement Board,* 804 A.2d 1285 (Pa.Cmwlth.2002).

6 Section 2962 delineates limitations on a municipality's powers; these are areas in which the legislature continues to exercise direct control of municipalities in the Commonwealth. 53 Pa.C.S. § 2962; *Fraternal Order of Police,* 644 A.2d at 249. None of the subsections of Section 2962 is applicable to this case.

7 Section 702 of the Charter states that elected officials, officers and employees must be classified as either exempt service or career service. Section 702(a) exempts only elected and certain appointed officials, and certain specifically delineated administrative employees, from the scope of the merit personnel system: all elected officials; the Managing Director and the City Solicitor; the heads of departments, offices, and agencies immediately under the direction and supervision of the Managing Director; one clerk or secretary for each of the full-time elected City officials and the heads of each City department; the City Clerk; the members of authorities, boards, and commissions; and, temporary, part-time, or seasonal employees. Section 702(b) states that "[a]ll other officers and employees shall be members of the career service." Employees in the career service are non-exempt and subject to the merit personnel system.

8 Section 1.02B of the Administrative Code, entitled "Definitions," defines "Administrative Service" to mean "all personnel in those units of the City which are under the authority of the Managing Director."

9 The other departments in the administrative service reporting to the Managing Director are the Departments of Finance, Public Works, Community Development, Police and Fire. (Administrative Code § 8.01.)

10 Act of July 28, 1953, P.L. 723, *as amended,* 16 P.S. § 3401.

11 In addition, the clerks of court and prothonotaries in *League of Women Voters* are personnel of the unified judicial system, and thus are subject to a separation of powers analysis. 819 A.2d at 158 n. 12. *See also* footnote 16 *infra.*

12 As mentioned previously, subsection B of Section 1.02 of the Administrative Code, entitled "Definitions," defines "Administrative Service" to mean "all personnel in those units of the City which are under the authority of the Managing Director." Section 10.05, entitled "Interference of Administration," states: "Except as otherwise provided in this Administrative Code, and for the purpose of inquiries and investigations, the Council or its members shall deal with employees in the administrative service solely through the Managing Director, and neither the Council nor its members shall give orders to such employees either publicly or privately."

13 City Council cites to Sections 207, 208 and 211 of the Charter to support its argument on this issue. All three sections are part of Article II of the Charter, entitled "Council—The Legislative Branch." However, none of these sections explicitly or implicitly provide City Council employment authority over non-exempt career service personnel, which is the crux of the issue in the case. Section 207 concerns its ability to fill vacancies on the *Council.* Section 208 concerns City Council's "General Powers and Duties." It states in pertinent part that, "[a]ll powers of the City not otherwise provided for in this Charter shall be exercised in a manner to be determined by Council." Contrary to City Council's argument, this section does not give it the authority it seeks because *other sections of the Charter provide* the Mayor and Managing Director with *this authority, i.e.,* Sections 308(m) and 406(b) and (c). Section 211 concerns City Council's *removal powers* which are applicable only to the City Solicitor, persons appointed to their office by City Council, or elected officials and appointed Department Heads—all of which are *exempt* personnel pursuant to Charter § 702(a).

14 As previously mentioned, Article II of the Charter is entitled "Council—The Legislative Branch." Both of the sections mentioned in this footnote are in Article III of the Charter, entitled "Executive Branch." Section 301, entitled "The Mayor," states that "[t]he executive, administrative, and law enforcement powers of the City shall be vested in the Mayor. The Mayor shall control and be accountable for the executive branch of City government, as provided by this Charter." Section 309, entitled "Appointment by the Mayor," states, in pertinent part, that "[t]he Mayor shall appoint: (a) One City Solicitor ... [and] (b) All members of Boards, Authorities and Commissions...."

15 The judicial branch of the state government is established in Article V of the Pennsylvania Constitution; Section 10 of that Article sets forth the Pennsylvania Supreme Court's supervisory authority over Pennsylvania courts. Thus, any discussion of the separation of powers involving the judiciary, involves a different constitutional question. *See, e.g., League of Women Voters,* 819 A.2d at 158 n. 12 ("If we were to interpret the Charter to allow the Executive branch of the County's government to prepare and administer the personnel system for personnel of the Judicial branch of government, we would be construing the Charter in a manner that violates the constitutional separation of powers."). *See also Commonwealth v. Mockaitis,* 575 Pa. 5, 834 A.2d 488 (2003) ("The General Assembly cannot constitutionally impose upon the judicial branch powers and obligations exclusively reserved to the legislative or executive branch...."); *Commonwealth v. Sutley,* 474 Pa. 256, 262, 378 A.2d 780, 783 (1977) ("[A]ny encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government.")

16 States are free to arrange the disposition of their powers as they wish as long as they do not violate the federal constitution. 25 Stetson L.Rev. 627, 662 (1996). This extends to a state's choice as to how the powers of local government are to be arranged. *Id.* Actually, there exists no constitutional obligation to provide local government. *See Hunter v. City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907).

17 *Ball v. Fitzpatrick,* 602 So.2d 873, 878 (Miss.1992) (the "system of checks and balances is not needed at the local level") (citing *State, ex rel. Wilkinson v. Lane,* 181 Ala. 646, 62 So. 31, 34 (1913) ("doctrine of separation of powers has 'no applicability, and [was] never intended to apply, to mere town or city governments or to mere town or city officials' "); *Ghent v. Zoning Commission,* 220 Conn. 584, 600 A.2d 1010, 1012 (1991) ("The constitutional provision [of separation of powers] applies to the state and not to municipalities, which are governed by charters and other statutes enacted by the legislature."); *Poynter v. Walling,* 177 A.2d 641, 645 (Del.Super.Ct.1962) ("constitutional requirement of separation of powers of the three governmental departments applies to state government and not to the government of municipal corporations and their officers"); *Tendler v. Thompson,* 256 Ga. 633, 352 S.E.2d 388, 388 (1987) ("doctrine of separation of powers applies only to the state and not to municipalities or to county governments"); *Willsey v. Newlon,* 161 Ind.App. 332, 316 N.E.2d 390, 391 (1974) ("it has repeatedly been held that the separation of powers doctrine of Article III has no application at the local level"); *Bryan v. Voss,* 143 Ky. 422, 136 S.W. 884, 887 (1911) ("it has not been the policy of the state to separate legislative from executive functions in its government of the municipalities"); *Wilson v. City of New Orleans,* 466 So.2d 726, 729 (La.Ct.App.1985) ("doctrine applies only to the state and is not applicable to local governments"); *County Council for Montgomery County v. Investors Funding Corporation,* 270 Md. 403, 312 A.2d 225, 243 (1973) ("constitutional doctrine of separation of powers is ... not applicable to local government"); *State, ex rel. Simpson v. City of Mankato,* 117 Minn. 458, 136 N.W. 264, 267 (1912) (separation of powers "does not apply to municipal governments"); *Graziano v. Mayor and Township Committee,* 162 N.J.Super. 552, 394 A.2d 103, 108 (1978) ("the separation of powers doctrine as it applies to federal and state governments is inapplicable to municipalities"); *Board of County Commissioners v. Padilla,* 111 N.M. 278, 804 P.2d 1097, 1102 (N.M.Ct.App.1990) ("[t]raditional doctrine derives from concern about the tyranny that can arise when one branch of government—the executive, legislative, or judicial—assumes the powers of another. Apparently, because this danger is diminished for a level of government whose powers are subordinated to higher levels of government or otherwise limited, the New Mexico Constitution's provision on separation of powers ... does not apply to the distribution of power within local governments."); *LaGuardia v. Smith,* 288 N.Y. 1, 41 N.E.2d 153, 156 (1942) ("theory of co-ordinate, independent branches of government has been held generally to apply to the national system and to the states, but not to the government of cities.")).

(4) Dugger v. City of Santa Fe

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Citizens for Incorporation, Inc. v. Board of County Com'rs of County of Bernalillo, N.M.App., June 2, 1993

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.

West Headnotes (17)

[1] **Administrative Law and Procedure** Legislative

"Legislative action" by agency usually reflects some public policy relating to matters of permanent or general character, is not usually restricted to a identifiable persons or groups, and is usually prospective.

4 Cases that cite this headnote

[2] **Municipal, County, and Local Government** Nature and form of proceeding

Annexations completed by municipality under petition method are reviewed under district court's original jurisdiction. NMSA 1978, §§ 3–7–15, 3–7–17, 3–7–17, subd. C.

[3] **Municipal, County, and Local Government** Proceedings

Of the three types of annexation procedures, the boundary commission and arbitration methods are administrative, and the petition method is legislative. NMSA 1978, §§ 3–7–1, subd. A, 3–7–17, subd. A.

2 Cases that cite this headnote

[4] **Municipal, County, and Local Government** Local laws concerning annexation

City's rejection of proposed annexation ordinance had same effect as enactment of ordinance rejecting annexation. NMSA 1978, §§ 3–7–1, subd. A, 3–7–17, subd. A.

[5] **Municipal, County, and Local Government** Nature and form of proceeding

Petition method of annexation was legislative, not quasi-judicial in nature, and thus, decision to

deny annexation was reviewable only on direct appeal to district court, and district court lacked jurisdiction to entertain writ of certiorari, where statute governing petition method of annexation required municipality to use legislative processes in approving or disapproving petition to annex and did not impose criteria for annexation. NMSA 1978, §§ 3–7–10, subd. A, 3–7–15, subds. A, B, 3–7–17.

2 Cases that cite this headnote

[6] **Municipal, County, and Local Government** Nature and form of proceeding

Process by which city reached its decision to reject annexation petition did not transform decision into quasi-judicial proceeding subject to review on merits, even if process had appearance of quasi-judicial proceedings; although municipality could properly establish criteria and apply them in quasi-judicial fashion, final decision to annex or not to annex retained its legislative character. NMSA 1978, §§ 3–7–1, subd. A, 3–7–10, subd. A, 3–7–15, subds. A, B, 3–7–17, 3–7–17, subd. A.

2 Cases that cite this headnote

[7] **Municipal, County, and Local Government** Proceedings Concerning Validity, Construction, and Operation of Local Laws

When ordinance is challenged as unconstitutional, test generally applied is whether ordinance bears reasonable or rational relationship to legitimate legislative goal or purpose.

[8] **Constitutional Law** Presumptions and Construction as to Constitutionality

Presumption that legislative acts are legal, valid, and constitutional extends to municipal ordinances.

[9] **Municipal, County, and Local Government** Proceedings Concerning Validity, Construction, and Operation of Local Laws

Under reasonableness standard for evaluating constitutionality of municipal ordinance, court is required to show great deference to municipality's decision; there is no independent inquiry into wisdom, policy, or justness of legislative action.

[10] **Municipal, County, and Local Government** Scope and standard of review

Municipal, County, and Local Government Presumptions and burdens on review

District court's application of administrative standard of review to determine that there was not substantial evidence on whole record to support city's decision to deny annexation petition constituted independent inquiry into wisdom of city's action based on evidence before it and was improper; district court's review was limited to determination of whether city's action was constitutional and within its legislatively granted authority. NMSA 1978, §§ 3–7–6, 3–7–11, 3–7–17, 3–21–7 to 3–21–9.

2 Cases that cite this headnote

[11] **Municipal, County, and Local Government** Scope and standard of review

Zoning law was not analogous to law governing annexation petitions so as to permit district court to apply standard of review normally applied in reviewing zoning decisions to denial of annexation petition; statute governing annexation petitions indicated Legislature's intent that decisions made under petition method be reviewed in same manner as other ordinances and court's inquiry was limited to procedures followed rather than merits of decision. NMSA 1978, §§ 3–7–6, 3–7–11, 3–7–15, subd. E, 3–7–17, 3–7–17, subds. A, C, 3–21–7 to 3–21–9; U.S.C.A. Const.Amends. 5, 14.

4 Cases that cite this headnote

[12] **Zoning and Planning** Scope of Review

Because Legislature demonstrated its intent that zoning decisions be handled administratively, application of administrative standard of review to zoning decisions is appropriate. NMSA 1978, §§ 3–7–6, 3–7–11, 3–7–17, 3–21–7 to 3–21–9.

[13] **Municipal, County, and Local Government** Scope and standard of review

Application of administrative standards of review to annexations made pursuant to arbitration and boundary commission methods is proper; legislature provided for establishment of administrative bodies to make annexation decisions pursuant to those methods. NMSA 1978, §§ 3–7–6, 3–7–11, 3–7–15, subd. E, 3–7–17, 3–7–17, subds. A, C, 3–21–7 to 3–21–9; U.S.C.A. Const.Amends. 5, 14.

1 Case that cites this headnote

[14] **Municipal, County, and Local Government** Annexation plans, reports, and maps

Master plan which municipalities were authorized to adopt, being only resolution, did not bind city to any specific procedures as did ordinance, but was merely advisory in nature; thus, master plan did not create entitlement to annexation by petition. U.S.C.A. Const.Amend. 14; Const. Art. 2, § 18; NMSA 1978, §§ 3–17–1, 3–17–17, subd. A, 3–19–1 to 3–19–12, 3–19–9, subd. A.

2 Cases that cite this headnote

[15] **Municipal, County, and Local Government** Resolutions in general

Resolution does not carry weight of law, as do ordinances for municipalities.

2 Cases that cite this headnote

[16] **Municipal, County, and Local Government** Local laws concerning annexation

Requirements of city ordinance that landowner had to meet before his or her land could be considered for annexation did not limit city's power to approve or disapprove proposed annexation.

[17] **Constitutional Law** Creation, alteration, and regulation

Municipal, County, and Local Government Notice and Hearing

City's refusal to pass ordinance annexing petitioner's property did not violate petitioner's procedural due process rights; petitioners received all procedural due process they were entitled to receive in that they received all notices of hearings provided for in city ordinances governing annexation by petition. NMSA 1978, §§ 3–7–15, subd. E, 3–7–17, 3–7–17, subds. A, C; U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

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).

[1] {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).

[2] {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.]

[3] {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 [4]** {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).

[5] {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.

[6] {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

[7] **[8]** {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).

[9] {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).

[10] {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.

[11] {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.

[12] {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.

[13] {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.

[14] {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.)

[15] {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.

[16] {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.

[17] {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

End of Document

(5) Hubby v. Carpenter

177 W.Va. 78
Supreme Court of Appeals of West Virginia.

Robert Nielsen HUBBY, Jr.

v.

James CARPENTER, Mayor and Municipal Judge for City of Buckhannon, etc.

No. 17165
|
Submitted Sept. 9, 1986.
|
Decided Nov. 14, 1986.

Synopsis
Original proceeding in prohibition challenged validity of statute which vested mayor with authority to hear and determine violations of municipal ordinance. The Supreme Court of Appeals, Miller, C.J., held that: (1) trial of defendant in mayor's court did not constitute due process violation, and (2) doctrine of separation of powers was not applicable to municipality, such as to prohibit misdemeanor trials in mayor's court.

Writ denied.

West Headnotes (4)

[1] **Constitutional Law** Impartiality; bias and prejudice

Trial of defendant for contributing to delinquency of minor, in violation of city ordinance, by the city's mayor, did not constitute due process violation as only a small fraction of city revenues were derived from fines levied in mayor's court and thus, amount of influence fines would have on municipal court's decision making process would be insubstantial. U.S.C.A. Const.Amends. 5, 14.

[2] **Courts** Creation and abolition in general

Criminal Law Jurisdiction of Justices of the Peace, Police Justices, and Other Officers

State Constitution authorizes legislature to establish municipal, police, or mayor's courts and to specify method by which such judges shall be selected; statute enacted pursuant to Constitution vests mayors of municipalities with judicial power to hear municipal law violations. Code, 8–10–1, 8–10–2; Const. Art. 8, § 11.

[3] **Constitutional Law** Separation of Powers

Separation of powers doctrine applies to state government and state officers and ordinarily does not extend to government of municipal corporations.

2 Cases that cite this headnote

[4] **Constitutional Law** Nature and scope in general

Criminal Law Jurisdiction of offense

Doctrine of separation of powers did not prohibit mayor from hearing cases involving misdemeanor violations of municipal ordinances; thus, trial of misdemeanor violation of ordinance regarding contributing to delinquency of minor could be heard in mayor's court. Const. Art. 6, § 39; Art. 8, § 11.

1 Case that cites this headnote

****706** ***79** Syllabus by the Court

1. "Under art. 3, § 14 of the West Virginia *Constitution,* the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration." Syllabus, *Champ v. McGhee,* 165 W.Va. 567, 270 S.E.2d 445 (1980).

2. "The due process clause of Article III, § 10 of the Constitution of West Virginia prohibits a municipal court judge from dismissing municipal charges solely because the accused has exercised his constitutional right to a jury trial, when the penalty under state law for the same offense carries a heavier jail sentence than provided for by municipal ordinance." Syllabus Point 2, *Scott v. McGhee,* —— W.Va. ——, 324 S.E.2d 710 (1984).

**707 3. In the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities.

Attorneys and Law Firms

Daniel J. Post, Buckhannon, for petitioner.

David W. McCauley, Coleman & Wallace, Buckhannon, for respondent.

Opinion

MILLER, Chief Justice:

This original proceeding in prohibition challenges the validity of W.Va. Code, 8–10–1,[1] which vests mayors with the authority to hear and determine violations of municipal ordinances, on the basis that it contravenes the separation of powers clause, Article V, Section 1 [2]of the West Virginia Constitution.

*80 In April, 1986, the relator, Robert Nielsen Hubby, Jr., was arrested on a charge of contributing to the delinquency of a minor and was taken before James Carpenter, the mayor of the City of Buckhannon, who had previously issued the arrest warrant, and a hearing date was set. According to the respondent mayor, contributing to the delinquency of a minor is prohibited by Article 3 of Ordinance No. 100 of the City of Buckhannon. The relator then petitioned this Court for a writ of prohibition seeking to prevent the mayor from conducting the misdemeanor proceeding.

Section 8 of the Charter of the City of Buckhannon entitled "Legislative Department: Duties" vests the legislative power of the city in the city council composed of the mayor, the city recorder, and five councilmen. Section 10 of the Charter provides that the mayor shall preside over city council meetings, and Section 18 provides that the judicial power of the city shall be vested in a police court of which the mayor shall be the judge.[3]

In the past, most challenges to municipal court procedures have been based on due process grounds or a constitutional provision specifically applicable to criminal proceedings. In *Champ v. McGhee,* 165 W.Va. 567, 270 S.E.2d 445 (1980), this Court invalidated a Bluefield municipal ordinance which prohibited jury trials in municipal courts and held in its single Syllabus:

> "Under art. 3, § 14 of the West Virginia *Constitution,* the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration."[4]

The Court also recognized in *Champ* that defendants in municipal court are entitled to a twelve-person jury, although in magistrate court they would only be entitled to a six-person jury under **708 Article VIII, Section 10 of the West Virginia Constitution.[5]

Four years later in a case arising out of the same municipal court, we held in *Scott v. McGhee,* 174 W.Va. 296, 324 S.E.2d 710 (1984), that the due process clause of our Constitution prohibits a municipal court judge in certain circumstances from dismissing municipal charges solely because the defendant exercised his right to a jury trial. In granting a writ of prohibition to prevent dismissal of the municipal charges, we held in Syllabus Point 2:

> "The due process clause of Article III, § 10 of the Constitution of West Virginia prohibits a municipal court judge from dismissing municipal charges solely because the accused has exercised his constitutional right to a jury trial, when the penalty under state law for the same offense carries a heavier jail sentence than provided for by municipal ordinance."

The right to counsel, as guaranteed by both the United States Constitution[6] and the West Virginia Constitution, was extended in *Bullett v. Staggs,* 162 W.Va. 199, 250 S.E.2d 38 (1978), to criminal trials in municipal courts as reflected by Syllabus Point 1: "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." We also ruled in *Bullett* that circuit courts under *81 W.Va. Code, 51–11–5, have the authority to appoint counsel for an indigent charged with a municipal ordinance violation.

The legislature has afforded persons convicted of municipal ordinance violations with an appeal de novo to the circuit court. W.Va. Code, 8–34–1.[7] In *State v. Eden,* 163 W.Va. 370, 256 S.E.2d 868 (1979), we held that our due process clause prohibits the imposition of a heavier penalty upon a defendant who exercises his right of appeal from magistrate court. In

State v. Bonham, 173 W.Va. 416, 317 S.E.2d 501 (1984), we reaffirmed and extended this principle to appeals from municipal courts, stating in Syllabus Point 2:

> "A defendant who is convicted of an offense in a trial before a magistrate or in municipal court and exercises his statutory right to obtain a trial de novo in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier penalty than the original sentence. W.Va. Const. art. III, § 10."

In *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), a municipal court judge was held to be subject to the due process guarantee that a judicial tribunal be neutral and detached. There, the United States Supreme Court found that a defendant was denied due process because he had been compelled to stand trial in a mayor's court, which provided a substantial portion of the village revenues. It was also shown that the mayor had substantial executive powers with regard to administering the affairs of the municipality.[8]

The Supreme Court's decision in *Ward* was a logical outgrowth of its earlier decision ****709** in *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In *Tumey,* the defendant was convicted of violating the prohibition law before the mayor of a small town in Ohio, whose regular salary was supplemented by the fees and costs he levied against persons he found to have violated municipal ordinances. The Supreme Court held the convictions violated due process, because the judge had "a direct, personal, substantial pecuniary interest in reaching a conclusion against him [the defendant] in his case." 273 U.S. at 523, 47 S.Ct. at 441, 71 L.Ed. at 754.

We have adopted the principles of *Ward* and *Tumey* and have sustained due process challenges to our former justice of the peace system based upon the concept that the pecuniary interest of the justice of the peace disqualified him from trying the case.[9] In *Keith v. Gerber,* 156 W.Va. 787, 197 S.E.2d 310 (1973), we granted a writ of prohibition preventing the mayor of the City of St. Marys from trying the accused on a traffic offense. There the mayor, in addition to a $300 yearly salary, received ***82** five dollars in compensation for each conviction obtained in his court. We stated in Syllabus Point 1: "Where a judge has a pecuniary interest in any case to be tried by him he is disqualified from trying the case, and prohibition is the proper remedy to restrain such trial."[10]

[1] In his response to the rule to show cause in this case, the respondent mayor asserts that he is not disqualified under *Ward,* because the City of Buckhannon realizes only a tiny fraction of its revenues from fines levied in the mayor's court. He included a chart showing the city's revenues during the past two fiscal years which indicated that the fines imposed in the mayor's court constituted less than one percent of the City's total revenues. In *Ward,* the mayor's court over a five-year period generated some forty percent of village revenues. It would appear that the *Ward* Court intimated that at some minimal level of collective fines due process would not be violated because their influence on the municipal court's decision-making process would be insubstantial. We agree with the respondent mayor that given the minor amount of municipal revenues derived from the mayor's court, a due process violation has not been shown.[11]

[2] With these procedural safeguards as a backdrop, we address the relator's separation of powers argument. We begin by observing that Article VIII, Section 11 of the West Virginia Constitution authorizes the legislature to establish municipal, ****710** police, or mayor's courts and to specify the method by which such judges shall be selected. This section also prohibits the judges from receiving compensation on a fee basis.[12] As indicated earlier, the legislature by virtue of W.Va. Code, 8–10–1, has vested mayors of municipalities with the judicial power to hear municipal law violations.[13]

[3] We have found only one case that addresses the precise separation of powers question presented here. In *Poynter v. Walling,* 54 Del. 409, 177 A.2d 641 (1962), the claim was made that a municipal court judge who was the mayor could not sit because of the separation of powers bar. The court held that the constitutional requirement that the three departments of government be separate "applies to state government and not to the government of ***83** municipal corporations and their officers." 54 Del. at 415, 177 A.2d at 645. This holding is in accord with the general rule that the separation of powers doctrine applies to state government and state officers and ordinarily does not extend to the government of municipal corporations. *Sarlls v. State ex rel. Trimble,* 201 Ind. 88, 166 N.E. 270 (1929); *Eckerson v. City of Des Moines,* 137 Iowa 452, 115 N.W. 177 (1908); *Bryan v. Voss,* 143 Ky. 422, 136 S.W. 884 (1911); *State ex rel. Simpson v. City of Mankato,* 117 Minn. 458, 136 N.W. 264 (1912); *Smith v. Hazlet,* 63 N.J. 523, 309 A.2d 210 (1973); *LaGuardia v. Smith,* 288 N.Y. 1, 41 N.E.2d 153 (Ct.App.1942); 16 Am.Jur.2d *Constitutional Law* § 295 (1979); 16 C.J.S. *Constitutional Law* § 112 (1984); Annot., 67 A.L.R. 737 (1930).

We have not had occasion to directly decide whether the separation of powers principles are applicable to the municipal government level. In several cases, however, we have indicated that the separation of powers doctrine has diminished vitality "at the lower levels of government" because "there must necessarily be an overlapping of functions in responsible officials lest the cost of government become too burdensome to bear." *State ex rel. Sahley v. Thompson,* 151 W.Va. 336, 342, 151 S.E.2d 870, 873 (1966), *overruled on other grounds, State ex rel. Hill v. Smith,* 172 W.Va. 413, 305 S.E.2d 771 (1983).[14] In *Sahley,* we quoted approvingly from *Wheeling Bridge & Terminal Ry. Co. v. Paull,* 39 W.Va. 142, 145, 19 S.E. 551, 551–52 (1894):

> "So that, while we find that the constitution, as much as possible keeps the heads of the three departments comparatively distinct and independent of each other, yet as we move down the scale these several powers become more complicated and interwoven with each other, *until we* ****711** *find the common council of every village exercising legislative, executive and judicial functions, indiscriminately, by authority of the same constitution which declares that these functions shall be kept distinct.* (Italics supplied.)"[15]

The thought expressed in *Wheeling Bridge* has deeper roots that rest on several principles. First, the concept of separation of powers is designed primarily as a check on the basic or organic form of government which is the State itself. *State v. Huber,* 129 W.Va. 198, 208–11, 40 S.E.2d 11, 18–20 (1946). Second, there is express constitutional recognition in Article VIII, Section 11 for the establishment of mayor's courts by the legislature. This indicates a constitutional status that suggests some recognition that the general constitutional doctrine of separation of powers is not fully applicable to a mayor's court. Third, we have long recognized under Article VI, Section 39, which empowers the legislature to create municipalities, that municipalities have no inherent powers, but are creatures of the legislature possessing only those powers that are expressly delegated or necessarily implied from some legislative enactment. *Toler v. City of Huntington,* 153 W.Va. 313, 168 S.E.2d 551 (1969); *State ex rel. Plymale v. City of Huntington,* 147 W.Va. 728, 131 S.E.2d 160 (1963); *Brackman's, Inc. v. City of Huntington,* 126 W.Va. 21, 27 S.E.2d 71 (1943).

These factors may well account for the reduced need for the separation of powers ***84** principle at the mayor's court level. This is particularly true in view of the various constitutional safeguards that surround the operation of a mayor's court which we have earlier touched upon.

[4] In the present case, the relator does not point to any circumstances that would demonstrate the need to rigidly apply the separation of powers doctrine at the municipal level of government. We, therefore, conclude that in the absence of special circumstances, the doctrine of the separation of powers is not applicable to municipalities.

For the foregoing reasons, the writ of prohibition is denied.

Writ denied.

All Citations

177 W.Va. 78, 350 S.E.2d 706

Footnotes

1 As pertinent here, W.Va. Code, 8–10–1, provides:

> "When not otherwise provided by charter provision or general law, the mayor of every municipality shall be the chief executive officer of such municipality, shall have the powers and authority granted in this section, and shall see that the ordinances ... are faithfully executed. He shall have jurisdiction to hear and determine any and all alleged violations thereof and to convict and sentence persons therefor.
>
> * * *
>
> "He shall have power to issue executions for all fines, penalties and costs imposed by him...."

2 Article V, Section 1 of the West Virginia Constitution provides:

> "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."

3 It appears the City of Buckhannon has adopted the mayor-council form of municipal government as authorized by W.Va. Code, 8–3–2. As pertinent here, the statutory provision states:

> "Plan I—'*Mayor-Council Plan.*' Under this plan: (1) There shall be a city council, elected at large or by wards, or both at large and by wards, by the qualified voters of the city; a mayor elected by the qualified voters of the city; and such other elective officers as the charter may prescribe; and (2) The mayor and council shall be the governing body and administrative authority."

4 Article III, Section 14 of the West Virginia Constitution provides, as relevant here: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men...."

5 Article VIII, Section 10 of the West Virginia Constitution provides, as pertinent here: "In a trial by jury in a magistrate court, the jury shall consist of six persons who are qualified as prescribed by law."

6 *See Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (Sixth Amendment to the United States Constitution).

7 W.Va.Code, 8–34–1, as material here, reads:

> "Every person sentenced under this chapter by any mayor or police court judge or municipal court judge to imprisonment or to the payment of a fine of ten dollars or more (and in no case shall a fine of less than ten dollars be given if the defendant, his agent or attorney object thereto) shall be allowed an appeal de novo to the circuit court...."

We noted in *Scott v. McGhee,* 174 W.Va. at —— n. 2, 324 S.E.2d at 710 n. 2, that "[s]tate law limits the maximum jail term for municipal ordinance violations to thirty days in jail. W.Va. Code, 8–11–1, and W.Va. Code, 8–12–5(57)."

8 In *Ward,* the Supreme Court also found it constitutionally irrelevant that the defendant was entitled to a trial de novo upon appeal from municipal court, reasoning that the defendant was entitled to a neutral and detached judge in the first instance.

9 *See State ex rel. Moats v. Janco,* 154 W.Va. 887, 180 S.E.2d 74 (1971); *State ex rel. Osborne v. Chinn,* 146 W.Va. 610, 121 S.E.2d 610 (1961); *Williams v. Brannen,* 116 W.Va. 1, 178 S.E. 67 (1935). The Court held in Syllabus Point 2 of *Janco* : "A justice of the peace is disqualified from acting in a criminal case in which he has a pecuniary interest, however remote, and a judgment of conviction rendered by him in such case is void because it is violative of the due process clauses of the Federal and State Constitutions." The Court has arrived at the same conclusion in civil cases. *See State ex rel. Shrewsbury v. Poteet,* 157 W.Va. 540, 202 S.E.2d 628 (1974); *State ex rel. Reece v. Gies,* 156 W.Va. 729, 198 S.E.2d 211 (1973). The Court stated in Syllabus Point 2 of *Shrewsbury:* " 'Where a justice of the peace has any pecuniary interest in any case to be tried by him, however remote, he is disqualified from trying such case.' Point 1, Syllabus, *State ex rel. Osborne v. Chinn,* 146 W.Va. 610 [121 S.E.2d 610 (1961)]."

10 We have recognized on the appellate level the "rule of necessity," which was discussed at some length in *United States v. Will,* 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). This rule acknowledges that an appellate court that is the court of last resort is the only forum that can hear a case on appeal. If the issue that must be decided affects all of the sitting judges and there is no alternate unbiased group, then the sitting appellate judges must of necessity decide the issue. *E.g., Oakley v. Gainer,* 175 W.Va. 115, 331 S.E.2d 846 (1985); *Wagoner v. Gainer,* —— W.Va. ——, 279 S.E.2d 636 (1981); *State ex rel. Brotherton v. Blankenship,* 157 W.Va. 100, 207 S.E.2d 421 (1973).

11 Moreover, in *Ward,* the Supreme Court indicated that where the mayor exercises only very limited executive powers, this would not disqualify him from presiding in the mayor's court, citing *Dugan v. Ohio,* 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). However, the Supreme Court in *Ward* left it unclear in this situation whether the showing of substantial revenues from the mayor's court might change the result.

12 Article VIII, Section 11 of the West Virginia Constitution provides:

> "The legislature may provide for the establishment in incorporated cities, towns or villages of municipal, police or mayors' courts, and may also provide the manner of selection of the judges of such courts. Such courts shall have jurisdiction to enforce municipal ordinances, with the right of appeal as prescribed by law. Until otherwise provided by law, all such courts heretofore established shall remain and continue as now constituted, and with the same right of appeal, insofar as their jurisdiction to enforce municipal ordinances is concerned; but on and after January one, one thousand nine hundred seventy-seven, any other jurisdiction now exercised by such courts shall cease. No judge of a municipal, police or mayor's court or any officer thereof shall be compensated for his services on a fee basis or receive to his own use for his services any pecuniary compensation, reward or benefit other than the salary prescribed therefor."

13 *See* note 1, *supra.* Under W.Va. Code, 8–10–2, the legislature has provided for an alternative scheme. This statute authorizes municipalities to create municipal courts and to provide for the appointment or election of a municipal judge who would exercise the same judicial power as the mayor. *See State ex rel. Hill v. Smith,* 172 W.Va. 413, 305 S.E.2d 771 (1983).

14 This Court in *Hill* struck down a municipal ordinance authorizing law enforcement and other local officials to issue arrest warrants. This was based in part upon decisions by the United States Supreme Court which require persons empowered to issue warrants to be neutral and detached and function independently of the police and prosecution. *See Shadwick v. City of Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972); *Coolridge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

15 Kenneth C. Davis, a leading authority on administrative law and former Associate Professor of Law at West Virginia University, in a rather lengthy article on the separation of powers entitled *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers,* 44 W.Va.L.Q. 270 (1938), points to the unworkable nature of the principle at the municipal level. He observed that "[e]very municipal charter which confers upon a municipal council executive, legislative, and judicial powers [would violate] a literal interpretation of Article V." 44 W.Va.L.Q. at 374.

End of Document

(6) La Guardia v. Smith

288 N.Y. 1
Court of Appeals of New York.

LA GUARDIA, Mayor,

v.

SMITH et al.

March 19, **1942**.

Synopsis

Appeal from Supreme Court, Appellate Division, First Department.

Proceeding in the matter of the application of Fiorello H. **La Guardia**, etc., to vacate, quash, or modify a certain subpoena duces tecum directing petitioner to appear and testify before a special committee of the Council of the City of New York investigating the affairs and conduct of the Municipal Civil Service Commission and to produce certain papers and documents, against Alfred E. **Smith** Jr., and others. From an order of the Appellate Division, 262 App.Div. 708, 27 N.Y.S.2d 992, affirming an order entered at Special Term, McCook, J., presiding, 176 Misc. 482, 27 N.Y.S.2d 321, denying such application, petitioner, his motion for leave to appeal having been denied by the Appellate Division, 262 App.Div. 726, 28 N.Y.S.2d 705, appeals by permission of the Court of Appeals.

Order affirmed.

LEHMAN, C. J., and RIPPEY, J., dissenting.

West Headnotes (9)

[1] **Municipal, County, and Local Government** Committees

Neither the mayor nor any other city officer is beyond the scope of investigations which committees appointed by New York City Council are authorized by charter to make, unless some statute or other principle of law secures to the mayor immunity from subpoena by such committee. New York City Charter 1936, § 43.

1 Case that cites this headnote

[2] **Constitutional Law** Separation of Powers

Whether the legislative, executive, and judicial powers of a state shall be kept absolutely separate, or whether persons or collection of persons belonging to one department may in respect to some matters exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.

7 Cases that cite this headnote

[3] **Municipal, County, and Local Government** Local entities as creatures of state

"Municipal corporations" are political institutions created to be employed in the internal government of the state.

[4] **Municipal, County, and Local Government** Committees

City government of New York as set up by legislature does not consist of three wholly independent departments, and the fact that functions are exercised by mayor and council which are independent of each other does not entitle mayor to immunity from subpoena by council committee investigating affairs of a department of city government such as is accorded the executives under federal plan of government. Laws 1934, Ex.Sess., c. 867; New York City Charter 1936, §§ 3–6, 21, 39, 43, 61, 62, 70; Const. art. 9, § 9.

8 Cases that cite this headnote

[5] **Municipal, County, and Local Government** Cities and municipal corporations in general

Municipal, County, and Local Government Local entities as creatures of state

A "municipal corporation" is not sovereign, but is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as

such it is subject to the control of the legislature. Const. art. 9, § 9.

[6] **Municipal, County, and Local Government** Power to create or incorporate

Municipal, County, and Local Government Change of boundaries

Municipal, County, and Local Government Division or consolidation

Municipal, County, and Local Government Power to dissolve

In the absence of express restrictions placed by the Constitution upon the exercise of its legislative powers, legislature may create or destroy, enlarge or restrict, combine or divide municipal corporations. Const. art. 9, § 9.

3 Cases that cite this headnote

[7] **Municipal, County, and Local Government** Powers and functions of council or other governing body in general

The theory of co-ordinate independent branches of government characteristic of national and state governments under federal plan generally does not apply to city governments.

8 Cases that cite this headnote

[8] **Municipal, County, and Local Government** Committees

The power of inquiry of a committee appointed by New York City Council to investigate affairs of a city department with process to enforce such power of inquiry is an essential auxiliary to council's legislative function, and, in determining whether records in office of the mayor were immune from subpoena duces tecum issued by such committee, it must be assumed that there was a legitimate objective for issuance thereof. New York City Charter 1936, §§ 21, 43.

3 Cases that cite this headnote

[9] **Municipal, County, and Local Government** Committees

A special committee appointed by New York City Council to investigate affairs and conduct of municipal civil service commission had authority to subpoena written report to the mayor of a prior analogous investigation made by city employees at mayor's direction, even though such report was in the custody and control of the mayor. New York City Charter 1936, §§ 21, 43.

Attorneys and Law Firms

****154** ***2** Fiorello H. LaGuardia, in person, and William C. Chanler, Corp. Counsel, of New York City (Robert H. Schaffer and Louis M. Weintraub, both of New York City, of counsel), for appellant.

***3** Emil K. Ellis, of New York City, Louis Gruss, of Brooklyn, and Myron A. Ellis, Jonas Ellis, and Murray Forer, all of New York City, for respondents.

Opinion

LEWIS, Judge.

The respondents are members of a special committee of the Council of the city of New York appointed to investigate the affairs and conduct of the Municipal Civil Service Commission. In the course of committee hearings, the investigation was directed to the personnel at the Information Center and to matters involving the method of selection and the qualifications of certain appointees. The inquiry adduced the fact that prior to the Council's investigation the Mayor had directed a city employee to investigate matters which also related to the personnel at the Information ***4** Center and that upon completion of her investigation the employee had made a written report to the Mayor. Thereupon, a subpoena duces tecum was issued by the committee and served upon the Mayor's secretary demanding the production of such report. When compliance with the subpoena was refused and contempt proceedings against the Mayor's secretary were imminent the committee was informed in writing by the corporation counsel that 'The Mayor is the person who has the possession, custody and control of such papers.' It was in these circumstances, and in a continued effort to secure the written report and related papers which were in the

Mayor's possession, that the subpoena duces tecum here in question was served upon the Mayor who promptly applied at Special Term for an order vacating the subpoena. The order of Special Term denying such application has been unanimously affirmed by the Appellate Division. The proceeding is here on appeal by our permission.

Accordingly our inquiry goes to the question whether records in the office of the Mayor of the city of New York, which are concededly pertinent to an official investigation by the Council as to matters relating to the affairs of a city department, are immune from the Council's power of subpoena.

We look first to the city's charter. By section 21 the Council is vested '* * * with the legislative power of the city.' By section 43 which bears the caption 'power of Investigation' the Council is granted 'power from time to time to appoint a special committee to investigate any matters relating to the property, affairs or government of the city or of any county within the city. Any such committee shall have power to require the attendance and examine and take the testimony under oath of such persons as it may deem necessary.' (Emphasis supplied.)

[1] The power of investigation thus reserved to the Council is broad indeed, it is broader than the analogous section of the prior charter. L.1901, ch. 466, s 54, Cf. Tanzer 'New York City Charter,' p. 45. Neither the Mayor, nor any other city officer is beyond the scope of investigation thus authorized unless some statute or some well-defined principle of law accords to the Mayor the immunity which he now asserts.

***5** The Ayor recognizes the broad field of investigation thus opened to the Council by the city's charter. He asserts, however, that section 43 should not be construed so broadly as to destroy what he deems to be the mutual independence of the Mayor and Council. In support of that position the Mayor suggests that rigid independence between the functions of his office and those of the Council is in line with the theory which prompted the framers of the Federal Constitution to treat as separate the three branches of government executive, legislative and judicial. We are told that the Federal plan, which has as one of its bases the requirement of making the three branches of government co-ordinate and independent, is also fundamental in the design for the government of cities and affords the only basis for decision in this proceeding.

[2] Upon this subject the Supreme Court of the United States has said: 'Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in repect to some matters, exert powers which, strictly speaking, ****155** pertain to another department of government, is for the determination of the state. * * * 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.' Story, Const. 5th ed. 393. Again: 'Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.' (Story, Const. 5th ed.) 395.' Dreyer v. People of State of Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L.Ed. 79; Williams v. Eggleston, 170 U.S. 304, 310, 18 S.Ct. 617, 42 L.Ed. 1047.

[3] As to the pattern of government adopted by the State of New York, it may be said that the design includes by implication the ***6** separation of executive, legislative and judicial powers. But when the State in turn made provision for the government of cities which this court has defined as 'political institutions, erected to be employed in the internal government of the state' (City of New York v. Village of Lawrence, 250 N.Y. 429, 437, 165 N.E. 836, 838) we find many instances, including that of the city of New York, where tripartite, independent branches of government are not prescribed.

[4] The State Constitution provides that 'It shall be the duty of the legislature to provide for the organization of cities * * *.' Art. IX, s 9. In the charter which the Legislature provided for the city of New York (Laws 1934, Ex.Sess., c. 867, adopted by referendum November 3, 1936, effective January 1, 1938) it did not see fit to set up tripartite, co-ordinate branches of government which are independent of each other. True, it prescribed that the Mayor shall be 'the chief executive officer of the city' (Charter, ss 3, 4, 5) and that the Council is 'the local legislative body of the city' (Id. s 21). But the fact that functions are exercised by the Mayor and the Council which are independent of each other is not enough, as we conclude, to entitle the Mayor to invoke immunities which

he now asserts and which are accorded the executive under the Federal plan of government.

Under charter provisions the Mayor, when sitting as a member of the Board of Estimate, shares many executive responsibilities with the Comptroller, the President of the Council and the Presidents of the five boroughs. Ch. 3, ss 61, 62, 70. As a member of the Board of Estimate he is a member of the Municipal Assembly (Laws 1924, c. 363, s 10, amended Laws 1928, c. 671), and as such may perform certain legislative functions (Charter, s 39). And although no provision is made for a judicial branch of the city's government, the charter contains the anomalous provision that 'The mayor is a magistrate.' Id. s 6.

[5] **[6]** It is thus seen, that unlike the office of President under the federal system, the powers of the office of Mayor of the city of New York are not exclusively executive. And unlike the federal system, which recognizes a separation of powers into three independent branches, the chartered plan of government for the city of New York has but two branches executive and legislative the functions of which, as defined by the Legislature, are not ***7** always independent. This comes about, as we have seen, from the fact that a city is not sovereign, as are the federal government and the states. 'A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.' Williams v. Eggleston, supra, 170 U.S. at page 310, 18 S.Ct. at page 619, 42 L.Ed. 1047. 'In the absence of express restrictions placed by the Constitution upon the exercise of its legislative powers, the Legislature may create or destroy, enlarge or restrict, combine or divide, municipal corporations.' City of New York v. Village of Lawrence, supra, 250 N.Y. at page 437, 165 N.E. at page 838.

****156** **[7]** It is for that reason that the theory of co-ordinate, independent branches of government has been generally held to apply to the national system and to the states but not to the government of cities. State ex rel. Wilkinson v. Lane, 181 Ala. 646, 658, 62 So. 31; Uridias v. Morrill, 22 Cal. 473, 478; Kaufman v. City of Tallahassee, 84 Fla. 634, 639, 94 So. 697, 30 A.L.R. 471; Ford v. Mayor & Council of Brunswick, 134 Ga. 820, 68 S.E. 733; Sarlls v. State ex rel. Trimble, 201 Ind. 88, 115, 166 N.E. 270, 67 A.L.R. 718; Eckerson v. City of Des Moines, 137 Iowa 452, 461-466, 115 N.W. 177; Bryan v. Voss, 143 Ky. 422, 427, 136 S.W. 884; State ex rel. Simpson v. City of Mankato, 117 Minn. 458, 467-469, 136 N.E. 264, 41 L.R.A.,N.S., 111; Barnes v. City of Kirksville, 266 Mo. 270, 282, 180 S.W. 545, Ann.Cas.1917C, 1121; City of Greenville v. Pridmore, 86 S.C. 442, 443, 68 S.E. 636, 138 Am.St.Rep. 1058; Walker v. City of Spokane, 62 Wash. 312, 324, 325, 113 P. 775, Ann.Cas.1912C, 994.

The case of Springer v. Government of Philippine Islands, 277 U.S. 189, 48 S.Ct. 480, 481, 72 L.Ed. 845, cited by the appellant, is not an authority opposed to our view in the present proceeding. There the controversy involved the validity of a law which purported to restrict the power of the Governor-General who was given 'the supreme executive power' by the 'Organic Act' the fundamental law of the Philippine Islands. There an express provision for the separation of powers was held to be contained within the Organic Act. The questions there determined differ widely from the one now before us.

[8] **[9]** In our consideration of the present problem we must assume that the acction of the Special Committee of the Council in issuing the subpoena duces tecum now challenged, had a legitimate objective. We have treated the committee's power of inquiry, with process to enforce it, as an essential auxiliary to its legislative function. Wilckens v. Willet, *40 N.Y. 521, 1 Keyes, 521, 525; ***8** People ex rel. McDonald v. Keeler, 99 N.Y. 463, 481, 482, 487, 2 N.E. 615, 52 Am.Rep. 49; McGrain v. Daugherty, 273 U.S. 135, 174, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 478, 162 N.E. 487, 60 A.L.R. 851; Matter of Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 8, 32 N.E.2d 769. We cannot say, as does the Mayor, that implicit in those provisions of the charter which prescribe the functions of the Mayor and the Council, is an intention by the Legislature to keep the two in a constant state of isolated independence. The scope of section 43 of the charter, already quoted, is broad. In the absence of some principle of law or some legislative declaration of public policy to the contrary, we regard that section as broad enough to apply to the Mayor of the city. We have seen that the principle of the separation of powers applies only to the sovereign authority not to the government of cities. Accordingly we may not read into section 43 by implication a right of immunity such as the Mayor now asserts.

The order should be affirmed, without costs.

LEHMAN, Chief Judge (dissenting).

The Charter of the City of New York provides, in section 21, that 'the council shall be vested with the legislative power of the city, and shall be the local legislative body of the city,

with the sole power to adopt local laws under the provisions of the city home rule law or otherwise, without requiring the concurrence of any other body or officer except as provided in sections thirty-eight, thirty-nine and forty.' Incidental to, but not limiting the general legislative power of the Council, the charter confers upon the Council certain enumerated powers. s 27. It is expressly given 'power from time to time to appoint a special committee to investigate any matters relating to the property, affairs or government of the city or of any county within the city. Any such committee shall have power to require the attendance and examine and take the testimony under oath of such persons as it may deem necessary.' s 43.

Pursuant to the provisions of that section the Council has appointed a special committee to investigate the Municipal Civil Service Commission of the City of New York. That committee has served upon the Mayor of the city a subpoena requiring him to appear before the committee 'to testify and give evidence in a certain inquiry and investigation of the **157 said Municipal Civil Service Commission, now being conducted pursuant to the provisions *9 of a resolution of the Council of the City of New York, adopted by said Council May 7th, 1940, as amended; and that you bring with you and produce at the time and place aforesaid a certain report, memorandum or communication made to you by one Ethel Epstein in the employ of the city of New York in or about the early part of 1940 relating to the personnel of the Information Center of the City of New York and any correspondence between yourself or your office, with the Municipal Civil Service Commission or with any other department of the city with relation to said personnel and the qualification of any said personnel by the Civil Service Commission and the examination for the position of Assistant Director of the Information Center and the eligibility requirements for said examination now in your custody, and all other papers, records, writings and evidences which you have in your custody or control concerning the premises. And for a failure to attend and to produce and bring with you the foregoing, you will be punished as and for a contempt.' The Mayor moved in the Supreme Court for an order to vacate and quash the subpoena or, in the alternative, to modify the subpoena 'so as to exclude therefrom any and all reports, memoranda, communications or other documents which the petitioner, as the chief executive officer of the city of New York, deems to be executive documents, and for such other and further relief as the Court shall deem just and proper in the premises.'

Chapter I of the charter is entitled 'Mayor.' In the first section of that chapter it is provided that 'the mayor shall be the chief executive officer of the city.' s 3. The second chapter of the charter is entitled 'Council.' Section 21, already quoted herein, is the first section of that chapter. Though the power conferred upon the Council by section 43 to appoint a special committee to investigate any matters relating to the 'property, affairs or government of the city' is subject to no express limitation, the Mayor contends that its exercise is restricted to the field of legislative powers vested in the Council and that in the exercise of the powers conferred upon the Mayor as 'chief executive officer of the city' the Mayor is not subject to command or interference by the Council.

*10 The principle of separation of governmental powers is 'as a general rule inherent in the American constitutional system.' Springer v. Government of Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 482, 72 L.Ed. 845. It is 'inherent' even though unexpressed in the fundamental law. Where legislative, executive and judicial powers are distributed by the fundamental law among separate departments the courts are constrained to read into the law as a logical conclusion the implied provision that the powers so distributed are to be forever 'separate and distinct from each other.' So, in that case, the court said that 'some of our state Constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments.' The question presented upon this appeal is whether under the charter there has been such separation and distribution of the powers of the Mayor as chief executive and the powers of the Council as the local legislative body of the city that there is implicit, though not expressed, the rule or principle that legislative and executive powers are to be separate and distinct from each other and that neither the powers conferred upon the Mayor nor the power conferred upon the Council may be exercised in manner which would infringe upon the independence of the other.

The question so posed is purely one of statutory construction. In providing a form of government for the cities of the state the Legislature is restricted only by the provisions of the Constitution of the State and the State Constitution contains no provision, express or implied, that the form of government provided for cities shall embody the principle of governmental separation of powers. It cannot be disputed that the Legislature may impose upon cities, the commission form of government which almost completely disregards the principle of separation of powers **158 or it may adhere to that principle in part and reject it in part. Nonetheless,

if in the charter the Legislature has provided a form of government in which executive powers vested in the Mayor and legislative powers vested in the Council are intended to be kept separate, distinct and independent, that intention must be given effect. ***11** In Springer v. Government of Philippine Islands, supra, a similar question was presented when the court was called upon to construe a statute of Congress creating a government for the Philippine Islands. No provision of the Constitution of the United States there constrained the Congress, in enacting the organic law for the Philippine Islands, to separate governmental powers in accordance with the principle embodied in state and federal Constitutions. The Congress chose, however, to do so and the Supreme Court of the United States construed the statute accordingly, saying: 'That the principle is implicit in the Philippine Organic Act does not admit of doubt.' Here the charter constitutes the 'organic act' for the city of New York. It confers executive powers upon the Mayor and it confers legislative powers upon the Council. Neither the Mayor nor the Council may exercise powers other than those conferred by the charter. As in the Philippine Island case, the problem here presented is how far that separation of powers was intended to be complete.

The cases cited in the opinion of Judge Lewis decide that though in the State and National governments the principle of separation of governmental powers is implicit as a logical conclusion from the distribution of powers among separate departments in the Constitution establishing such governments, yet the Legislatures, vested by those Constitutions with legislative power to provide for the incorporation and government of cities or other municipal corporations, are not bound, in the exercise of that power, to distribute or to separate governmental powers. These cases do not, I think establish or even imply that the 'theory of co-ordinate independent branches of government' has veen held, generally, not to apply to city governments. On the contrary, in these cases there was a challenge of a then novel assertion of power by the Legislature to reject a theory which for a century or more had been generally accepted though not rigidly applied in the creation of city government. These cases do not decide or, I think, even suggest that where the Legislature has distributed governmental powers among separate departments of a city government, the principle of separation of power is not implied as a logical conclusion from such distribution.

***12** The charter confers upon the Commissioner of Investigation, appointed by the Mayor, as well as upon the Council, broad power of investigation. He is required to 'make any investigation directed by the mayor or the council.' s 803. I recognize, of course, that upon this appeal the question is not presented whether that section empowers the Commissioner to investigate the conduct of members of the Council or to subpoena them. I point out only that the grant of power to the Commissioner is, like the grant of power to the Council, not made subject to any express limitation and that unless we read such limitation by implication into the grant of power to one or both it will be within the power of a committee of the Council to summon the Mayor to testify in the course of a legislative investigation and within the power of an official appointed by the Mayor to summon the members of the Council in an investigation directed by the Mayor. It seems to me clear that there is necessarily implied in the grant of power to each a limitation that neither Council nor Mayor may encroach upon the field reserved for the other. Otherswise, the exercise by one of power for political or personal ends might invoke retaliation by the other. The extent of the power claimed by the Councilmanic committee and its necessary effect upon the efficiency of municipal government is well illustrated by the nature of the paper which the Mayor has been subpoenaed to produce. It is, as Judge Lewis points out, a written report made to the Mayor in regard to an investigation which the Mayor had directed the officer to make for the information of the Mayor in relation to the performance of duties by executive officers within the field where the Mayor is, by the charter, the responsible head. The Mayor challenges the right of the dommittee to compel its production. He does not claim that it contains information which, in the public interest, should not be ****159** revealed. He does claim that the public interest demands that reports of such investigation be treated as confidential unless declared to be public records in accordance with the provisions of section 51 of the General Municipal Law, Consol. Laws, c. 24, or demanded upon an investigation which the State might have a right to make.

The Commission which formulated the proposed charter was attempting to devise an organic law which would provide a practical ***13** and efficient form of administration of the affairs of the city of New York, not an ideal form of administration of the affairs of an ideal city in the land of Utopia. We may assume that its members knew that even in the field where observance of the principle of separation of powers is commanded by the Constitution, 'the exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the seqaration of powers.' Matter of Richardson, 247 N.Y. 401, 410, 160 N.E. 655, 657. We may assume, too, that they knew

that though the power of the Legislature to provide a form of municipal government or administration of the affairs of a city which completely abandoned the principle of separation of powers as in the 'commission's form of government had been challenged in many jurisdictions, it had been everywhere sustained. Knowing all that they formulated a charter which did at least in large measure separate executive and legislative power and which in its first chapter conferred upon the Mayor broad powers as the 'chief executive officer of the city' and in its second chapter conferred upon the Council broad 'legislative power' as 'the local legislative body of the city.' Here we have a system in which there is at least some 'approximation' of the principle of separation of executive and legislative power. Obviously in a city government the approximation must always be incomplete. We must decide how far there is implied in that separation the rule that the powers conferred upon the Mayor and Council are not only separate, but exclusive.

The fact that the separation of executive and legislative powers is not entirely complete does not show that the separation so far as made was not intended to create fields in which the powers of the Mayor and the Council are exclusive. That would be true even where the rule of separation of powers is mandatory. 'The existence in the various Constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.' Springer v. Government of Philippine Islands, supra, 277 U.S. at page 202, 48 S.Ct. at page 482, 72 L.Ed. 845. The charter as adopted must be construed in the light of the fact that it provides a form of ***14** government which in large degree conforms to the traditional pattern of government and which recognizes a division between exective and legislative powers. In no case that has been found by either counsel has any local legislative body asserted a right to subpoena the chief executive officer of a municipality or to require him to produce documents which have been prepared for his information in the course of the performance of his executive duties. In final analysis the question to be decided by us is whether there can be efficient government in which there has been in large degree a separation and distribution of power unless the powers so separated and distributed are deemed exclusive.

Again I point out that the Charter we are construting is intended to provide for the city of New York, not for an ideal city in Utopia. Visionary dreamers, but not men of practical experience, might have assumed that neither the Council nor the Mayor would ever attempt, for political or other reasons, to interfere with or discredit the other. I do not suggest that in this case the Council is attempting to do that, but certainly the power which it now asserts might be used for such purpose. Nor do I suggest that the Mayor has with such purpose ever asserted a power which encroached upon the field of powers allotted to the Council, but in Matter of Radio Station WNYC, 280 **N.Y**. 629, 20 **N.E**.**2d** 1008, this court held unanimously that section 38 of the charter which provides that 'every local law or resolution * * * after its passage by the council, ****160** shall be presented to the mayor for approval' does not apply to a resolution adopted by the Council for the appointment of a special committee to investigate the management of the Municipal Broadcasting System of the city. Section 38 in terms it must be moted, applies to every resolution. We felt constrained, nonetheless, to exclude from its scope a resolution which was not analogous to a local law and was adopted in the exercise of a power merely incidental to the exercise of the Council's genreal legislative power. Practical considerations and age old American traditions of government demanded the rejection of a literal construction of the charter which would give to the 'chief executive officer' of the city the power to impede the Council in the exercise of powers conferred upon it only as an incident of its 'genreal legislative powers.' The same practical considerations and established traditions demand the ***15** rejection of a literal construction of the charter which would give to the Council the right and power to impede the chief executive officer of the city in the exercise of his executive powers.

That the powers of the Mayor as the chief executive officer are vested in him alone and are not subject to control by the Council is clear beyond dispute. Interference by one governmental department with the preformance by the head of another governmental department of powers exclusively vested in him has never heretofore been sanctioned. In repeat that the Legislature might have devised a system of government without separation of governmental powers or departments, but it has not chosen to do so. The organic law of the city confers upon the Mayor alone certain executive powers, and it places upon him the burden of the responsibility which flows from governmental powers and duties. Implicit in the grant of exclusive power and exclusive responsibility is the rule that no other department of city government may interfere with the chief executive officer of the city in the exercise of his power and in carrying out his responsibility. That is ture alike where the Legislature is required by the Constitution to set up separate departments

of government each vested with exclusive power and where the Legislature freely chooses to do so. The charter must be construed in the light of these tried traditions of American government. The conditions created by the war have again demonstrated their wisdom. To meet those conditions the Legislature may grant to the Mayor additional powers or may limit or may withdraw powers heretofore granted to him and vest them in some other officer or department, either State or local. Where exclusive executive power and exclusive responsibility is vested in the chief executive officer of the city he should not be subjected to the possibility of being impeded or harassed by another department of the city government which shares neither his duty nor his responsibility. To give another department the power to harass or impede the chief executive is to invite disaster. We may properly find that the subpoena issued by the Committee of the Council would in this case constitute no substantial interference. So, too, we may assume for the purposes of this appeal that the Council as now constituted would not tolerate unreasonable interference with the Mayor by its Special Committee for personal or political reasons and that the Mayor would not direct or tolerate unreasonable ***16** interference with members of the Council for like reasons. That is immaterial. The question before us concerns the scope of the power of the Council, not the propriety of its exercise. Perhaps at some time in the future a 'chief executive officer' and members of the Council may be elected who are temperamentally unable or even unwilling to impose upon themselves a measure of self-control so rigid, so perfect and complete.

The orders of the Appellate Division and of Special Term should be reversed and the motion to vacate the subpoena should be granted.

LOUGHRAN, FINCH, CONWAY, and DESMOND, JJ., concur with LEWIS, J.

LEHMAN, C. J., dissents in opinion in which RIPPEY, J., concurs.

Order affirmed.

All Citations

288 N.Y. 1, 41 N.E.2d 153

End of Document

(7) State ex rel. Chapman v. Truder

STATE EX REL. CHAPMAN V. TRUDER, 1930-NMSC-049, 35 N.M. 49, 289 P. 594 (S. Ct. 1930)

STATE ex rel. CHAPMAN
vs.
TRUDER

No. 3579

SUPREME COURT OF NEW MEXICO

1930-NMSC-049, 35 N.M. 49, 289 P. 594

May 27, 1930

Appeal from District Court, San Miguel County; Armijo, Judge.

Rehearing Denied June 17, 1930.

Action by the State, on the relation of Charles Chapman, for himself and others similarly situated, against Thomas V. Truder. From an adverse judgment, defendant appeals.

SYLLABUS

SYLLABUS BY THE COURT

1. The office of district attorney and mayor of a city are not incompatible and may be held by one person at one and the same time.

2. The third article of the Constitution means that the powers of the state government -- not the local governments thereafter to be created by the Legislature -- shall be divided into three departments, and that the members of one department shall have no part in the management of the affairs of either of the other departments. This article does not relate to municipal offices.

COUNSEL

F. Faircloth, of Santa Rosa, and Hilario Rubio, of Las Vegas, for appellant.

A. C. Erb, of East Las Vegas, for appellee.

JUDGES

Bickley, C. J. Watson and Catron, JJ., concur. Parker and Simms, JJ., did not participate.

AUTHOR: BICKLEY

OPINION

*{*49}* **{1}** OPINION OF THE COURT This was an action brought by the appellee, against appellant, the district attorney of the Fourth judicial district, for unlawfully intruding into the office of mayor of the city of Las Vegas. His position is that when appellant, the mayor of the city of Las Vegas, became the elected, qualified and acting district attorney aforesaid, the office of mayor became vacant by virtue of subsection 8 of section 96 -- 107, 1929 Comp., providing that an office of the class here involved becomes vacant by the incumbent *{*50}* "accepting and undertaking to discharge the duties of another incompatible office." The trial court found and concluded that the two offices are incompatible.

{2} The only argument advanced to support the conclusion of the trial court is, as stated in the complaint, as follows:

> "There is a possibility of the District Attorney having to present an accusation in writing against the Mayor of the city of Las Vegas, in the event that the Mayor of the city of Las Vegas committed some act which would be cause for his removal from said office pursuant to the laws of the State of New Mexico."

{3} Appellee refers to chapter 36, Laws 1909, being "An Act Providing for the Removal of Officers, etc.," compiled in chapter 80, Code 1915, and in chapter 96, 1929 Comp. The removal power extends to city officers elected by the people. The charges are primarily to be presented by the Grand Jury to the district court of the county in or for which the officer accused is elected. Section 96 -- 108, 1929 Comp. If a situation at once demanding action to be taken when there is to be no grand jury for at least twenty days, the district attorney shall, whenever sworn evidence is presented to him showing that the officer involved is guilty of any of the matters mentioned as causes for removal, present the accusation to the court, which accusation must be supported by sworn affidavit or affidavits, and the court either with or without a jury, as the exigencies of the case may require, must investigate the matter in a hearing upon notice to the accused.

{4} The proceeding is civil in its nature. State v. Leib, 20 N.M. 619, 151 P. 766, 767. We do not doubt the power of the district court to call special term of the court and a special grand jury to consider presentation of accusation for removal of an officer.

{5} The general duty of a district attorney to investigate and initiate criminal charges against law violators does not seem to rest upon him under the statute for removal of officers. In such cases, his services are invoked by the presentation to him of sworn evidence of matters which are causes for removal. If the district attorney and his assistant may for some reason be disqualified or refuse *{*51}* to prosecute, the district court may appoint a competent person to represent the county or state. Section 39 -- 109, 1929 Comp. By section 90 -- 2904, 1929 Comp., any person holding any office in any city, town, or village, by virtue of election or by virtue of appointment to an elective

office of such city, town, or village, may be removed for malfeasance in office, by the judge of the district court upon complaint filed by the mayor or the city council, board of aldermen or board of trustees, of any city, town, or village. From all the foregoing, it does not appear that the public interests would suffer from a lack of a procedure for the removal of a mayor of a city, even if the district attorney should be the incumbent of both offices and the mayor should be subject to removal.

{6} This is not like a case where one officer has the power to exercise a discretion of removal of another. The district attorney has no power to remove the officers named in the removal statute. He may only present charges based upon sworn evidence, presented to him. If the district attorney should then fail to proceed, the offending officer is not thereby immune. It has not been pointed out to us and we are unable to discover from our examination of the statutes prescribing the duties of the offices of the district attorney and Mayor, where one is subordinate to the other or where a contrariety and antagonism would result in the attempt of one person to faithfully and impartially discharge the duties of both. There seems to be only one instance in which the duties of a mayor directly touches the state's interest. By section 90 -- 617, 1929 Comp., he is made a conservator of the peace, in that:

> "He shall have and exercise within the city limits the power conferred upon the sheriffs of counties to suppress disorders and keep the peace."

But these duties are not incompatible with those of a district attorney. Applying the test adopted in Haymaker v. State, 22 N.M. 400, 163 P. 248, L. R. A. 1917D, 210, we are of the opinion that the offices are not incompatible.

{7} Article 3 of our Constitution is as follows:

> "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 *{*52}* 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."

{8} It has been suggested that this prevents the offices of district attorney and mayor of a city being filled by the same person contemporaneously, upon the theory that the mayor is an executive officer, while the office of the district attorney falls within the judicial branch of the government.

{9} California and Arkansas have constitutional provisions substantially the same as ours, quoted supra, and it has been held in both states, we think correctly, that such constitutional provisions apply to state offices only, and not to municipal offices. See People v. Provines, 34 Cal. 520, followed in Holley v. County of Orange, 106 Cal. 420, 39 P. 790; State v. Townsend, 72 Ark. 180, 79 S.W. 782, 2 Ann. Cas. 377; Peterson v. Culpepper, 72 Ark. 230, 79 S.W. 783, 2 Ann. Cas. 378.

{10} From all of the foregoing, it follows that the judgment must be reversed, and it is so ordered.

(8) State ex rel. Clark v. Johnson

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.

West Headnotes (25)

[1] **Mandamus** Interest in Subject-Matter

Standing would be conferred on petitioners, who sought writ of mandamus precluding governor from implementing tribal-state gaming compacts and revenue-sharing agreements, on basis of importance of public issues involved, irrespective of their status as state legislators, voters and taxpayers, where claim that governor exercised state legislature's authority presented issues of constitutional and fundamental importance related to state's definition of itself as sovereign.

5 Cases that cite this headnote

[2] **Mandamus** Jurisdiction and authority

Exercise of original constitutional jurisdiction of Supreme Court in mandamus against state officers was appropriate over proceeding which sought to preclude governor from implementing tribal-state gaming compacts and revenue-sharing agreements, notwithstanding statute conveying upon district court exclusive original jurisdiction in all cases of mandamus, where early resolution of dispute was desirable, given that compacting tribes were in process of building casinos, and relevant facts were virtually undisputed and legal issues would have come eventually to Supreme Court even if proceedings had been initiated in district court. Const. Art. 6, § 3; NMSA 1978, § 44–2–3; SCRA 1986, 12–504.

8 Cases that cite this headnote

[3] **Mandamus** Jurisdiction and authority

Circumstances necessary or proper to seek writ of mandamus in Supreme Court include possible inadequacy of other remedies and necessity of early decision on question of great public importance.

4 Cases that cite this headnote

[4] **Mandamus** Specific Acts

Proceeding alleging that governor lacked constitutional authority to bind state of New Mexico by signing tribal-state gaming compacts and revenue-sharing agreements supported use of prohibitory mandamus, which would necessarily lie if governor's actions were unconstitutional.

6 Cases that cite this headnote

[5] **Constitutional Law** Constitutionality of Statutory Provisions

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 constitution.

[6] **Constitutional Law** Determination of constitutionality of statutes

Constitutional Law Wisdom

Constitutional Law Encroachment on Executive

Although it is not within province of Supreme Court to evaluate wisdom of an act of either the legislature or the governor, it is Supreme Court's role to determine whether that act goes beyond bounds established by State Constitution.

3 Cases that cite this headnote

[7] **Constitutional Law** Nature and scope in general

Constitutional Law Determination of constitutionality of actions of other branches in general

State Constitutions are not grants of power to legislative, executive, and judiciary, but are limitations on powers of each, and no branch of state may add to nor detract from Constitution's clear mandate; it is function of judiciary, when its jurisdiction is properly invoked, to measure acts of executive and legislative branch solely by yardstick of Constitution.

5 Cases that cite this headnote

[8] **Mandamus** Parties Defendant or Respondents

Native American tribes and pueblos with whom governor signed tribal-state gaming compacts and revenue-sharing agreements pursuant to IGRA were not indispensable parties to mandamus proceeding to preclude governor from implementing compacts and agreements; writ was sought against governor, not against tribal officials, and resolution of case required only that Supreme Court evaluate governor's legal authority to enter into compacts and agreements absent legislative authorization or ratification, which authority could not derive from compact and agreement but must have derived from state law, and, therefore, as action was not based on breach of contract, its resolution did not require adjudication of rights and obligations of respective parties to compact. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

18 Cases that cite this headnote

[9] **Mandamus** Parties Plaintiff or Petitioners

Mandamus Parties Defendant or Respondents

In mandamus case, party is indispensable if performance of an act to be compelled by writ of mandamus is dependent on will of third party not before the court.

4 Cases that cite this headnote

[10] **Indians** Activities otherwise permitted by state

Supreme Court was proper forum to decide whether permissive lottery exception to state's general criminal prohibition against gambling "permitted" all forms of casino-style gaming, within meaning of IGRA provision that gaming activities are lawful on Indian lands only if conducted pursuant to tribal-state compact and located in state that permits such gaming; although question of what forms of Class III

gaming state "permitted" under IGRA was ultimately a federal question, it depended on interpretation of state's gambling laws. Indian Gaming Regulatory Act, § 11(d)(1)(B), 25 U.S.C.A. § 2710(d)(1)(B); NMSA 1978, § 30–19–6.

2 Cases that cite this headnote

[11] **Gaming and Lotteries** Casinos and Gaming Establishments

Indians Activities otherwise permitted by state

Permissive lottery exception to state gambling laws did not authorize any and all forms of "casino-style" gaming for purpose of IGRA provision limiting permissible scope of tribal-state gaming compact to those forms of Class III gaming activities the state "permits"; although statutory definition of "lottery" in Criminal Code is extremely broad, that definition does not apply to lottery operated by tax exempt organization, so that exception allowing semi-annual lottery for charitable purposes would not exempt such organization from general criminal prohibition against gambling, and, therefore, expansive construction of term "lottery" that would authorize such organization to engage in full range of "casino-style" gaming would be contrary to unequivocal public policy against for-profit gambling, which legislature criminalized except for licensed pari-mutuel horseracing. Indian Gaming Regulatory Act, § 11(d)(1)(B), 25 U.S.C.A. § 2710(d)(1)(B); NMSA 1978, §§ 30–19–1, subd. C, 30–19–2, 30–19–3, 30–19–6, 30–19–6, subd. D.

2 Cases that cite this headnote

[12] **Gaming and Lotteries** Lotteries and raffles

Indians Activities otherwise permitted by state

Particularized inquiry would be necessary to determine whether state permitted any form of "casino-style" gaming, for purpose of deciding which, if any, Class III gaming activities might be lawful on Indian lands if conducted pursuant to tribal-state compact under IGRA, as each particular form of gaming would necessarily fall under either of mutually exclusive definitions of "lottery" and "betting"; although state criminalized both betting and lotteries in general, permissive lottery exception existed for nonprofit organizations under certain circumstances, and any attempt to categorize what form of gaming was allowed under permissive lottery exception would thus require court to decide whether any particular form of gaming could be categorized as either "making a bet" or participating in "lottery." Indian Gaming Regulatory Act, § 11(d)(1)(B), 25 U.S.C.A. § 2710(d)(1)(B); NMSA 1978, §§ 30–19–1, subds. B, B(3), C, 30–19–2, 30–19–3, 30–19–6, 30–19–6, subd. D.

1 Case that cites this headnote

[13] **Gaming and Lotteries** Licenses and Regulation

Indians Tribal-state compacts

Indians Fees and revenue

Fact that governor had taken course contrary to legislature's expressed public policy against unrestricted gaming was relevant in evaluating his authority to enter into tribal-state gaming compacts and revenue-sharing agreements by negotiating and executing such compacts and agreements without explicit statutory authorization.

2 Cases that cite this headnote

[14] **Constitutional Law** Purposes of separation of powers

Doctrine of separation of powers as reflected in Federal and State Constitutions rests on notion that accumulation of too much power in one governmental entity presents threat to liberty. U.S.C.A. Const. Art. 3, § 1 et seq.; Const. Art. 3, § 1; Art. 4, § 1; Art. 5, § 1.

3 Cases that cite this headnote

[15] **Constitutional Law** Separation of Powers

Constitutional Law Encroachment in general

Constitutional Law Determination of constitutionality of actions of other branches in general

Although State Constitution explicitly provides for separation of governmental powers, absolute separation of governmental functions is neither desirable nor realistic; however, Supreme Court will intervene when one branch of government unduly interferes with or encroaches on authority or within province of coordinate branch of government. Const. Art. 3, § 1.

4 Cases that cite this headnote

[16] **Constitutional Law** Encroachment on legislature

Governor may not exercise power that as a matter of State Constitutional law infringes on power properly belonging to legislature. Const. Art. 3, § 1; Art. 4, § 1; Art. 5, § 1.

2 Cases that cite this headnote

[17] **Constitutional Law** Encroachment on legislature

Indians Tribal-state compacts

Determination that tribal-state gaming compact with Indian pueblo, negotiated and executed by governor pursuant to IGRA, did not "execute" existing state statutory or case law but was instead an attempt to create new law was not, in itself, dispositive of question whether governor had exercised power that, as a matter of state constitutional law, infringed on power properly belonging to legislature; test was whether governor's action disrupted proper balance between executive and legislative branches by attempting to foreclose legislative action in areas where legislative authority was undisputed, by precluding future legislative action, or by foreclosing inconsistent legislative action or precluding application of such legislation to compact. Indian Gaming Regulatory Act, § 11(d)(1), 25 U.S.C.A. § 2710(d)(1); Const. Art. 3, § 1; Art. 4, § 1; Art. 5, § 1.

19 Cases that cite this headnote

[18] **Gaming and Lotteries** Licenses and Regulation

Indians Tribal-state compacts

Indians Fees and revenue

Governor unduly disrupted proper balance between executive and legislative branches, thus exceeding his constitutional authority as state's chief executive officer, in negotiating and executing tribal-state gaming compacts and revenue-sharing agreements between state and several Indian tribes and pueblos pursuant to IGRA; representative compact gave pueblo virtually irrevocable and perpetual right to conduct any form of Class III gaming if permitted in state on date governor signed agreement and any action by state to amend or repeal its laws that would restrict scope of Indian gaming would terminate pueblo's obligation to make payments to state under revenue-sharing agreement, thus effectively precluding inconsistent legislative action, and, moreover, compact struck detailed and specific balance between respective roles of state and tribe in important regulatory, licensing, and enforcement matters absent any action on part of legislature, which had expressed general repugnance to for-profit gambling by prohibiting virtually all aspects of gambling on non-Indian lands. Indian Gaming Regulatory Act, § 11(d)(3)(C), 25 U.S.C.A. § 2710(d)(3)(C); Const. Art. 4, § 22; Art. 5, § 4; NMSA 1978, § 30–19–3.

9 Cases that cite this headnote

[19] **States** Executive Authority, Powers, and Functions

Statutes Approval or Veto by Executive

Governor's role with respect to all legislation passed by legislature is limited to approving or vetoing legislation, apart from nondiscretionary ministerial duties, and this role extends to legislation approving compacts with other sovereign entities. Const. Art. 4, § 22.

1 Case that cites this headnote

[20] **States** In general; nature

Residual government authority rests with legislative branch rather than executive branch, given broad plenary powers of state legislature, which is directly representative of the people, and, therefore, if State Constitution is silent on particular issue, legislature should be body of government to address issue.

4 Cases that cite this headnote

[21] **Indians** Tribal-state compacts

Indians Fees and revenue

States Executive Authority, Powers, and Functions

Governor could not rely on section of Constitution providing that governor should execute the laws as conferring authority to unilaterally enter into tribal-state gaming compact and revenue-sharing agreement pursuant to IGRA, and state had no statute authorizing governor to transact state's business with other sovereigns or otherwise authorizing governor to enter into such compacts and agreements. Indian Gaming Regulatory Act, § 11(d)(3)(C), 25 U.S.C.A. § 2710(d)(3)(C); Const. Art. 5, § 4.

2 Cases that cite this headnote

[22] **Indians** Tribal-state compacts

Indians Fees and revenue

States Executive Authority, Powers, and Functions

Joint Powers Agreement Act, authorizing "public agencies" to enter into "agreements" with other public agencies, did not authorize governor to bind state by unilaterally entering into tribal-state gaming compact and revenue-sharing agreement pursuant to IGRA; governor was not a "state department or agency" within meaning of statute and, although statute authorized agreements between state and Indian tribe, it expressly required any such agreement to be authorized by public agency's legislative or other governing body and expressly disclaimed any enlargement of authority of public agencies by subjecting agreements executed thereunder to constitutional or legislative restrictions. Indian Gaming Regulatory Act, § 11(d)(3)(C), 25 U.S.C.A. § 2710(d)(3)(C); NMSA 1978, §§ 11–1–2, subd. B, 11–1–3.

2 Cases that cite this headnote

[23] **Indians** Tribal-state compacts

Mutual Aid Act, authorizing tribal-state agreements with respect to law enforcement, did not pertain to gaming compacts and thus provided no statutory basis for representative compact with pueblo which was negotiated and executed by governor; fact that compact had some provisions regarding law enforcement did not bring all of its terms within scope of Mutual Aid Act. NMSA 1978, §§ 29–8–1 to 29–8–3.

[24] **States** Executive Authority, Powers, and Functions

Authority of state executive acting pursuant to legislative grant of authority is limited to express or implied terms of that grant.

[25] **Indians** Tribal-state compacts

States Executive Authority, Powers, and Functions

Provision of IGRA authorizing state officials, acting pursuant to their authority under state law, to enter into tribal-state gaming compacts on behalf of state did not invest state governors with powers in excess of those that governors possessed under state law and, thus, governor's power to negotiate and sign compacts derived solely from state Constitution and state statutes, which did not authorize him to unilaterally enter into such compacts without express legislative approval, and compacts executed by governor with various tribes and pueblos were therefore without legal effect and could not be implemented. Indian Gaming Regulatory Act, §

11(d)(1)(C), (d)(3)(B), 25 U.S.C.A. § 2710(d)(1)(C), (d)(3)(B).

6 Cases that cite this headnote

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.

[1] {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.

[2] **[3]** {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.

[4] {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).

[5] **[6]** **[7]** {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

[8] **[9]** {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).

[10] {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).

[11] {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).

[12] {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).

[13] {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*

[14] {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.).

[15] {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

[16] **[17]** {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.

[18] {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).

[19] {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.

[20] {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

[21] {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.

[22] {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.

[23] **[24]** {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

[25] {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).

(9) State ex rel. Coll v. Carruthers

STATE EX REL. COLL V. CARRUTHERS, 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380 (S. Ct. 1988)

STATE OF NEW MEXICO, ex rel. MAX COLL and BEN D. ALTAMIRANO, Petitioners,
vs.
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

SUPREME COURT OF NEW MEXICO

1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380

August 02, 1988, Filed

ORIGINAL MANDAMUS PROCEEDING

COUNSEL

Carpenter & Goldberg, Joseph Goldberg, David J. Stout, Albuquerque, NM, for Petitioners

Campbell and Black, Jack M. Campbell, Michael B. Campbell, Bradford B. Berge, John H. Bemis, Alex Valdez, General Counsel Office of the Governor, Special Assistant Attorney General, Ted Apodaca, General Counsel Department of Finance & Administration, Special Assistant Attorney General, Santa Fe, NM, for Respondents and Real Parties in Interest

OPINION

*{*441}* 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 *{*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 be 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 *{*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 *{*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 *{*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 governors 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 boldfaced material above was stricken through in the bound volume.]

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 *{*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 *{*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 he governor. Since the condition itself is improper, we decline to adopt petitioners' argument that the appropriation *{*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 **interdepartment** 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 boldfaced material above was stricken through in the bound volume.]

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 *{*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.

DISSENT

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 1387. 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 1387, to Item F (controlling federal funds), as violative of **Sego vs. 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.

---

1 The letters used in this opinion refer to lettered items in the petition and correspond to items in the General Appropriation Bill.

(10) State v. Saltwater

542 P.3d 783
Court of Appeals of New Mexico.

STATE of New Mexico, Plaintiff-Appellant,
v.
Rhiannon SALTWATER a/k/a Rhiannon Marie Saltwater, Defendant-Appellee.
and
State of New Mexico, Plaintiff-Appellant,
v.
Octavius Atene a/k/a Octavius Dan Atene, Defendant-Appellee.

No. A-1-CA-40129 and No. A-1-CA-40264
(consolidated for purpose of opinion)
|
Filing Date: August 21, 2023
|
Certiorari Denied, December 21, 2023, No. S-1-SC-40117
|
Certiorari Denied, January 16, 2024, No. S-1-SC-40116

Synopsis

Background: Defendants, who were both charged with child abuse by endangerment, filed motion to dismiss, arguing that statute criminalizing driving while intoxicated (DWI) with a minor displaced prosecutors' charging discretion under the general/specific statute rule. The District Court, McKinley County, Louis E. DePauli, D.J., and R. David Pederson, D.J., granted defendants' motion. State appealed.

[Holding:] The Court of Appeals, Henderson, J., held that general/specific statute rule did not apply, and thus prosecutors retained discretion to charge defendants with child abuse by endangerment instead of DWI with a minor.

Reversed and remanded.

West Headnotes (27)

[1] **Statutes** General and specific statutes

The general/specific statute rule requires in relevant part that where a statute addresses a subject in general terms and another statute addresses the same subject in a more detailed manner, the latter will control to the extent they conflict.

1 Case that cites this headnote

[2] **Criminal Law** Election between offenses

In the particular context of criminal law, the general/specific statute rule assists courts in determining whether the Legislature intended to limit the discretion of the prosecutor in charging under one statute instead of another for the commission of a particular offense.

[3] **Criminal Law** Review De Novo

Court of Appeals reviews application of the general/specific statute rule de novo.

[4] **Criminal Law** Election between offenses

Under the general/specific statute rule, the first question is whether the Legislature intended to create separately punishable offenses between the two relevant crimes, even if the defendant was only charged with or convicted of one of the two crimes at issue.

[5] **Criminal Law** Election between offenses

Under the general/specific statute rule, legislative intent to create multiple punishments necessarily implies that legislature also intended to leave intact prosecutor's charging discretion.

[6] **Criminal Law** Election between offenses

For purposes of the general/specific statute rule, if the Legislature did not intend to

create separately punishable offenses, courts proceed to a second question, i.e. whether the Legislature intended to limit prosecutorial discretion regarding charging decisions to the more specific statute; both questions are answered using the same analytical framework.

[7] **Criminal Law** Election between offenses

To start under the general/specific statute rule, courts must compare the elements of the crimes described in the general and specific statutes.

[8] **Criminal Law** Election between offenses

Under the general/specific statute rule, if the elements are identical, both questions are answered at once: the Legislature did not intend to create separately punishable offenses, and as a corollary intended to limit prosecutorial discretion to the more specific statute, absent a clear expression of legislative intent to the contrary.

[9] **Criminal Law** Election between offenses

Under the general/specific statute rule, if the elements are different, then there is a presumption that the Legislature intended to create separately punishable offenses and, concomitantly, intended to leave prosecutorial charging discretion intact.

[10] **Criminal Law** Election between offenses

To determine if presumption that legislature intended to create separately punishable offenses and, concomitantly, intended to leave prosecutorial charging discretion intact under the general/specific statute rule, courts should resort to other indicia of legislative intent, such as the language, purpose, and histories of the statutes, and whether the violation of one statute will normally result in a violation of the other; in furthering that intent, courts may limit prosecutorial discretion to the specific statute even in the face of differing elements.

[11] **Criminal Law** Election between offenses

In furthering the Legislature's intent to create separately punishable offenses and, concomitantly, intend to leave prosecutorial charging discretion intact under the general/specific statute rule, courts may limit prosecutorial discretion to the specific statute even in the face of differing elements.

[12] **Statutes** General and specific statutes

General/specific statute rule is merely a tool of statutory interpretation and is not an end to itself.

[13] **Criminal Law** Election between offenses

In the specific context of comparing two criminal statutes, courts should apply the general/specific statute rule guardedly to the extent that it operates to restrict the charging discretion of the prosecutor.

[14] **Criminal Law** Election between offenses

Under the general/specific statute rule, there must be clear evidence that the legislature intended to limit a prosecutor's charging discretion.

[15] **Criminal Law** Election between offenses

In ascertaining legislative intent, courts should balance the rule of lenity, which favors applying the general/specific statute rule in cases of ambiguity, with the judiciary's longstanding deference to prosecutorial discretion, which favors the exercise of caution before applying the general/specific statute rule.

[16] **Criminal Law** Different Offenses in Same Transaction

Because of its double jeopardy roots, the general/specific statute rule requires court to

compare the elements of two statutes pursuant to *Blockburger*. U.S. Const. Amend. 5.

[17] **Double Jeopardy** Proof of fact not required for other offense

Under *Blockburger*, courts ask whether each provision requires proof of an additional fact which the other does not. U.S. Const. Amend. 5.

[18] **Criminal Law** Traffic offenses

The elements of the statute criminalizing child abuse by endangerment and statute criminalizing driving while intoxicated (DWI) with a minor differ, thus creating a presumption that the Legislature did not intend to limit charging discretion to DWI with a minor. N.M. Stat. Ann. §§ 30-6-1(D)(1), 66-8-102.5.

[19] **Double Jeopardy** Proof of fact not required for other offense

When the modified *Blockburger* double jeopardy test applies, courts compare the elements of the two statutes based on the state's legal theory of the particular case as to how the statutes were violated; the test applies to cases in which a defendant is convicted for one act under different criminal statutes and where the statutes at issue are vague and unspecific or are written in the alternative. U.S. Const. Amend. 5.

[20] **Criminal Law** Different Offenses in Same Transaction

For purposes of the general/specific statute rule, Court of Appeals does not ask whether the conduct used to convict a defendant of two crimes is unitary.

[21] **Criminal Law** Election between offenses

While double jeopardy inquiry focuses on whether legislature intended to limit court's discretion in imposing multiple punishments, general/specific statute rule determines whether legislature intended to limit discretion of prosecutor in its selection of charges. U.S. Const. Amend. 5.

[22] **Statutes** Prior or existing law in general

The Court of Appeals presumes that the Legislature is aware of existing case law and acts with knowledge of it.

[23] **Infants** Child abuse, neglect, or endangerment

The child abuse statute is designed to give greater protection to children than adults because children are more vulnerable than adults and are under the care and responsibility of adults. N.M. Stat. Ann. § 30-6-1.

[24] **Infants** Vehicular operation

A conviction for child abuse by endangerment cannot be sustained when premised upon a driving while intoxicated (DWI) conviction that is based on the driver being in actual physical control of a nonmoving vehicle with a child occupant. N.M. Stat. Ann. §§ 30-6-1(D)(1), 66-8-102.5.

[25] **Automobiles** Driving while intoxicated

Infants Vehicular operation

Driving while intoxicated (DWI) with a minor based on actual physical control with a child occupant will result in a violation of driving while intoxicated (DWI) with a minor, because it incorporates the general DWI statute, not simply instances of actual driving. N.M. Stat. Ann. § 66-8-102.5.

[26] **Criminal Law** Election between offenses

General/specific statute rule requiring that the more specific criminal statute controls instead of a more general statute to the extent they conflict did not apply, and thus prosecutors retained discretion to charge defendants with

child abuse by endangerment instead of driving while intoxicated (DWI) with a minor; while child abuse statute and statute criminalizing DWI with a minor shared similar purposes and histories, there were differences in conduct each criminalized, plain language of statute criminalizing DWI with a minor provided no indication that Legislature intended it to always be charged by a prosecutor instead of child abuse by endangerment, and statutory elements of child abuse by endangerment and DWI with a minor differed. N.M. Stat. Ann. §§ 30-6-1(D)(1), 66-8-102.5.

2 Cases that cite this headnote

[27] Criminal Law Election between offenses

In applying the general/specific statute rule, courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys, and for that reason the Supreme Court requires clear evidence of an intent by the Legislature to limit prosecutorial discretion.

***785 APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY, Louis E. DePauli, Jr. and R. David Pederson, District Court Judges**

Attorneys and Law Firms

Raúl Torrez, Attorney General, Benjamin L. Lammons, Assistant Attorney General (No. A-1-CA-40129), Santa Fe, NM, Meryl Francolini, Assistant Attorney General (No. A-1-CA-40264), Albuquerque, NM, for Appellant

Bennett J. Baur, Chief Public Defender, Melanie C. McNett, Assistant Appellate Defender (No. A-1-CA-40129), Santa Fe, NM, Steven J. Forsberg, Assistant Appellate Defender (No. A-1-CA-40264), Albuquerque, NM, for Appellees

OPINION

HENDERSON, Judge.

***786** {1} In 2019, the Legislature enacted a new statute that makes it a misdemeanor to drive while intoxicated with a minor in the vehicle, so long as the minor did not suffer great bodily harm or death (DWI with a minor). NMSA 1978, § 66-8-102.5 (2019). In the two cases before us,[1] we are asked whether the general/specific statute rule requires a prosecutor to charge a defendant for DWI with a minor under Section 66-8-102.5 when that statute is violated, instead of child abuse by endangerment, contrary to NMSA 1978, § 30-6-1(D)(1) (2009). The district courts below concluded that it did, and dismissed child abuse by endangerment charges against Rhiannon Saltwater and Octavius Atene (collectively, Defendants), who were driving while intoxicated with minors in their vehicles. The State appeals, arguing that the district courts erred by misapplying the general/specific statute rule and impermissibly restricting prosecutorial charging discretion. We agree. The general/specific statute rule is inapplicable and does not require a prosecutor to charge DWI with a minor instead of child abuse by endangerment when the facts support both charges. The district courts thus improperly limited prosecutorial charging discretion by dismissing the child abuse by endangerment charges. We reverse and remand for further proceedings consistent with this opinion.[2]

BACKGROUND

{2} Both cases on appeal share similar relevant facts. Saltwater, the first Defendant, was driving a vehicle with her seven-year-old daughter in the backseat. As Saltwater approached an intersection, the traffic light turned red and the truck in front of her stopped; Saltwater did not, and rear-ended the truck. Two officers who were nearby responded to the scene, and one noticed that Saltwater's daughter was crying. When the officer asked if she was okay, the daughter responded that she was not, so the officer called an ambulance. The daughter was later confirmed to have minor physical injuries as a result of the crash. Saltwater was given field sobriety tests, all of which indicated impairment, and she was arrested. Saltwater provided a breath sample less than an hour later that showed a blood alcohol concentration (BAC) of 0.22.

{3} Atene, the second Defendant, was driving a vehicle with his two daughters as passengers. One was five years old, and the other was one-month-old. While traveling on a state highway, Atene crashed into another vehicle. Deputies arrived on the scene to find a third-party witness attending to Atene's daughters. The five-year-old had blood running from her nose, a cut and scratches on her face, and blood on her shirt. The one-month-old was "red and crying," having been found "stuck" under a car seat by the witness. Atene was also injured

and transported to a hospital, where he later agreed to have his blood drawn for testing. Atene's BAC was 0.19 after the crash.

{4} As relevant here, Defendants were charged by criminal information with child abuse by endangerment. Prior to trial, Defendants moved to dismiss those charges pursuant to *State v. Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329, arguing that the newly-enacted Section 66-8-102.5 displaced the prosecutors' charging discretion under the general/specific statute rule. *See Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329 (permitting dismissal where the facts are undisputed and the case raises a purely legal issue). The district courts agreed with Defendants, dismissed the child abuse by endangerment charges, and amended the criminal information to charge DWI with a minor.[3] These appeals followed.

***787 DISCUSSION**

[1] [2] [3] {5} "The general/specific statute rule is a tool in statutory construction." *State v. Santillanes*, 2001-NMSC-018, ¶ 7, 130 N.M. 464, 27 P.3d 456. The general/specific statute rule requires in relevant part that where a statute addresses a subject in general terms and another statute addresses the same subject in a more detailed manner, the latter will control to the extent they conflict. *See State v. Cleve*, 1999-NMSC-017, ¶ 17, 127 N.M. 240, 980 P.2d 23. "[I]n the particular context of criminal law, the general/specific statute rule assists courts in determining whether the Legislature intended to limit the discretion of the prosecutor in charging under one statute instead of another for the commission of a particular offense." *Santillanes*, 2001-NMSC-018, ¶ 10, 130 N.M. 464, 27 P.3d 456. Because it raises questions of statutory construction, we review application of the general/specific statute rule de novo. *See State v. Farish*, 2021-NMSC-030, ¶ 11, 499 P.3d 622.

[4] [5] [6] {6} Due to its track record of being "frequently difficult for courts to apply," the general/specific statute rule has been clarified and rephrased a number of times. *Cleve*, 1999-NMSC-017, ¶ 21, 127 N.M. 240, 980 P.2d 23; *see State v. Guilez*, 2000-NMSC-020, ¶ 8, 129 N.M. 240, 4 P.3d 1231 (recognizing and naming two "distinct approaches" to the general/specific statute rule, the "quasi-double-jeopardy analysis" and the "preemption analysis"), *abrogated by Santillanes*, 2001-NMSC-018, ¶ 11, 130 N.M. 464, 27 P.3d 456 (rejecting the approach in *Guilez* and stating that those "labels inaccurately suggest that there must be two independent analyses undertaken in every case to determine whether the general/specific statute rule applies"). The sum of that progression is a tiered analysis, focused on legislative intent that ultimately determines whether the general/specific statute rule applies. *Santillanes*, 2001-NMSC-018, ¶¶ 11-17, 130 N.M. 464, 27 P.3d 456. For criminal statutes, the first question is whether the Legislature intended to create separately punishable offenses between the two relevant crimes, even if the defendant was only charged with or convicted of one of the two crimes at issue. *Id.* ¶ 13. We begin with this question "because a legislative intent to create multiple punishments necessarily implies that the Legislature also intended to leave intact the prosecutor's charging discretion." *Id.* (internal quotation marks and citation omitted). If the Legislature did not intend to create separately punishable offenses we proceed to the second question, whether the Legislature intended to limit prosecutorial discretion regarding charging decisions to the more specific statute. *See id.* ¶ 16. Both questions are answered using the same analytical framework. *Id.*

[7] [8] [9] [10] [11] {7} To start, courts must compare the elements of the crimes described in the general and specific statutes. *Id.* ¶ 23. If the elements are identical, both questions are answered at once: the Legislature did not intend to create separately punishable offenses, and as a corollary intended to limit prosecutorial discretion to the more specific statute, " 'absent a clear expression of legislative intent to the contrary.' " *Id.* ¶ 16 (quoting *Cleve*, 1999-NMSC-017, ¶ 26, 127 N.M. 240, 980 P.2d 23). However, if the elements are different, then "there is a presumption that the Legislature intended to create separately punishable offenses and, concomitantly, intended to leave prosecutorial charging discretion intact." *Id.* To determine if that presumption stands, "courts should resort to other indicia of legislative intent," such as "the language, purpose, and histories of the statutes," and "whether the violation of one statute will normally result in a violation of the other." *Id.* (internal quotation marks and citation omitted). In furthering that intent, courts may limit prosecutorial discretion to the specific statute even in the face of differing elements. *See id.* ¶ 18.

[12] [13] [14] [15] {8} The foregoing analysis is qualified by several broad concerns. Our Supreme Court has cautioned against applying the general/specific statute rule in "a rigid, ***788** mechanistic fashion." *Id.* ¶ 17. The rule "is merely a tool of statutory interpretation and is not an end to itself." *Id.* (internal quotation marks and citation omitted). Furthermore, "[i]n the specific context of

comparing two criminal statutes, ... courts should apply the general/specific statute rule guardedly to the extent that it operates to restrict the charging discretion of the prosecutor." *Id.* ¶ 21. There must be "clear evidence" that the Legislature intended to limit a prosecutor's charging discretion. *Id.* Finally, "[i]n ascertaining legislative intent, courts should balance the rule of lenity, which favors applying the general/specific statute rule in cases of ambiguity, with the judiciary's longstanding deference to prosecutorial discretion, which favors the exercise of caution before applying the general/specific statute rule." *Cleve*, 1999-NMSC-017, ¶ 26, 127 N.M. 240, 980 P.2d 23.

I. Elements of the Offenses

[16] **[17]** {9} Because of its double jeopardy roots, the general/specific statute rule requires us to compare the elements of two statutes pursuant to *Blockburger v. United States*, 284 U.S. 299, 303-04, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *See Santillanes*, 2001-NMSC-018, ¶ 16, 130 N.M. 464, 27 P.3d 456; *see also id.* ¶ 13 (noting the "close relationship between the general/specific statute rule and the principle of double jeopardy"). Under *Blockburger*, we ask " 'whether each provision requires proof of an additional fact which the other does not.' " *Santillanes,* 2001-NMSC-018, ¶ 16, 130 N.M. 464, 27 P.3d 456 (quoting *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180).

[18] {10} The elements plainly differ under a comparison between the two statutes at issue in this case. Child abuse by endangerment "consists of a person knowingly, intentionally or [recklessly],[4] and without justifiable cause, causing or permitting a child to be ... placed in a situation that may endanger the child's life or health." Section 30-6-1(D)(1). Our Supreme Court has held, "[T]o find that the accused acted with the requisite mens rea, the jury ... must find that [the] defendant's conduct created a *substantial and foreseeable risk* of harm." *State v. Chavez*, 2009-NMSC-035, ¶ 22, 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted). In contrast, DWI with a minor consists of a violation of the general DWI statute, NMSA 1978, § 66-8-102 (2016), "when a minor is in the vehicle and when the minor does not suffer great bodily harm or death." Section 66-8-102.5(A). Unlike child abuse by endangerment, DWI with a minor requires proof that the defendant was driving while under the influence of drugs or alcohol. *See* § 66-8-102. And unlike DWI with a minor, child abuse by endangerment requires proof of a culpable mental state and sufficient risk of harm to the child. Additionally, although both crimes require proof of a specific age, DWI with a minor only applies to children under thirteen while child abuse covers any child under eighteen. *Compare* § 66-8-102.5(C), *with* § 30-6-1(A)(1). Thus, strictly speaking, the elements of the two statutes differ, creating a presumption that the Legislature did not intend to limit charging discretion to DWI with a minor. *See Santillanes*, 2001-NMSC-018, ¶ 16, 130 N.M. 464, 27 P.3d 456; *see also State v. Ibn Omar-Muhammad*, 1985-NMSC-006, ¶ 22, 102 N.M. 274, 694 P.2d 922 (concluding that the Legislature intended to leave prosecutorial discretion intact when the vehicular homicide statute contained no requirement that the defendant "know of any risk involved in [their] actions," in contrast to depraved mind murder).

[19] {11} Recognizing the side-by-side differences between the statutes, Saltwater urges us to apply the *Blockburger* test as modified by our Supreme Court in *State v. Gutierrez*, 2011-NMSC-024, ¶ 48, 150 N.M. 232, 258 P.3d 1024. When the modified *Blockburger* test applies, we compare the elements of the two statutes based on "the state's legal theory of the particular case as to how the statutes were violated." ***789** *State v. Begaye*, 2023-NMSC-015, ¶ 17, 533 P.3d 1057. The test applies to cases in which a defendant is convicted for one act under different criminal statutes and "where the statutes at issue are vague and unspecific or are written in the alternative." *Id.* ¶¶ 12, 17. Saltwater argues that we should also use the modified *Blockburger* test in our general/specific statute rule analysis because the rule "should be applied in a flexible manner," *see Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456, and the child abuse statute, if taken literally, "could be read broadly to permit prosecution for any conduct." *See Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434, 211 P.3d 891. Under a modified *Blockburger* approach, Saltwater asserts that the elements of child abuse by endangerment are subsumed into DWI with a minor, because driving while intoxicated is reckless behavior that creates a substantial and foreseeable risk of harm to a minor passenger. *See State v. Orquiz*, 2012-NMCA-080, ¶ 15, 284 P.3d 418 ("[J]ust as the driver's actions strictly constitute DWI, even absent any additional 'plus factor,' so do the driver's actions constitute child abuse by endangerment.").

{12} Saltwater misunderstands how the State's charging theory impacts our analysis. New Mexico case law has perhaps been less than clear about what role the state's charging theory has in determining if the general/specific statute rule applies. Often, it appears that appellate courts engage only in a strict elements comparison. For example, in *Ibn Omar-Muhammad*, the defendant was convicted of first-

degree depraved mind murder after killing the victim with their car while fleeing from police. 1985-NMSC-006, ¶¶ 1, 10, 102 N.M. 274, 694 P.2d 922. The defendant appealed, arguing that they should have been charged with vehicular homicide under the general/specific statute rule. *Id.* ¶ 16. Our Supreme Court rejected the argument based on differences between the mental states required to convict for depraved mind murder and vehicular homicide:

> [T]he mental state required for vehicular homicide (conscious wrongdoing) requires only that a defendant purposefully engage in an unlawful act. This concept does not require that a defendant know of any risk involved in [their] actions. However, for a defendant to be convicted of depraved mind murder in the first degree, it must be proven that [they have] a subjective knowledge of the risk involved in [their] action. This element of subjective knowledge under depraved mind murder requires proof of an additional fact which is not required under the vehicular homicide statute.

Id. ¶ 22. In so concluding, the Court did not focus on the specific conduct alleged to have amounted to depraved mind murder and whether the Legislature intended to punish that conduct under the vehicular homicide statute. *See id.*

{13} However, in *Cleve*, our Supreme Court expressly relied on the state's charging theory when comparing elements of unlawful hunting and cruelty to animals. 1999-NMSC-017, ¶ 30, 127 N.M. 240, 980 P.2d 23. Unlike the cases at hand, the defendant had been convicted under both statutes at issue. *See id.* ¶¶ 4-5. Both the unlawful hunting and cruelty to animals statutes in force at the time provided numerous alternative bases for violations. *See* NMSA 1978, § 30-18-1 (1999, amended 2007); NMSA 1978, § 17-2-7 (1979). In its analysis, the Court noted that the state sought a conviction for unlawful hunting and cruelty to animals based on the defendant snaring and killing two deer in violation of state regulations. *Cleve*, 1999-NMSC-017, ¶ 30, 127 N.M. 240, 980 P.2d 23. The Court accordingly limited its analysis by comparing only the applicable statutory elements, namely taking a game animal in a manner not permitted by regulations and torturing or cruelly killing an animal. *See id.* (noting that when "offenses are defined by statutes providing several alternatives," courts "focus on the legal theory of the case and disregard any inapplicable statutory elements" (internal quotation marks and citation omitted)). In the end, "the unique elements of torture or cruelty" and a violation of state regulation presented a difference in the two statutes creating a presumption that the Legislature intended separately punishable offenses. *Id.*

{14} This Court took the same approach in *State v. Santillanes* regarding child abuse and vehicular homicide. 2000-NMCA-017, ¶ 7, 128 N.M. 752, 998 P.2d 1203, *rev'd on other* ***790** *grounds*, 2001-NMSC-018, ¶¶ 1, 24-26, 130 N.M. 464, 27 P.3d 456. As it does now, the child abuse statute applicable at the time defined the crime in the alternative. *See* NMSA 1978, 30-6-1(C) (1989, amended 2009). The defendant had been charged, and convicted, of vehicular homicide and child abuse by endangerment resulting in death. *Santillanes*, 2000-NMCA-017, ¶ 3, 128 N.M. 752, 998 P.2d 1203. The defendant had been drinking while driving with their three children, girlfriend, and her niece in the vehicle when they crashed into an oncoming truck, killing everyone but the defendant. *Id.* ¶ 2. Like our Supreme Court in *Cleve*, this Court narrowed the elements of child abuse to those relevant to the case. *See id.* ¶ 7. In so doing, we concluded that "the statutes stand independently of one another, and neither subsumes the other because the charge of child abuse resulting in death requires only the death of a child and vehicular homicide requires that the death occur as a result of a defendant driving a vehicle while intoxicated." *Id.* Even though it reversed on other grounds, our Supreme Court "agree[d] with [this Court] that under the *Blockburger* test the elements of the crimes differ[ed]," and proceeded to apply the factors outlined in *Cleve* to determine that the Legislature did not intend to limit the discretion of the prosecutor in charging an individual who caused the death of a child in a manner that otherwise meets the elements of both crimes, when the crime occurred during the operation of a vehicle. *Santillanes*, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456.

[20] {15} In examining the elements of the child abuse by endangerment and DWI with a minor in this case, we have done no more than is required by *Santillanes* and *Cleve*. Neither of those cases, in narrowing the statutes at issue to their relevant elements, went as far as Saltwater suggests we do now. Nor do we think it necessary or appropriate to do so. First, Saltwater's approach, which asks us to consider the State's proof under both statutes rather than whether both statutes require proof that the other does not, would turn our elements comparison into one focusing on whether the conduct was unitary. "However, for purposes of the general/specific statute rule, we do not ask whether the conduct used to convict a defendant of two crimes is unitary." *Santillanes*, 2001-NMSC-018, ¶ 14, 130 N.M. 464, 27 P.3d 456. Second, unlike the defendants in *Santillanes* and *Cleve*, Defendants have neither been convicted nor charged with both statutes at issue. Our analysis is necessarily "somewhat hypothetical" as a result—we cannot compare the state's charging theory

between two statutes. *See Santillanes*, 2001-NMSC-018, ¶ 14, 130 N.M. 464, 27 P.3d 456. It is difficult, then, to accept the level of granularity Saltwater suggests is appropriate, because we simply do not know how the State would charge Defendants if it charged them with both DWI with a minor and child abuse by endangerment. Attempting to do so would also unduly restrict our ultimate goal, which is determining whether the Legislature intended to limit charging discretion to a specific statute *in all cases* where the elements of the specific statute are met.

[21] {16} In rejecting Saltwater's argument, we caution against relying on this conclusion in the event a defendant is convicted of both child abuse by endangerment and DWI with a minor. "[W]hile the double jeopardy inquiry focuses on whether the Legislature intended to limit a court's discretion in imposing multiple punishments, the general/specific statute rule determines whether the Legislature intended to limit the discretion of the prosecutor in its selection of charges." *Cleve*, 1999-NMSC-017, ¶ 25, 127 N.M. 240, 980 P.2d 23. With that focus in mind, we acknowledge that Saltwater's suggested approach may be better applicable to a circumstance that entails two convictions after the State's theory has been elaborated on in more detail. *Cf. Santillanes*, 2001-NMSC-018, ¶ 14, 130 N.M. 464, 27 P.3d 456 ("[I]f a defendant is convicted of two crimes and raises claims of both double jeopardy and the general/specific statute rule, it is important to analyze each claim independently."). However, for purposes of our general/specific statute rule analysis, based on our comparison above, the elements of child abuse by endangerment and DWI with a minor are different. Like the statutes in *Ibn Omar-Muhamad*, child abuse by endangerment requires a particular mental state that ***791** is absent from the DWI with a minor statute. 1985-NMSC-006, ¶ 22, 102 N.M. 274, 694 P.2d 922. And like this Court acknowledged in *Santillanes*, child abuse by endangerment does not require proof that the defendant was driving while intoxicated. *See* 2000-NMCA-017, ¶ 7, 128 N.M. 752, 998 P.2d 1203. Those differences give rise to a presumption that the Legislature intended to leave prosecutorial discretion to choose either charge intact. *See Santillanes*, 2001-NMSC-018, ¶ 16, 130 N.M. 464, 27 P.3d 456.

II. Other Indicia of Legislative Intent

[22] {17} We move on now to determine if the presumption in favor of prosecutorial discretion stands in the face of other indicators of legislative intent. We first look to the language, histories, and purpose of the child abuse and DWI with a minor statutes. *See id.* Section 66-8-102.5 contains no language expressly limiting use of the child abuse statute when a person drives while intoxicated with a minor in the vehicle, despite three appellate decisions declining to require prosecution under statutes addressing intoxicated drivers. *See Santillanes*, 2001-NMSC-018, ¶ 27, 130 N.M. 464, 27 P.3d 456; *Guilez*, 2000-NMSC-020, ¶ 24, 129 N.M. 240, 4 P.3d 1231; *State v. Castañeda*, 2001-NMCA-052, ¶ 9, 130 N.M. 679, 30 P.3d 368. We "presume[ ] that the Legislature is aware of existing case law and acts with knowledge of it." *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988. Indeed, the Legislature was mindful of Section 66-8-102.5's interaction with other statutes, specifically permitting punishment in addition to that under the general DWI statute, Section 66-8-102. *See* § 66-8-102.5(B). If the Legislature intended Section 66-8-102.5 to be the specific statute charged in every instance of DWI with a minor, it could have stated so explicitly. We disagree with Saltwater's argument that the plain language of Section 66-8-102.5 supports an inference that the Legislature intended to restrict charging discretion simply because the facts of this case "fit" what is being described in the statute. The notion that a defendant's conduct fits within one statute more specifically than another is embodied in every argument under the general/specific statute rule, but that fact is insufficient on its own to demonstrate legislative intent to restrict charging discretion—that is why we engage in the multistep analysis from *Santillanes*. 2001-NMSC-018, ¶¶ 11-17, 130 N.M. 464, 27 P.3d 456.

[23] {18} However, we do agree with Defendants that the child abuse statute and Section 66-8-102.5 share a similar purpose and histories. The child abuse statute "is designed to give greater protection to children than adults because children are more vulnerable than adults and are under the care and responsibility of adults." *Santillanes*, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456 (internal quotation marks and citation omitted). In *Castañeda*, this Court contrasted that purpose with the general DWI statute, and concluded that "the DWI statute protects the general public (including children) from intoxicated drivers." 2001-NMCA-052, ¶ 10, 130 N.M. 679, 30 P.3d 368. Although the State suggests that *Castañeda* should still control, we are not addressing the statute we addressed in *Castañeda*, but instead a statute that focuses on a smaller class of individuals. In addition to a violation of the general DWI statute, Section 66-8-102.5 requires that there be a minor under thirteen years old in the vehicle. This element narrows the general DWI statute to protect specifically younger minors, rather than

adults, similar to the child abuse statute. *See Santillanes*, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456. In so doing, the Legislature continued the spirit of the child abuse statute through to Section 66-8-102.5. "[T]he history of the child abuse statute clearly shows the Legislature's intent to protect children from abuse and compels the conclusion that the Legislature has expanded protection for children." *Santillanes*, 2001-NMSC-018, ¶ 24, 130 N.M. 464, 27 P.3d 456 (alterations, internal quotation marks, and citation omitted). Despite having no statutory history of its own—the statute has yet to be amended since its passing—Section 66-8-102.5 similarly represents an expansion of protection for children against abuse at the hands of adults.

[24] **[25]** {19} We next consider "whether the violation of one statute will normally ***792** result in a violation of the other." *Santillanes*, 2001-NMSC-018, ¶ 16, 130 N.M. 464, 27 P.3d 456 (internal quotation marks and citation omitted). Regarding the child abuse statute and general DWI statute, we have previously held that they "criminalize some of the same conduct." *Castañeda*, 2001-NMCA-052, ¶ 8, 130 N.M. 679, 30 P.3d 368. So is the case with the child abuse statute and Section 66-8-102.5. Indeed, this Court has held that driving while intoxicated with a minor may result in a conviction for child abuse "even absent any additional 'plus factor.' " *Orquiz*, 2012-NMCA-080, ¶ 15, 284 P.3d 418. But that holding does not dictate the result here, because despite the similarities, there are important differences in the conduct targeted by the statutes generally. It is beyond dispute that the child abuse statute criminalizes significantly more conduct than driving while intoxicated with a minor. There are also instances where Section 66-8-102.5 will be violated when the child abuse statute is not. For example, the holding in *Orquiz* was limited to cases of "actual driving." 2012-NMCA-080, ¶¶ 4, 10, 284 P.3d 418. "[O]ur case law holds that a conviction for child abuse by endangerment cannot be sustained when premised upon a DWI conviction that is based on the driver being in actual physical control of a *non-moving vehicle* with a child occupant." *Id.* ¶ 10; *see, e.g.*, *State v. Etsitty*, 2012-NMCA-012, ¶¶ 2, 13, 270 P.3d 1277 (reversing a conviction for child abuse based on the defendant being intoxicated while in the driver's seat of a parked truck with his child present). However, a DWI based on actual physical control with a child occupant *will* result in a violation of DWI with a minor, because it incorporates the general DWI statute, not simply instances of actual driving. *See* § 66-8-102.5 (requiring "a violation of Section 66-8-102 ... when a minor is in the vehicle and when the minor does not suffer great bodily harm or death"). Despite the fact that the child abuse statute and Section 66-8-102.5 criminalize some of the same conduct, there are important instances where they do not, indicating that the Legislature intended the prosecutor be able to choose which to charge depending on the circumstances.

{20} We recognize both the State and Defendants suggest for our consideration what they consider to be other indicators of legislative intent. The State posits that we can glean the Legislature's intent from statements made by Section 66-8-102.5's sponsor to the local news and in a hearing while the statute was being voted on. Defendants reject this approach and turn our attention to video recordings of hearings on Section 66-8-102.5 during the legislative session and drafts of the statute. We understand these efforts, given the increased accessibility of individual legislators' prior statements in a state that still has " 'no state-sponsored system of recording the legislative history of particular enactments.' " *State v. Vest*, 2021-NMSC-020, ¶ 33, 488 P.3d 626 (quoting *Regents of Univ. of N.M. v. N.M. Fed'n of Tchrs.*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236). However, New Mexico case law is firm in rejecting attempts to consider materials like the parties put forward to determine legislative intent. *See id.* ¶ 33 ("There are countless reasons why language may be added or deleted during the legislative drafting process and, unlike the United States Congress, our Legislature does not keep a record of floor debates or committee hearings."); *Regents of Univ. of N.M.*, 1998-NMSC-020, ¶ 32, 125 N.M. 401, 962 P.2d 1236 ("The statements of legislators, especially after the passage of legislation, cannot be considered competent evidence in establishing what the Legislature intended in enacting a measure."); *Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 16, 115 N.M. 308, 850 P.2d 1011 ("The views of individual legislators are not controlling in judicial interpretation of statutes under the circumstances present here because the sovereign authority of the [L]egislature is instilled in the representative body, not its individual members."); *Baker v. Hedstrom*, 2012-NMCA-073, ¶ 28, 284 P.3d 400 ("[G]enerally, not even statements of legislators are considered competent evidence in determining legislative intent."). Given our case law, we will not consider the legislative history the parties ask us to, and instead rely on our analysis of Section 66-8-102.5 as finally passed.

***793** **[26]** **[27]** {21} While the child abuse statute and DWI with a minor statute share similar purposes and histories, there are differences in the conduct each criminalizes, and the plain language of Section 66-8-102.5 provides no indication that the Legislature intended it to always be charged by a

prosecutor instead of child abuse by endangerment. "[I]n applying the general/specific statute rule, courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys," and for that reason our Supreme Court requires "clear evidence of an intent by the Legislature to limit prosecutorial discretion." *Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456. The elements of child abuse by endangerment and DWI with a minor differ, and other indicia of legislative intent fall short of the clear evidence required by *Santillanes* to require a prosecutor to charge the latter. Accordingly, we hold that the general/specific statute rule does not apply in the cases before us, and the prosecutors retained the discretion to charge Defendants with child abuse by endangerment.

CONCLUSION

{22} For the foregoing reasons, we reverse and remand to the district court for further proceedings consistent with this opinion.

{23} **IT IS SO ORDERED.**

WE CONCUR:

J. MILES HANISEE, Judge

JACQUELINE R. MEDINA, Judge

All Citations

542 P.3d 783, 2024-NMCA-018

Footnotes

1 This opinion consolidates two appeals: Case Nos. A-1-CA-40129 and A-1-CA-40264. Because these cases each raise the same determinative issue, we consolidate the cases for decision. *See* Rule 12-317(B) NMRA.

2 Because we hold that the general/specific statute rule does not require the prosecutor to charge DWI with a minor instead of child abuse, we do not reach the State's argument in Atene's case that the child abuse charge was premised on failure to restrain, not driving while intoxicated.

3 The State raises an argument concerning Saltwater's right to be free from double jeopardy; however, the district court did not base its ruling on double jeopardy, and Saltwater concedes "that double jeopardy is not yet at issue for purposes of this appeal." Therefore, we do not address this issue further.

4 We replace the statute's reference to negligence with recklessness in line with our Supreme Court's opinion in *State v. Consaul*, 2014-NMSC-030, ¶ 37, 332 P.3d 850 ("To avoid the confusion that has plagued this area of the law, we believe that what has long been called 'criminally negligent child abuse' should hereafter be labeled 'reckless child abuse' without any reference to negligence.").

(11) West Old Town Neighborhood Association v. City of Albuquerque

KeyCite Red Flag - Severe Negative Treatment
Superseded by Statute as Stated in Albuquerque Commons Partnership v. City Council of City of Albuquerque, N.M., February 18, 2008

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.

West Headnotes (15)

[1] **Zoning and Planning** Decisions of boards or officers in general

Administrative standard of review applied to city council's zoning actions, which were intended to apply to single property, inasmuch as actions were quasi-judicial in nature, not legislative.

2 Cases that cite this headnote

[2] **Zoning and Planning** Zoning power in general

City council may enact zoning it chooses when it authors sector development plan.

[3] **Zoning and Planning** Legislative, administrative, judicial, or quasi-judicial power

Zoning decisions involving application of general rule to specific property are not legislative acts; rather, they are deemed quasi-judicial in nature.

6 Cases that cite this headnote

[4] **Administrative Law and Procedure** Substantial evidence

Appellate court applies whole record standard of review to administrative decisions, looking at all the evidence, favorable and unfavorable, bearing on decision to determine if there is substantial evidence to support result.

3 Cases that cite this headnote

[5] **Administrative Law and Procedure** Substantial evidence

Administrative decision will be affirmed if it is supported by applicable law and by substantial evidence in the record as a whole.

[6] **Zoning and Planning** Applicability to Persons or Places

City's sector development plan could establish zoning for land outside city's boundaries upon annexation by city, even though plan was adopted by resolution and not ordinance, inasmuch as resolution was passed with all formalities of companion ordinance that annexed property and amended zoning map. Albuquerque, **N.M**., Zoning Code § 14–16–4–1(E); Albuquerque, **N.M**., Ordinance 19 (May 16, 1994); Albuquerque, **N.M**., Resolution 45 (May 16, 1994).

2 Cases that cite this headnote

[7] **Municipal, County, and Local Government** Ordinances, By-Laws, and Resolutions; Local Laws

When resolution is in substance and effect ordinance or permanent regulation, name given to it is immaterial; if it is passed with all formalities of ordinance, it thereby becomes legislative act, and it is not important whether it is called ordinance or resolution.

[8] **Zoning and Planning** Applicability to Persons or Places

City's sector development plan created zoning for land outside city's boundaries that became operative when property was annexed 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. Albuquerque, **N.M**., Zoning Code §§ 14–13–1–2(C)(1, 2), 14–16–4–1(C)(9)(a).

[9] **Zoning and Planning** Intention and purpose of enacting body

Fundamental principle of construction for zoning ordinances is to determine and carry out intent of legislative body.

[10] **Zoning and Planning** Proceedings to Modify or Amend

City council's actions 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 zoning map and sector development plan amendments, in that rezoning decision was based on unique circumstances surrounding property owner's zoning petition, not required criteria. Albuquerque, **N.M**., Zoning Code § 14–16–4–1(C)(9); Albuquerque, **N.M**., Resolution 270–1980.

[11] **Zoning and Planning** Changes to comprehensive or general plan

City council's amendment of sector development plan to increase permitted density for annexed property was not justified based on changed neighborhood condition, when cited examples of existing higher density in area existed when plan was adopted, and thus could not be "changed" condition, plan, which indicated that annexed property should be zoned so as to maintain existing semirural character of area, expressed concern about this high density development, and environmental planning committee specifically found that zoning change did not constitute changed condition, but rather was response to unique situation. Albuquerque, **N.M**., Zoning Code § 14–16–4–1(C)(9); Albuquerque, **N.M**., Resolution 270–1980(D)(2).

3 Cases that cite this headnote

[12] **Zoning and Planning** Changes to comprehensive or general plan

City council's rezoning of newly annexed property, and corresponding amendment of sector development plan, was not justified on ground that new zoning category was more advantageous to community, in that proposed new density would permit only approximately 19 lots on property, whereas special use permit granted by county would have permitted up

to 40 lots, inasmuch as county zoning did not continue in effect after annexation, and lower density provided for in sector development plan was very advantage that citizens bargained for when sector development plan was amended to reduce allowable density upon annexation. Albuquerque, N.M., Zoning Code § 14–16–4–1(C)(9); Albuquerque, N.M., Resolution 270–1980(D)(3).

2 Cases that cite this headnote

[13] **Zoning and Planning** Applicability to Persons or Places

As general rule, zoning regulations and ordinances of municipality extend to newly added territory immediately upon annexation.

[14] **Administrative Law and Procedure** Competence, expertise, and knowledge of agency

Deference is generally accorded agency's interpretation of its own enactments due to agency's superior expertise, knowledge, and resources; however, deference given is only that which is due.

[15] **Zoning and Planning** Proceedings to Modify or Amend

City council could not ignore or revise its stated zoning policies and procedures for single decision, no matter how well-intentioned goal may have been; therefore, city council's actions in rezoning newly annexed property and amending zoning map and sector development plan to permit new zoning, which did not comply with amendment requirements, were not entitled to deference.

1 Case that cites this headnote

Attorneys and Law Firms

****530** ***496** Hessel E. Yntema, III Oman, Gentry & Yntema, P.A. Albuquerque, for Petitioners–Appellants.

Robert M. White, City Attorney and David N. Suffling, Assistant City Attorney, Albuquerque, for Respondent–Appellee.

John A. Myers and Kevin J. McCready, Myers, Oliver & Price, P.C., Albuquerque, for Interested Parties.

****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

[1] [2] [3] [4] [5] 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

[6] **[7]** 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.

[8] **[9]** 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

[10] 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

[11] 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

[12] 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.

[13] 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

[14] **[15]** 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.

End of Document

(12) N.M. Const. art. III, § 1

ARTICLE III
Distribution of Powers

Section 1. [Separation of departments; establishment of workers compensation body.]

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. Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type and organization of the body, the mode of appointment or election of its members and such other matters as the legislature may deem necessary or proper. (As amended November 4, 1986.)

ANNOTATIONS

The 1986 amendment, which was proposed by H.J.R. No. 7 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 173,989 for and 92,419 against, added the last two sentences.

Cross references. — For the workers' compensation division, *see* 52-5-1 NMSA 1978.

Comparable provisions. — Idaho Const., art. II, § 1.

Iowa Const., art. III, § 1.

Montana Const., art. III, § 1.

Utah Const., art. V, § 1.

Wyoming Const., art. II, § 1.

I. GENERAL CONSIDERATION.

Cap on medical malpractice damages does not violate separation of powers. — The cap on medical malpractice damages in 41-5-6 NMSA 1978 does not violate the separation of powers clause in Article III, Section 1 of the constitution of New Mexico. *Salopek v. Friedman*, 2013-NMCA-087.

Abrogation of common law jurisdiction to correct illegal sentences. — Paragraph A of Rule 5-801 NMRA, which abrogated the common law jurisdiction of the district court to correct illegal sentences, does not violate the separation of powers doctrine. *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, *overruled by State v. Romero*, 2023-NMSC-008.

State constitutions are not grants of power to the legislative, executive or judiciary branches, but are limitations on the powers of each, and no branch of the state may add to, nor detract from, its clear

mandate. *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 1957-NMSC-075, 63 N.M. 250, 316 P.2d 1069, *overruled, Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 N.M. 751, 726 P.2d 1381.

Each of three departments of government is equal and coordinate and responsible only to the people, and the courts are not warranted in assuming that their department is the only one to which it is safe to entrust enforcement of provisions of constitution regulating enactment of statutes. *Kelley v. Marron*, 1915-NMSC-092, 21 N.M. 239, 153 P. 262.

Functions of departments. — The legislature makes, the executive executes and the judiciary construes the laws. *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, 36 N.M. 151, 9 P.2d 691.

What delegation impermissible. — No one of the three branches of government can effectively delegate any of the powers that peculiarly and intrinsically belong to that branch. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

Members of one department not to manage affairs of others. — This article of constitution means that powers of state government shall be divided into three departments, and that members of one department shall have no part in management of either of the others. *State ex rel. Chapman v. Truder*, 1930-NMSC-049, 35 N.M. 49, 289 P. 594.

Exercise of powers and duties. — One branch of the state government may not exercise powers and duties belonging to another. *State ex rel. SCC v. McCulloh*, 1957-NMSC-096, 63 N.M. 436, 321 P.2d 207.

Occasional overlapping of powers contemplated. — Our constitution does not necessarily foreclose exercise by one department of the state of powers of another but contemplates in unmistakable language that there are certain instances where the overlapping of power exists. *State ex rel. Holmes v. State Bd. of Fin.*, 1961-NMSC-172, 69 N.M. 430, 367 P.2d 925.

The doctrine of separation of powers allows some overlap in the exercise of governmental functions. *Mowrer v. Rusk*, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886.

Rule 5-805 NMRA does not violate separation of powers. — Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

The interests protected by maintaining separation of powers can best be furthered, not by requiring a total separation of functions among the branches, but by ensuring that adequate checks exist to keep each branch free from the control or coercive influence of the other branches. *Board of Educ. v. Harrell*, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511.

A legislator's appointment as a special assistant district attorney does not violate the separation of powers doctrine in Article III, Section 1 of the New Mexico Constitution. — The New Mexico Constitution prohibits a person charged with the exercise of the powers of one branch of government from exercising the powers of the other branches of government, prohibits service as a legislator by any person who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, and prohibits a legislator from being appointed to a civil office in the state during the

legislator's term of office. A district attorney occupies an office of trust, is a quasi-judicial officer, and exercises core executive functions; as a result, a district attorney is constitutionally ineligible to serve as a member of the legislative branch. A private attorney appointed as a special assistant district attorney, however, is neither a public officer nor a public employee of the appointing district attorney and exercises the power and authority of the district attorney only in the specific case or matter for which they are appointed, and therefore a legislator's appointment to such a role does not unduly encroach upon or interfere with the authority of the executive or judicial branches. A private attorney's isolated exercise of district attorney authority while serving as a special assistant district attorney and a legislator does not violate the separation of powers doctrine of Article III, Section 1 of the New Mexico Constitution. 2024 Op. Att'y Gen. No. 24-04.

Compulsory arbitration. — The "principle of check", which entails courts retaining power to make enforceable, binding judgments through review of agency determinations, requires that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitration such as is required by 22-10-17.1 NMSA 1978. *Board of Educ. v. Harrell*, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511.

This article does not relate to municipal offices. *State ex rel. Chapman v. Truder*, 1930-NMSC-049, 35 N.M. 49, 289 P. 594.

This section does not apply to the distribution of power within local governments. *Board of Cnty. Comm'rs v. Padilla*, 1990-NMCA-125, 111 N.M. 278, 804 P.2d 1097.

Applicability of section to public employees. — This section applies to public officers, not employees, in the different branches of government. *State ex rel. Stratton v. Roswell Indep. Schools*, 1991-NMCA-013, 111 N.M. 495, 806 P.2d 1085.

To be a public officer, the person must be invested with sovereign power. *State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, 111 N.M. 495, 806 P.2d 1085.

Governor lacked authority under separation of powers doctrine to bind the state by unilaterally entering into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

Constitutional powers of the legislature and executive branches when administering federal funds. — When federal funds come with specific conditions attached, the executive branch is merely administering the funds consistent with the requirements established by the federal government, and no legislative appropriation is required. If a state retains wide discretion, then such funds must be appropriated—a function constitutionally reserved for the legislature. *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031

When the state retains wide discretion in administering federal funds, the power to appropriate the funds falls exclusively within the purview of the legislative branch. — Where the federal government, through the federal American Rescue Plan Act of 2021 (ARPA), provided approximately $1.75 billion in COVID-19-related financial assistance to New Mexico, and where the New Mexico legislature attempted to appropriate the ARPA funds through the General Appropriation Act of 2021, and where the governor vetoed the portions that related to ARPA funds, asserting that the legislature lacked the authority to direct the executive's administration of federal funds, and where the governor also spent approximately $600 million of the $1.75 billion in ARPA funds, and where petitioners filed suit against the governor, seeking a writ of mandamus and stay prohibiting her from expending or appropriating any additional ARPA funds, the New Mexico Supreme Court issued a prohibitory writ of mandamus and order providing that the governor and state treasurer shall not transfer, encumber, commit, expend or appropriate any additional ARPA funds absent legislative appropriation, because the amount of discretion the federal government left to New

Mexico in allocating the ARPA funds compelled a conclusion that the federal funds were subject to legislative appropriation. *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031.

Mandamus proceeding against governor. — The supreme court's issuance of writs commanding the governor to abide by a legislative decision extending the term of an agreement pursuant to the Public Employee Bargaining Act (Chapter 10, Article 7E NMSA 1978) and to recognize a statutory or constitutional right of petitioners to organize and collectively bargain would require the court to exceed its constitutional powers in violation of this section. *State ex rel. AFSCME v. Johnson*, 1999-NMSC-031, 128 N.M. 481, 994 P.2d 727.

Nature of functions of state corporation commission (now public regulation commission). — Functions of state corporation commission (now public regulation commission) are not confined to any of the three departments of government, but its duties and powers pervade them all. *In re Atchison, T. & S.F. Ry.*, 1933-NMSC-029, 37 N.M. 194, 20 P.2d 918.

Power of governor to pardon criminal contempt. — Criminal contempt is an offense against authority of court, community and state, not the judge personally, and hence is one in which state has power, through its governor, to extend grace and forgiveness, by means of pardoning power, without violating this section. *State v. Magee Publ'g Co.*, 1924-NMSC-023, 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142, *overruled by State v. Morris*, 1965-NMSC-113, 75 N.M. 475, 406 P.2d 349.

Selection of specific programs for which funds to be used. — The governor's veto of the following language that appears as overstricken was valid: "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." The legislature is authorized to define the basic purpose for which funds are appropriated, but the selection and identification of specific programs is the responsibility of the executive branch of government. *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380.

Appropriation for specific data processing system. — The legislature, in appropriating funds for data processing services, 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. Such legislative action effectively "swallowed up" the executive management function. *State ex rel. Coll v. Carruthers*, 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380.

Necessity of preserving error. — On appeal, for a party to challenge a statute requiring registration of engineers, on constitutional grounds, as making a delegation of either legislative or judicial power to an administrative board, a motion must be presented, ruled on and excepted to at trial in order to preserve the error for appeal. *Hatfield v. New Mexico State Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 1955-NMSC-067, 60 N.M. 242, 290 P.2d 1077.

II. LEGISLATIVE DELEGATION OF POWER.

The legislature's delegation of authority in the Occupational Health and Safety Act, to the environmental improvement board to promulgate regulations addressing violence against convenience store workers does not violate the constitutional doctrine of separation of powers. *New Mexico Petroleum Marketers Assn. v. New Mexico Envtl. Improvement Bd.*, 2007-NMCA-060, 141 N.M. 678, 160 P.3d 587.

Legislature may lawfully delegate authority to an administrative agency when that authority is restricted by specific legislative standards. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

Where legislature delegates powers, reasonable standards must be provided as a guide in the exercise of the discretionary power conferred. *State ex rel. State Park & Recreation Comm'n v. New Mexico*

State Auth., 1966-NMSC-033, 76 N.M. 1, 411 P.2d 984.

Workers' compensation administration. — Creation of a workers' compensation administration and vesting in it the power to decide controversies thereunder, is a valid exercise of legislative power. *Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 N.M. 751, 726 P.2d 1381, *overruling State ex rel. Hovey Concrete Products Co. v. Mechem*, 1957-NMSC-075, 63 N.M. 250, 316 P.2d 1069.

Creation of administrative board. — Powers conferred upon state loan board, created by Laws 1912, ch. 16 (executed), were not judicial but administrative, so that act did not violate this section. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156.

Administrative body may be delegated power to make fact determinations to which the law, as set forth by the legislative body, is to be applied. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141; *Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, 70 N.M. 310, 373 P.2d 809.

Powers in arbitration board. — Former annexation statute which provided that board of arbitrators should order annexation when it found that benefits of municipality were or could be made available in reasonable time to territory desired to be annexed and that board could not arbitrarily withhold annexation was not invalid as a delegation of legislative power. *Cox v. City of Albuquerque*, 1949-NMSC-041, 53 N.M. 334, 207 P.2d 1017.

Reduction of annexation area by arbitration board. — Fact that board or arbitration provided for under former annexation act limited its finding of benefits to less than the whole area described in the plat, so that the area subject to annexation became reduced, did not constitute an unlawful delegation of legislative power. *Cox v. City of Albuquerque*, 1949-NMSC-041, 53 N.M. 334, 207 P.2d 1017.

Determination of prevailing wage by commissioner. — Laws 1937, ch. 179 (former 6-6-6 to 6-6-10, 1953 Comp.), dealing with minimum wages on public works, was not unconstitutional as an unlawful delegation of legislative authority to the state labor commissioner (now replaced by the chief of the labor and industrial bureau of the employment service division) because the act did not establish any standard or formula by which he could determine the prevailing wage. *City of Albuquerque v. Burrell*, 1958-NMSC-070, 64 N.M. 204, 326 P.2d 1088.

Spacing unit standards adequate. — The standards of preventing waste and protecting correlative rights, as laid out in 70-2-11 NMSA 1978, are sufficient to allow the oil conservation commission (now the oil conservation division) power under 70-2-18 NMSA 1978 to prorate and create standard or nonstandard spacing units to remain intact, the latter section not being an unlawful delegation of legislative power. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 1975-NMSC-006, 87 N.M. 286, 532 P.2d 582.

Assessment powers. — Procedure outlined in former Conservancy Act (Laws 1923, ch. 140) was not an unlawful delegation of the power of taxation vested in the legislature by the organic law. *In re Proposed Middle Rio Grande Conservancy Dist.*, 1925-NMSC-058, 31 N.M. 188, 242 P. 683.

Investigative powers in boundary commission. — Commitment to boundary commission of power to investigate question of proper location of a boundary is not a delegation of improper power. *State ex rel. Clancy v. Hall*, 1917-NMSC-070, 23 N.M. 422, 168 P. 715.

Authorization of administrative rule-making not unconstitutional delegation. — Statute authorizing state game commission to promulgate rules concerning game animals and fish is a proper exercise of state's police power, and is not an unconstitutional delegation of legislative power. *State ex rel. Sofeico v. Heffernan*, 1936-NMSC-069, 41 N.M. 219, 67 P.2d 240.

Conferring of quasi-judicial powers on agencies. — Legislature, in exercising its police powers, may confer certain "quasi-judicial" powers on administrative agencies with regard to laws affecting the general

public, but such powers do not extend to determinations of rights and liabilities between individuals. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141.

Quasi-judicial school board functions. — School board functions which are quasi-judicial do not constitute a violation of the separation of powers clause of the constitution as a delegation of judicial powers to the board. *McCormick v. Board of Educ.*, 1954-NMSC-094, 58 N.M. 648, 274 P.2d 299, superseded by statute, *Sanchez v. Board of Educ. of Town of Belen*, 1961-NMSC-081, 68 N.M. 440, 362 P.2d 979.

Control of liquor traffic. — Pursuant to 60-6B-4 NMSA 1978, the delegation of the legislative authority to disapprove the transfer of a liquor license on moral as well as on safety and health grounds is within the traditional definition of the state's police power and thus constitutional. *Dick v. City of Portales*, 1993-NMCA-125, 116 N.M. 472, 863 P.2d 1093, *rev'd*, 1994-NMSC-092, 118 N.M. 541, 883 P.2d 127.

Revocation procedure not improper legislative delegation. — Former 67-21-21, 1953 Comp., purporting to confer power on the state board of registration for professional engineers and land surveyors to revoke the certificate of any registrant who is found guilty by the board after trial of gross negligence, incompetency or misconduct in the practice of his profession, is not an unlawful delegation of legislative power. *Hatfield v. New Mexico State Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 1955-NMSC-067, 60 N.M. 242, 290 P.2d 1077.

Formation of college districts by petition not improper delegation. — This section was not violated by authorization in former 21-13-4 NMSA 1978 (repealed) for formation of junior college districts by petition method, as this was not a delegation of power but merely a statutory method for implementing the legislative determination of a purpose to be fulfilled. *Daniels v. Watson*, 1966-NMSC-011, 75 N.M. 661, 410 P.2d 193.

Direction to governor to conform national guard. — Statute directing governor to issue such orders as might be necessary to conform the national guard of New Mexico to that prescribed by the war department was not a delegation of legislative authority. *State ex rel. Charlton v. French*, 1940-NMSC-010, 44 N.M. 169, 99 P.2d 715.

Determination of property misuse improperly delegated. — Subdivision [Subsection] A(2) of 30-14-4 NMSA 1978, proscribing the remaining in or occupying of any public property after having been requested to leave by the lawful custodian or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable and, thus, an unconstitutional delegation of legislative power. *State v. Jaramillo*, 1972-NMCA-071, 83 N.M. 800, 498 P.2d 687.

Legislature cannot delegate power to appropriate money. — Under constitutional separation-of-powers principles, the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution. *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001.

The legislature did not delegate to the secretary of state the authority to reinstate straight-ticket voting in New Mexico. — Where the New Mexico secretary of state sought to reinstate straight-ticket voting in the November 2018 general election, and where petitioners, a coalition of voters, political parties, and political organizations, filed a petition for writ of mandamus requesting an order prohibiting the secretary of state from further efforts to reinstate the straight-ticket option on the grounds that she does not possess the authority to do so, the writ of mandamus was issued because N.M. Const., Art. VII, § 1(B) gives the legislature plenary authority over elections, an authority which cannot be delegated and which is limited only by the New Mexico constitution. Moreover, the history of straight-ticket voting in New Mexico indicates that the legislature never delegated or attempted to delegate to the secretary of state the authority to decide whether straight ticket voting shall be an option to voters in general elections, and 1-10-12(F) NMSA 1978, which gives the secretary of state the authority to prescribe the form of the ballot, was never intended to

authorize the secretary of state to decide questions related to straight-ticket voting. *Unite New Mexico v. Oliver, 2019-NMSC-009*.

Reduction of budgets by board unconstitutional. — The unrestricted and unguided power contained in Laws 1961, ch. 254, § 24 (an appropriation section), whereby state board of finance could impose a reduction of up to ten percent on operating budgets simply if in its opinion the legislature had been overly generous, was an unconstitutional grant of legislative power and the board could not legally proceed thereunder. *State ex rel. Holmes v. State Bd. of Fin.*, 1961-NMSC-172, 69 N.M. 430, 367 P.2d 925.

Executive control of expenditures permissible. — Legislature, without the same constituting any violation of N.M. Const., art. IV, § 22, or of this section, may provide in the general appropriation bill for the executive to control the expenditure of the amounts appropriated. *State ex rel. Holmes v. State Bd. of Fin.*, 1961-NMSC-172, 69 N.M. 430, 367 P.2d 925.

Pharmacy board allowed to schedule drugs. — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of different drugs, is not an unconstitutional delegation of authority. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

Unconstitutional delegation of zoning power. — Section 3-21-18 NMSA 1978, which permits private individuals to "create" a special zoning district without any limitation on the size and location of the district, is void as an unconstitutional delegation of legislative power because there is no standard to guide the private individuals in determining the size or location of the district. *Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n*, 1985-NMCA-114, 103 N.M. 675, 712 P.2d 21.

III. LEGISLATION AFFECTING JUDICIARY.

A. LEGISLATION VALIDLY AFFECTING COURTS.

Court decisions may be modified by legislative enactment. — The legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. *Ferguson v. New Mexico State Hwy. Comm'n*, 1982-NMCA-180, 99 N.M. 194, 656 P.2d 244, cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Impartiality provision valid. — It is no invasion of judicial power for the legislature to say that such power shall not be exercised by judges who are believed by the litigants to be partial. *State ex rel. Hannah v. Armijo*, 1933-NMSC-087, 38 N.M. 73, 28 P.2d 511.

Longarm statute not violative of courts' powers. — Section 38-1-16 NMSA 1978 is not an unconstitutional invasion of the judicial branch in violation of the separation of powers provision of the constitution. *Gray v. Armijo*, 1962-NMSC-082, 70 N.M. 245, 372 P.2d 821.

Provision in 38-1-16 NMSA 1978, which allows substituted service on nonresidents involved in automobile accidents, does not constitute unconstitutional exercise of judicial powers by the legislature. *Clews v. Stiles*, 303 F.2d 290 (10th Cir. 1960), *rev'g* 181 F. Supp. 172 (D.N.M. 1960).

Domicile presumption valid. — The presumption of domicile established for military personnel stationed in this state for six months, under 40-4-5 NMSA 1978 (relating to jurisdictional requirements for dissolution of marriage), is not an unconstitutional interference with the judicial branch of government. *Crownover v. Crownover*, 1954-NMSC-092, 58 N.M. 597, 274 P.2d 127.

No unconstitutional delegation of judicial powers. — Section 30-20-13 NMSA 1978, regarding interference, trespass and damage to public facilities and providing penalties therefor, does not

unconstitutionally delegate judicial power since it contemplates ultimate determination by judge or jury that the person accused committed disruptive acts. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888.

Establishment of penalties for criminal behavior is solely within the province of the legislature. *State v. Mabry*, 1981-NMSC-067, 96 N.M. 317, 630 P.2d 269.

Legislative act making a sentence mandatory, and thus denying any right of the courts to suspend sentences, does not violate the doctrine of separation of powers. *State v. Mabry*, 1981-NMSC-067, 96 N.M. 317, 630 P.2d 269.

Procedural statute effective unless conflicts with court rule. — Since the supreme court has no quarrel with a statutory arrangement which seems reasonable and workable, a statute regulating practice and procedure, although not binding on the supreme court, is given effect until there is a conflict between it and a rule adopted by the court. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Legislation dealing with procedure in judicial proceedings is not automatically in violation of this section; rather, such legislation is unconstitutional only when it conflicts with procedure adopted by the supreme court. *Otero v. Zouhar*, 1984-NMCA-054, 102 N.M. 493, 697 P.2d 493, *aff'd in part, rev'd in part*, 1985-NMSC-021, 102 N.M. 482, 697 P.2d 482.

Legislative power to determine appealability. — The legislature has the power to determine in what district court cases, civil and criminal, the supreme court shall exercise appellate jurisdiction, except for those cases in which the district court has imposed a sentence of death or life imprisonment, for which the constitution has directly conferred appellate jurisdiction. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Tort Claims Act constitutional. — The legislature acted constitutionally in enacting the Tort Claims Act (41-4-1 to 41-4-27 NMSA 1978) following judicial abolition of sovereign immunity. *Ferguson v. New Mexico State Hwy. Comm'n*, 1982-NMCA-180, 99 N.M. 194, 656 P.2d 244, cert. denied, 99 N.M. 226, 656 P.2d 889.

Authorization of rule-making. — Laws 1933, ch. 84, §§ 1, 2 (38-1-1 and 38-1-2 NMSA 1978), having authorized the supreme court to promulgate court rules, such rules do not delegate an exclusive legislative function to the courts. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

Receiver appointment provision directory, not mandatory. — Provision in former 48-7-8, 1953 Comp., dealing with insolvency and involuntary liquidation of state banks, that the court should appoint the state bank examiner as receiver amounted to no more than a recommendation to the judiciary to appoint him, as otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. VI, § 13. *Cooper v. Otero*, 1934-NMSC-008, 38 N.M. 164, 29 P.2d 341.

Judicial power validly conferred by Conservancy Act. — Powers and duties conferred upon district court by Conservancy Act (73-17-1 to 73-17-24 NMSA 1978) are essentially judicial, and do not violate this section. *Gutierrez v. Middle Rio Grande Conservancy Dist.*, 1929-NMSC-071, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261, cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Drainage District Law. — Drainage District Law of 1912, ch. 84 (73-6-1 to 73-7-56 NMSA 1978), providing for creation of drainage districts by petition filed in proper district court, did not violate this section, the duties imposed by the act being judicial in character. *In re Dexter-Greenfield Drainage Dist.*, 1915-NMSC-097, 21 N.M. 286, 154 P. 382.

Filling municipal court vacancies. — A municipal ordinance establishing a procedure for filling a temporary vacancy on the municipal court did not violate this section. *Aguilar v. City Comm'n*, 1997-NMCA-

045, 123 N.M. 333, 940 P.2d 181.

B. LEGISLATION IMPROPERLY CONFERRING POWERS ON COURTS.

Placing of original administrative jurisdiction in courts invalid. — A statutory amendment to 72-12-3 NMSA 1978 which permitted removal of application for use of underground water from the jurisdiction of the state engineer to be placed within the original jurisdiction of the courts was unconstitutional as violative of the separation of powers doctrine of this section. *City of Hobbs v. State ex rel. Reynolds*, 1970-NMSC-133, 82 N.M. 102, 476 P.2d 500.

The 1967 amendment to 72-12-7 NMSA 1978, purporting to remove proceeding relating to change in location of well or use of water from administrative jurisdiction, and placing it within the original jurisdiction of the courts, violated separation of powers doctrine. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141.

De novo review of commission's decisions by courts unconstitutional. — Insofar as 70-2-25 NMSA 1978 purports to allow the district court, on appeal from order or decision of the oil conservation commission, to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders of the commission, it is void as an unconstitutional delegation of power, contravening this provision of the New Mexico constitution. *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, 70 N.M. 310, 373 P.2d 809.

Review of engineer's decision limited. — Section 72-7-1 NMSA 1978 does not permit the district court, in reviewing a decision of the state engineer, to hear new or additional evidence; review by the court is limited to questions of law and restricted to whether, based upon the legal evidence produced at the hearing before the state engineer, that officer acted fraudulently, arbitrarily or capriciously, whether his action was in accordance with the law and the evidence, and whether it was within the scope of his authority. *Kelley v. Carlsbad Irrigation Dist.*, 1963-NMSC-049, 71 N.M. 464, 379 P.2d 763, superseded by statute, *Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist.*, 1974-NMSC-082, 87 N.M. 149, 530 P.2d 943.

Courts generally not to perform administrative functions. — Just as a commission cannot perform a judicial function, neither can the court perform an administrative one. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141; *Kelley v. Carlsbad Irrigation Dist.*, 1963-NMSC-049, 71 N.M. 464, 379 P.2d 763, superseded by statute, *Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist.*, 87 N.M. 149, 530 P.2d 943.

Prerequisites to exercise by courts of administrative functions. — Before a court may exercise an administrative function, such as granting an extension of time to pay taxes and waiving penalty and interest for delinquency in payment, belonging inherently to another department of the government, it must appear that an appropriate attempt has been made to delegate such function to the courts, and that the attempt is not repugnant to this section. *State v. Fifth Judicial Dist. Court*, 1932-NMSC-023, 36 N.M. 151, 9 P.2d 691.

Granting liquor permits not for court. — The district court does not have the administrative function of determining whether or not a liquor permit should be granted. *Baca v. Grisolano*, 1953-NMSC-028, 57 N.M. 176, 256 P.2d 792; *Floeck v. Bureau of Revenue*, 1940-NMSC-014, 44 N.M. 194, 100 P.2d 225.

Cancellation of licenses. — The Liquor Control Act (former 60-3-1 NMSA 1978 et seq.) gave the court authority only to determine whether upon the facts and law, the action of the official in cancelling a license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious; otherwise it would be a delegation of administrative authority to the district court in violation of the constitution. *Baca v. Grisolano*, 1953-NMSC-028, 57 N.M. 176, 256 P.2d 792; *Floeck v. Bureau of Revenue*, 1940-NMSC-014, 44 N.M. 194, 100 P.2d 225.

Impermissible for courts to zone. — To the extent that Laws 1927, ch. 27, § 8 (repealed) purports to allow the district court to zone land, it is void as an unconstitutional delegation of power to the judiciary, contravening this section. *Coe v. City of Albuquerque*, 1966-NMSC-196, 76 N.M. 771, 418 P.2d 545, appeal after remand, 1968-NMSC-069, 79 N.M. 92, 440 P.2d 130.

C. IMPROPER INTERFERENCE WITH JUDICIARY BY LEGISLATURE.

Infringement upon judiciary by state or local government barred. — This article bars any infringement upon the power and the authority of the judiciary by the executive and legislative branches at any level of state or local government. *Mowrer v. Rusk*, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886.

Legislative enactments on procedure. — The distinction between substantive law and those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts is not always clearly defined. There may be areas in which procedural matters so closely border upon substantive rights and remedies that legislative enactments with respect thereto would be proper. *Southwest Underwriters v. Montoya*, 1969-NMSC-027, 80 N.M. 107, 452 P.2d 176.

Judiciary determines rules of procedure for cases within the judicial system, pursuant to its authority under the separation of powers doctrine. *Angel Fire Corp. v. C.S. Cattle Co.*, 1981-NMSC-095, 96 N.M. 651, 634 P.2d 202.

Attempts to regulate pleading, practice and procedure invalid. — The supreme court's constitutional power under this section and N.M. Const., art. VI, § 3, of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government, and statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); *State ex rel. Anaya v. McBride*, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1976).

Court has the power to regulate pleading, practice and procedure within the courts so that, on procedural matters such as time limitations for appeals, a rule adopted by the supreme court governs over an inconsistent statute. *AAA v. SCC*, 1985-NMSC-037, 102 N.M. 527, 697 P.2d 946.

Procedural statute infringing on court's duties. — Statute providing for dismissal of actions not brought to conclusion within three years and exempting cases and proceedings in which there is to be a jury from the dismissal requirement is a procedural statute which infringes on court's completion of its duties under the constitution; the rule of court in effect at that time will prevail. *Southwest Underwriters v. Montoya*, 1969-NMSC-027, 80 N.M. 107, 452 P.2d 176.

Creation of journalist's privilege invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalist's privilege purportedly created by Subsection A of 38-6-7 NMSA 1978 is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. *Ammerman v. Hubbard*

Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Expedition of criminal cases for courts. — Under the doctrine of separation of powers, the matter of expediting the flow of criminal cases through the courts is a peculiarly judicial function. *State ex rel. Delgado v. Stanley*, 1972-NMSC-024, 83 N.M. 626, 495 P.2d 1073, *abrogated*, *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.2d 20.

Legislative interference with quo warranto improper. — Since the constitution provides for separate and equal branches of government in New Mexico, any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the constitution in the judiciary, such as quo warranto, cannot be deemed binding. *State ex rel. Anaya v. McBride*, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

Portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint is invalid. *State ex rel. Anaya v. McBride*, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

Legislature not to interfere with appellate procedure. — It would be utterly impossible for the court to live up to its responsibilities and to properly and expeditiously handle the matters which come before it on appeal and otherwise, if the legislature could determine and define the nature of the appellate process, establish the procedures to be followed in that process and fix time limitations within which the court must act. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Time of hearing appeals for court. — The time within which the supreme court must consider a matter before it is for that court to determine; it is purely a procedural matter. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Substitution of de novo hearing for appeal improper. — Legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature not to control practice of law. — Legislative attempts to confer any power over the control of the practice of law, including the power of suspension or disbarment, are violative of this section. *In re Patton*, 1974-NMSC-017, 86 N.M. 52, 519 P.2d 288, *abrogated*, *In re Bristol*, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

Bar admission requirements. — The legislature may enact valid laws in fixing minimum but not maximum requirements for admission to the bar, but it may not require admission on standards other than as accepted or established by the courts; any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and prohibiting the legislature from invading the judiciary. *In re Sedillo*, 1959-NMSC-095, 66 N.M. 267, 347 P.2d 162.

Conflict of interest laws not regulation of law practice. — The application to former executive branch attorneys of Subsection C of 10-16-8 NMSA 1978, prohibiting former public officers and employees from representing persons for pay before their former government agency employer, is not an attempt by the legislature to regulate the practice of law and the provision does not violate separation of powers. *Ortiz v. Taxation & Revenue Dep't*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

IV. JUDICIAL REVIEW OVER LEGISLATIVE AFFAIRS.

Power to make law is reserved exclusively to legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

Emergency clause for legislature. — It is exclusive function of legislature to determine whether legislation should carry an emergency clause precluding a referendum. *Hutchens v. Jackson*, 1933-NMSC-051, 37 N.M. 325, 23 P.2d 355.

Statutory construction upholding constitutionality adopted. — Where a statute is susceptible of two constructions, one supporting the act and giving it effect and the other rendering it unconstitutional and void, court must adopt that construction which will uphold statute's constitutionality. *Abeytia v. Gibbons Garage*, 1920-NMSC-064, 26 N.M. 622, 195 P. 515; *State ex rel. Clancy v. Hall*, 1917-NMSC-070, 23 N.M. 422, 168 P. 715.

Validity of legislation presumed. — The supreme court has repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments. A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. *McGeehan v. Bunch*, 1975-NMSC-055, 88 N.M. 308, 540 P.2d 238.

A statute is presumed to be constitutional unless it clearly violates some specific provision of the constitution. Likewise, an ordinance as well as a statute, is presumed to be valid, and the one who attacks it has the burden of establishing its invalidity. *City of Albuquerque v. Jones*, 1975-NMSC-025, 87 N.M. 486, 535 P.2d 1337.

There is a presumption of the validity and regularity of legislative enactments. Courts must uphold the efficacy of statutes unless they are satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. *Gallegos v. Homestake Mining Co.*, 1982-NMCA-052, 97 N.M. 717, 643 P.2d 281.

Every presumption is in favor of the validity of legislative enactments. *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, 95 N.M. 391, 622 P.2d 699, cert. quashed, 95 N.M. 426, 622 P.2d 1046 (1981).

Supreme court will not enquire into the wisdom, policy or justness of legislation. *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, 95 N.M. 391, 622 P.2d 699.

Review of legislative action. — The legislature is a coordinate branch of our state government; its prerogative in the matter of legislation is to be questioned solely from the standpoint of our federal or state constitutional limitations. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141; *State v. Armstrong*, 1924-NMSC-089, 31 N.M. 220, 243 P. 333.

The function of the courts in scrutinizing acts of the legislature is not to raise possible doubt nor to listen to captious criticism, since as the legislature possesses the sole power of enacting law, it will not be presumed that the people have intended to limit its power or practice by unreasonable or arbitrary restrictions. Every presumption is ordinarily to be indulged in favor of the validity and regularity of legislative acts and procedure. *Fellows v. Shultz*, 1970-NMSC-071, 81 N.M. 496, 469 P.2d 141; *State v. Armstrong*, 1924-NMSC-089, 31 N.M. 220, 243 P. 333.

Legislature to determine public need. — A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse. *State v. Collins*, 1956-NMSC-046, 61 N.M. 184, 297 P.2d 325.

Courts may not inquire into statutory policy. — Under the separation of powers doctrine, the courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the legislature. *Gallegos v. Homestake Mining Co.*, 1982-NMCA-052, 97 N.M. 717, 643 P.2d 281.

No power in court to stay corporation commission (now public regulation commission) order. — A district court had no power to stay an order of state corporation commission (now public regulation commission) (an administrative board exercising a legislative function) pending a determination of whether the order was lawful and reasonable, in view of separation of powers doctrine. *State ex rel. SCC v. McCulloh*, 1957-NMSC-096, 63 N.M. 436, 321 P.2d 207.

Power to review legislation prior to enforcement action. — The court of appeals did not have authority to review the constitutionality of the New Mexico Mining Act (69-36-1 to 69-36-20 NMSA 1978) in an appeal challenging regulations on their face before the mining commission took action to enforce the act. *Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-134, 121 N.M. 83, 908 P.2d 776, cert. denied, 120 N.M. 828, 907 P.2d 1009.

V. POWERS OF EXECUTIVE DEPARTMENT.

Judicial standards commission. — Because the judicial standards commission plays no role in the traditional functions of the judiciary, the governor's actions in removing the executive appointees to the commission did not infringe on the judiciary's performance of those functions. *State ex rel. N.M. Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Public service commission's order unconstitutional. — Orders of the public service commission that effectively deregulated the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the legislature exceeded the commission's authority and violated the separation of powers doctrine. *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Executive created public assistance policy unconstitutional. — Governor's implementation of public assistance policy through the human services department violated the separation of powers doctrine, because in changing eligibility requirements, it was an executive creation of substantive law. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Cease and desist order against executive officers. — Cease and desist order was proper contempt sanction against governor and executive agency that continued implementation of public assistance program for several months following issuance of writ of mandamus by supreme court ordering the cessation of the program. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Granting power to mining director constitutional. — Regulations of the mining commission granting power to the director, an employee of the commission, were not violative of the separation of powers doctrine. *Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-134, 121 N.M. 83, 908 P.2d 776, cert. denied, 120 N.M. 828, 907 P.2d 1009.

State engineer regulations to determine water rights priorities. — The state engineer exceeded the state engineer's statutory authority under 72-2-9.1 NMSA 1978 and violated the principles of separation of powers under Article III, Section 1 of the constitution of New Mexico when the state engineer adopted regulations that permitted the state engineer to determine water right priorities as among water rights owners and to curtail water usage based upon evidence contained in subfile orders, offers of judgment, hydrographic surveys, and permits issued by the state engineer. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-015, 149 N.M. 394, 249 P.3d 932, *rev'd*, 2012-NMSC-039, 289 P.3d 1232.

Executive privilege recognized. — Recognition of an executive privilege is required by the constitution of the state of New Mexico. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330, *abrogated, Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

Executive privilege is a recognition by one branch of government, the judiciary, that another coequal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant. The legislative and judicial branches of state government enjoy similar privileges which are required to be recognized by the supreme court under the constitution. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Purposes of privilege. — Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Limitation on privilege. — Executive privilege does not protect communications, whether intended as confidential or not, between the executive department and members of the public or others not employed in the executive department. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Privilege not absolute. — The mere fact that the executive department holds information and claims executive privilege does not of itself render the information exempt from judicial process. Nor does the fact that the privilege is of constitutional origin make the privilege absolute. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Balancing test applied to determine disclosure. — Trial courts are required to determine whether the claim of executive privilege has been properly invoked in each situation. Once it is found that the privilege applies, the trial court must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought. *State ex rel. Att'y Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, 96 N.M. 254, 629 P.2d 330.

Executive conditions on grants of capital outlay appropriations. — Executive Order 2013-006, which requires state agencies, local public bodies and other entities to meet criteria that exceed the conditions required under the 2013 Work New Mexico Act, Laws 2013, ch. 226, before they can receive and use capital outlay appropriations, violates the separation of powers mandated by Article III, Section 1 of the constitution of New Mexico. 2013 Op. Att'y Gen. No.13-03.

Appointment of legislator to executive council. — A state representative's appointment to an executive advisory council does not violate this section providing for the separation of powers. 1977 Op. Att'y Gen. No. 77-03.

Public school teachers and administrators in legislature. — School teachers are not "public officers" but only employees, and they are not barred by the separation of powers provision from being legislators. State ex rel. Stratton v. Roswell Indep. Schs., 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

This state's strong constitutional separation-of-powers doctrine precludes public school teachers and administrators from serving in the legislature. 1988 Op. Att'y Gen. No. 88-20.

Representative serving on state defense force. — A New Mexico state representative may not serve in the New Mexico state defense Force; the offices of legislator and state defense force member are incompatible and serving on both would create a conflict of interest. 1988 Op. Att'y Gen. No. 88-71.

Naming of commission members by legislature. — Oil Conservation Act is not unconstitutional on the ground that since the legislature has named the members of the oil conservation commission there has been an invasion of the executive power of appointment. 1951 Op. Att'y Gen. No. 51-5397.

Charging fees for services. — In the absence of express authority, fees may not be charged by the board of trustees of the New Mexico supreme court law library to patrons using the library in order to generate income for the library. Administrative bodies do not have implied authority to charge fees for services. 1988 Op. Att'y Gen. No. 88-78.

Grand jury is a function of the courts; that is, of the judicial branch of government. 1982 Op. Att'y Gen. No. 82-14.

Delegation of authority to administrative agency. — The legislature has the power to establish administrative agencies and to delegate to them the enforcement of statutes regulating the conduct of professions. 1980 Op. Att'y Gen. No. 80-09.

Governor does not have authority to legislate the regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Executive agency controlling expenditure of appropriations. — The legislature may provide in the general appropriations bill for an executive agency to control the expenditure of the amounts appropriated without constituting a violation of the separation-of-powers provisions in this section. 1987 Op. Att'y Gen. No. 87-32.

Promulgation of collective bargaining rules by personnel board. — The words "among other things" at the beginning of 10-9-13 NMSA 1978 do not constitute a valid delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution commits New Mexico to the doctrine of separation of powers and also vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

Legislative review of administrative regulations proper. — Legislative review of administrative rules and regulations promulgated under delegated rule-making powers is consistent with the constitutional doctrine of separation of powers, and does not interfere with judicial prerogative. 1977 Op. Att'y Gen. No. 77-12.

Applicability of motor pool provisions to judiciary. — Procedures adopted under Laws 1968, ch. 43, § 11 (15-3-25 NMSA 1978) for operating the state motor pool are binding upon the judicial branch of the government unless the supreme court determines that such compliance would unreasonably impede or impair the functions of the judiciary. 1968 Op. Att'y Gen. No. 68-64.

Legislative grant of water rights invasion of judiciary's function. — Where exclusive jurisdiction has been given to the judiciary to determine water rights, the separation of powers doctrine forbids the legislature from granting such rights; therefore, proposed bill which would grant a water right of two-acre inches per acre foot to those holding water rights in the artesian basins would be unconstitutional. 1971 Op. Att'y Gen. No. 71-23.

Divestment of office by judicial action of questionable validity. — There is a very serious question as to whether a person can be divested of his legislative office by judicial action pursuant to a constitutional provision which on the face of it would disqualify him from holding office, because this presents a question

of separation of power, and the courts will not interfere with the organization of one of the other equal branches of government. 1956 Op. Att'y Gen. No. 56-6400.

Attorney general not to interfere with legislative qualifications. — The attorney general has been granted no statutory authority to intervene in a determination by the legislature of whether public school teachers are qualified to serve, and, in fact, is barred from doing so by the separation of powers doctrine. 1975 Op. Att'y Gen. No. 75-21.

Law reviews. — For comment on Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962), see 3 Nat. Resources J. 178 (1963).

For comment on Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963), see 3 Nat. Resources J. 340 (1963).

For note, "Separation of Powers Doctrine in New Mexico," see 4 Nat. Resources J. 350 (1964).

For note, "Annexation of Unincorporated Territory in New Mexico," see 6 Nat. Resources J. 83 (1966).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For annual survey of New Mexico criminal procedure, see 16 N.M. L. Rev. 25 (1986).

For survey of workers' compensation law in New Mexico, see 18 N.M. L. Rev. 579 (1988).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

For comment, "Deannexation: A proposed statute," see 20 N.M. L. Rev. 713 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 294 to 359.

Delegation of powers by various branches of government, 2 A.L.R. 882, 12 A.L.R. 1435, 27 A.L.R. 927, 32 A.L.R. 1406, 40 A.L.R. 347, 47 A.L.R. 70, 48 A.L.R. 454, 54 A.L.R. 1104, 55 A.L.R. 372, 70 A.L.R. 1243, 84 A.L.R. 1147, 86 A.L.R. 1554, 88 A.L.R. 1519, 91 A.L.R. 799, 92 A.L.R. 400, 96 A.L.R. 312, 96 A.L.R. 826.

Delegation of power to the judiciary, 6 A.L.R. 218, 18 A.L.R. 67, 34 A.L.R. 1128, 64 A.L.R. 1373, 69 A.L.R. 266, 70 A.L.R. 1284, 71 A.L.R. 821, 87 A.L.R. 546.

Delegation of power to the people, 6 A.L.R. 218, 18 A.L.R. 67, 20 A.L.R. 1491, 29 A.L.R. 41, 53 A.L.R. 149, 64 A.L.R. 1378, 70 A.L.R. 1062, 72 A.L.R. 1339, 76 A.L.R. 105, 123 A.L.R. 950.

Power of court to force the legislative body to apportion representatives or election districts as required by the constitution, 46 A.L.R. 964.

Censorship laws as delegations of power, 64 A.L.R. 505.

Governmental powers in peace-time emergency, 86 A.L.R. 1539, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Emergency as affecting validity of delegation of power to executive, 86 A.L.R. 1554, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Constitutionality, construction, and application of provisions of state tax law for conformity with federal income tax law or administrative and judicial interpretation, 42 A.L.R.2d 797.

Validity, construction, and effect of statute, ordinance, or other measure involving chemical treatment of public water supply, 43 A.L.R.2d 453.

Arbitration statute as unconstitutional delegation of judicial power, 55 A.L.R.2d 432.

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

16 C.J.S. Constitutional Law §§ 111 to 227.

(13) N.M. Const. art. V, § 4

Sec. 4. [Governor's executive power; commander of militia.]

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. He shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion.

ANNOTATIONS

Cross references. — For authorized purposes of state indebtedness, including suppression of insurrection and public defense, *see* N.M. Const., art. IX, § 7.

For the militia generally, *see* N.M. Const., art. XVIII, §§ 1 and 2.

For heading cabinet, *see* 9-1-3 NMSA 1978.

For governor's power to call out the militia, *see* 20-2-6 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, §§ 4, 5.

Iowa Const., art. IV, §§ 7, 9.

Montana Const., art. VI, §§ 4, 13.

Utah Const., art. VII, §§ 4, 5.

Wyoming Const., art. IV, § 4.

Executive privilege. — The executive privilege in New Mexico, which derives from the constitution and which is reserved to and can be invoked only by the governor, extends only to documents that are communicative in nature, that are made to and from individuals in very close organizational and functional proximity to the governor, and that relate to decisions made by the governor in the performance of the governor's constitutionally-mandated duties. *Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

Application of the executive privilege to the inspection of public records. — Courts considering the application of the executive privilege to a request for the inspection of public records under the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978) must independently determine whether the documents at issue are in fact covered by the privilege and whether the privilege has been invoked by the governor, to whom the privilege is reserved. Courts are not required to balance the competing needs of the executive and the party seeking disclosure. Where appropriate, courts should conduct an in camera view of the documents at issue as part of their evaluation of the privilege. *Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853.

Executive privilege did not apply to drivers' license records. — Where petitioners requested public documents from the motor vehicle division relating to the issuance of drivers' licenses to foreign nationals and to an audit of the license program ordered by the governor; the motor vehicle division redacted information pursuant to executive privilege; the redacted documents included communications regarding New Mexico's negotiations with the Mexican government regarding access to identity documents and discussions related to implementing the audit of the driver's license program; the documents at issue were principally internal emails between staff of the motor vehicle division, not communications with the governor

or the governor's immediate staff; and the motor vehicle division, not the governor, asserted the executive privilege; the documents at issue did not qualify for the executive privilege. *Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853, *rev'g* 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444.

Governor is sole judge of facts that may seem to demand aid and assistance of military force of state. *State ex rel. Charlton v. French*, 1940-NMSC-010, 44 N.M. 169, 99 P.2d 715.

To provide for public defense embraces considerations of preparedness as well as execution. *State ex rel. Charlton v. French*, 1940-NMSC-010, 44 N.M. 169, 99 P.2d 715.

Power of militia supersedes civil authorities. — Where governor, seeking to quell insurrection, calls out the militia, by executive process, and puts them in charge, such military forces do not act as sheriffs or deputy sheriffs, but their power supersedes the civil authorities. *State ex rel. Roberts v. Swope*, 1933-NMSC-097, 38 N.M. 53, 28 P.2d 4.

Other provisions. — This section is in pari materia with N.M. Const., art. IX, § 7 (authorizing state indebtedness for certain purposes, including the suppressing of insurrection and public defense) and art. XVIII, § 2 (relating to the organization, discipline and equipment of the militia). *State ex rel. Charlton v. French*, 1940-NMSC-010, 44 N.M. 169, 99 P.2d 715.

Governor entitled to legislative immunity. — Actions of the governor recommending state appropriations for medicaid waivers, revamping the state personnel system and plan for growth in the medicaid programs were legislative in nature and therefore the governor is entitled to legislative immunity. *Lewis v. New Mexico Dep't of Health*, 275 F.Supp.2d 1319 (D.N.M. 2003).

Governor did not have authority to enter compacts with Indian tribes. — The governor could not rely on statutory authority to enter into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

Constitutional powers of the legislature and executive branches when administering federal funds. — When federal funds come with specific conditions attached, the executive branch is merely administering the funds consistent with the requirements established by the federal government, and no legislative appropriation is required. If a state retains wide discretion, then such funds must be appropriated—a function constitutionally reserved for the legislature. *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031

Governor did not have the authority to administer federal funds provided to the state for COVID-19-related financial assistance. — Where the federal government, through the federal American Rescue Plan Act of 2021 (ARPA), provided approximately $1.75 billion in COVID-19-related financial assistance to New Mexico, and where the New Mexico legislature attempted to appropriate the ARPA funds through the General Appropriation Act of 2021, and where the governor vetoed the portions that related to ARPA funds, asserting that the legislature lacked the authority to direct the executive's administration of federal funds, and where the governor also spent approximately $600 million of the $1.75 billion in ARPA funds, and where petitioners filed suit against the governor, seeking a writ of mandamus and stay prohibiting her from expending or appropriating any additional ARPA funds, the New Mexico Supreme Court issued a prohibitory writ of mandamus and order providing that the governor and state treasurer shall not transfer, encumber, commit, expend or appropriate any additional ARPA funds absent legislative appropriation, because the amount of discretion the federal government left to New Mexico in allocating the ARPA funds compelled a conclusion that the federal funds were subject to legislative appropriation. *State ex rel. Candelaria v. Grisham*, 2023-NMSC-031.

Governor has almost unlimited authority to suppress insurrection, and is himself the judge as to the local condition requiring it. 1919 Op. Att'y Gen. No. 19-2416.

Governor's authority not to be invaded by legislature. — Any attempt by the legislature to invade the authority vested in the governor by virtue of this section would be interference by one department of the government with another, contrary to Article 3 of the constitution. 1951 Op. Att'y Gen. No. 51-5438.

Limitation imposed by former 20-6-2 NMSA 1978, prior to its 1953 amendment, on the issuance of certificates of indebtedness by the governor without calling a special session of the legislature, was not in conflict with this section as it did not interfere with the governor's power to call out the militia. 1951 Op. Att'y Gen. No. 51-5438.

Governor does not have authority to legislate regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor § 4; 53 Am. Jur. 2d Military and Civil Defense §§ 3, 32, 34.

Mandamus to governor, 105 A.L.R. 1124.

Prohibition as means of controlling action of governor, 115 A.L.R. 14, 159 A.L.R. 627.

Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A.L.R. 1053.

War, constitutionality, construction and application of statute conferring emergency powers on governor during, 150 A.L.R. 1488.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

6 C.J.S. Armed Services § 288 et seq.; 81A C.J.S. States § 130.

(14) U.S. Const. art. II, § 3

Sec. 3. [Powers and Duties of the President]

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

(15) ROA 1994, §2-16-1(C)

§ 2-16-1 PURPOSE.

(A) Issues have arisen in the past and will arise in the future over the respective duties and obligations of the City Council, the legislative branch of city government, and the Mayor, the executive branch of city government.

(B) Litigation, while available to resolve these issues, does not serve the best interests of the city in terms of ensuring an expeditious resolution that minimizes adversity.

(C) The voters of the City of Albuquerque approved a City Charter amendment directing that disputes over the respective duties and obligations of the legislative and executive branches of city government be resolved by a three person conference committee utilizing procedures to be adopted by ordinance.

(D) This article is adopted in compliance with the City Charter to establish the procedures for the Intragovernmental Conference Committee.

(Ord. 15-2010)

(16) ROA 1994, § 3-1-2

§ 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)

(17) ROA 1994, §3-3-2-8

§ 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)

(18) ROA 1994, §3-2-2

§ 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)

(19) ROA 1994, §9-4-4-10

§ 9-4-4-10 PROCEDURES FOR RESPONSES TO REQUESTS FOR EMERGENCY TRANSPORT.

(A) The City through coordinated dispatch shall:

(1) Receive, evaluate, and categorize all requests for emergency transport of sick and injured persons within the community.

(2) Dispatch appropriate Fire Department response.

(3) Notify ambulance operator as to location and nature of call pursuant to written protocols prepared by the Medical Control Board.

(4) Take control of patient and scene and provide for patient care until care is transferred to a contracted emergency transport ambulance service.

(5) Continue patient care during transport when appropriate or upon the request of a contractor.

(6) Transport patients when medically necessary or when a contracted ambulance service is either delayed or unavailable.

(B) The ambulance transport providers shall respond to any request for emergency transport of sick or injured persons which has been referred to the ambulance provider by the City, pursuant to contract with the City.

(Ord. 40-1997; Am. Ord. 2017-001)

(20) ROA 1994,
§ 9-4-4-4(E)

§ 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)

(21) ROA 1994,
§§ 3-1-13 to -19, 23

§ 3-1-13 VACATION LEAVE.

(A) Vacation leave will accrue on a biweekly basis from the day of a city employee's current permanent employment. Vacation leave may be taken as accrued, upon approval of the employee's department head or designee. Hours worked in addition to a regular work week as given below, shall not entitle an employee to additional vacation. The city shall not compensate employees and officials for unused vacation time, except:

(1) Pursuant to a collective bargaining agreement; or

(2) Any permanent employee separating from the city service is eligible to be compensated for accrued vacation leave as provided for in the Personnel Rules and Regulations.

(B) Vacation leave will accrue as follows:

Continuous Service	Reg. Work Week	Biweekly Accruals	Accrual Year
Continuous Service	Reg. Work Week	Biweekly Accruals	Accrual Year
Less than 5 years:	40 hours	3.85 hours	100 hours
	56 hours	5.39 hours	140 hours
More than 5 years BUT less than 10 years:	40 hours	4.62 hours	120 hours
	56 hours	6.47 hours	168 hours
More than 10 years BUT less than 15 years:	40 hours	5.54 hours	144 hours
	56 hours	7.76 hours	201.6 hours
More than 15 years:	40 hours	6.16 hours	160 hours
	56 hours	8.62 hours	224 hours

(C) The Mayor and the City Councillors do not accrue vacation time. The Mayor sets his or her own hours and days of work, consistent with his Charter position as a full-time official. Similarly, Councillors set their own hours and days of work, consistent with their duties to attend meetings and attend to their other responsibilities.

(D) Vacation accumulation will be computed as of the pay period including December 31 each year. The excess over 78 biweekly accruals shall be dropped from the record.

(E) No vacation time may be accrued or accumulated by classified or unclassified employees or officials except as provided by this section or as provided by a collective bargaining agreement entered into consistent with §§ 3-2-1 et seq., Labor- Management Relations.

('74 Code, § 2-9-14) (Ord. 52-1978; Am. Ord. 52-1988; Am. Ord. 30-1989; Am. Ord. 29-1998; Am. Ord. 7-2010)

§ 3-1-14 SICK LEAVE.

(A) Permanent city employees on a regular work week of 40 hours will accrue sick leave at the rate of 3.70 hours biweekly with a maximum accumulation of 1,200 hours allowed. Employees on a regular work week of over 40 hours shall accumulate additional sick leave both biweekly and maximum accumulation on a basis proportional to the 40-hour week. Permanent employees employed for a regular work week of 20 hours shall be entitled to half the leave benefits authorized for full-time, permanent employees of the city; leave benefits shall be prorated for employees employed for a regular work week of more than 20 hours.

(B) Sick leave will accrue on a biweekly basis from the date of current, permanent, full-time, probationary or non-probationary employment. Hours worked in addition to a regular work week as listed above shall not entitle an employee to additional sick leave accumulation.

(C) Pro-rata conversion to cash payment or to vacation time of sick leave exceeding certain accumulations will be provided for in the Personnel Rules and Regulations. Pro-rata or full conversion of sick leave to early retirement will be provided for in the Personnel Rules and Regulations. Personnel Rules and Regulations providing for conversion to cash payment or to vacation time of sick leave exceeding certain accumulations shall be the same for classified and unclassified employees.

(D) Proper and reasonable provisions for controlling and verifying the use of sick and emergency leave will be established in the Personnel Rules and Regulations.

(E) In the event that collective bargaining agreements make reference to sick leave benefits, the reference will be to the ordinance as it was in effect at the time the agreement was ratified.

(F) No sick leave may be accrued or accumulated by classified or unclassified employees or officials except as provided by this section or as provided by a collective bargaining agreement entered into consistent with §§ 3-2-1 et seq., Labor-Management Relations.

('74 Code, § 2-9-15) (Ord. 52-1978; Am. Ord. 29-1998; Am. Ord. 7-2010)

§ 3-1-15 INJURIES IN PERFORMANCE OF DUTY.

(A) Any employee who is injured or who suffers occupational disease in the performance of his duties and who, as a result of such injuries or disease, receives weekly benefits under the Workers' Compensation Act of New Mexico, §§ 52-1-1 et seq. NMSA 1978, shall be granted injury time with full pay so long as a qualified doctor of Medicine (M.D.), Osteopathy (D.O.), or Podiatry (D.P.M.) designated by the city certifies that the injury required the employee's absence from his or her work. The Chief Administrative Officer may withhold payment of injury time to any employee if, upon investigation, the Chief Administrative Officer desires that the payment of injury time be withheld until such employee has settled his or her claim under the Workers' Compensation Act of New Mexico, §§ 52-1-1 et seq. NMSA 1978, against the city.

(B) Injury time shall be in addition to the number of days sick leave accumulated. An employee placed in physical layoff status shall return to the first available position closest to his or her former grade or classification as possible, for which he or she can qualify, when a qualified doctor of Medicine (M.D.), Osteopathy (D.O.), or Podiatry (D.P.M.), selected by the Chief Administrative Officer, certifies that such employee is physically able to perform such duties according to the physical qualifications of the job.

(C) Injury time shall not exceed the following stated maximum hours for any accidental injury, recurrence or aggravation of this injury or for any occupational accidental injury, recurrence or aggravation of this injury; or for any occupational disease, recurrence or aggravation of this disease.

Regular Work Week Working Hrs.	***Maximum Injury Time***
40 hours	960 hours
56 hours	1,344 hours

(D) Subject to the deductions below, sums paid to employees under the terms of this section shall constitute a lien against any amount collected through settlement or court action by the employee against a third party causing the injury. Upon such payment the city may proceed against such third party in its own name or in the name of the injured employee to collect such injury time pay, and failure of the employee to cooperate with the city in any legal or other action will subject the employee to

disciplinary action. As a condition of employment, an employee who receives workmen's compensation or injury time shall permit the city to bring an action against any responsible party for recovery of all such benefits paid to the employee.

(E) Injury time pay shall not exceed the difference between Workmen's Compensation benefits received and an employee's regular pay. There shall be deducted from salary received for injury time or sick leave granted for injury or occupational disease, any cash compensation benefits received under the Workmen's Compensation Laws of the State of New Mexico. In the event a lump sum settlement is made of the employee's claim under the New Mexico Workmen's Compensation Laws, the percentage of his or her disability shall be agreed upon at the time such lump settlement is made and deduction shall be made from his or her injury time as a result of his or her disability under the Workmen's Compensation Laws of the State of New Mexico; provided that in no event shall the total amount deducted exceed the amount of the lump sum settlement made with the employee.

('74 Code, § 2-9-16) (Ord. 52-1978; Am. Ord. 69-1988; Am. Ord. 29-1998)

§ 3-1-16 LEAVE WITH PAY.

(A) Leave with pay may be authorized in writing by the Chief Administrative Officer for any employee to attend an official meeting where the good of the city service is involved, or to serve required court-related duty, or to attend an educational institution, or to secure special instruction, or to testify on behalf of the city in Court. If an employee is required to serve court-related duty, any compensation he or she receives for such duty shall be paid to the city by the employee.

(B) Four bargaining unit members who are designated by a union as the union's negotiating team pursuant to § 3-2-13, Labor-Management Relations, will receive leave with pay to attend scheduled bargaining sessions with the city negotiating team which occur during the employee's normal work hours. This benefit is limited to the bargaining necessary to negotiate the collective bargaining agreement and does not include ongoing negotiations during the term of a collective bargaining agreement. Leave for collective bargaining may begin no earlier than 60 days prior to expiration of an existing agreement and ends when tentative agreement is reached on a successor agreement. This leave must be approved by the Chief Administrative Officer upon the verification of the City's lead negotiator. The Chief Administrative Officer shall promulgate rules of procedure concerning leave for collective bargaining.

(C) Military leave with pay will be authorized for permanent employees who are members of the National Guard or Air National Guard of New Mexico or any organized reserve unit of the armed forces of the United States, including the Public Health Service, for a period not to exceed 15 working days in each federal fiscal year which begins October 1, in addition to other authorized leave, when they are ordered to active duty training with such units. Permanent employees who are members of an unorganized reserve component may be granted military leave not to exceed 15 working days in each federal fiscal year which begins October 1, for the purpose of attending organized courses of instruction or training periods authorized such personnel. Permanent employees called to active military duty in emergencies declared by the Governor or the President for short periods of time not to exceed 15 days may be granted military leave. Military leave with pay will be authorized for public safety employees covered under the respective collective bargaining agreements for a period not to exceed 420 hours for sworn, full-time police officers and full-time prisoner transport officers, and 528 hours for sworn, full-time firefighters per calendar year. To receive military leave benefits, an employee must file orders or a letter from their military commander containing the details of the leave with the City Human Resources Department, and their respective payroll department(s).

(D) Upon the specific recommendation of the department director, the Chief Administrative Officer may grant leave with pay for a period not to exceed six calendar months to permanent employees having at least five years continuous service and 12 calendar months to permanent employees having at least ten years continuous service in the city upon demonstration of extreme hardship, due to personal injury or sickness. No employee will be eligible for such leave unless he has clearly exhibited

exceptional performance of duties which have been specifically so certified by the employee's department head. Leave with pay for such purposes may be granted by the Chief Administrative Officer only after usage of vacation leave, sick and emergency leave and injury time, and only if the employee is not eligible for pension benefits under the city or state retirement programs or under Federal Social Security. A decision of the Chief Administrative Officer not to grant such leave with pay will not be the subject of a grievance as defined in this article.

(E) Leave with pay for an employee's birthday is authorized for any employee who is not represented by an employee organization as defined in §§ 3-2-1 et seq., Labor-Management Relations, in collective bargaining. If the employee's birthday falls on a day other than a normal working day, or if the employee is required to work on the birthday, the employee may select an alternate day, but such day must be approved by the division or department head.

(F) An employee under investigation by the city for alleged misconduct may be placed in leave with pay status during the investigation. Such leave shall be limited to 30 working days. Leave in excess of 15 working days shall require approval by a committee composed of the Director of the Human Resources Department, the Director of the Office of Employee Relations and the City Attorney, or their designees.

(G) The Chief Administrative Officer may develop a leave program for the purpose of allowing city employees to act as loaned executives.

(H) Leave with pay may also be authorized by the Chief Administrative Officer for services or activities of an employee outside of the scope of his or her employment which can be reasonably anticipated to directly or indirectly benefit the city.

(I) Parental leave with pay will be authorized for all employees qualified for benefits as described in § 3-1-6(E), who have completed at least 12 months of continuous service and have worked 1,250 hours within the 12 months preceding the date the parental leave will begin.

(1) Parental leave will be available for any eligible employee who experiences a qualifying event.

(a) A qualifying event includes a birth or the placement of a minor child with the employee for adoption or foster care (excluding the adopting of a stepchild or partner's child) experienced by the employee, the employee's spouse, or domestic partner.

(2) Parental leave will consist of 12 standard work weeks at full pay to be used within six months of the qualifying event. If an employee is eligible for leave under the Family and Medical Leave Act (FMLA), parental leave must be taken concurrently with leave under the FMLA.

('74 Code, § 2-9-17) (Ord. 52-1978; Am. Ord. 69-1988; Am. Ord. 30-1989; Am. Ord. 47-1989; Am. Ord. 29-1998; Am. Ord. 2017-022; Am. Ord. 2018-036)

§ 3-1-17 LEAVE WITHOUT PAY.

(A) An employee may be granted leave without pay for a period not to exceed one year as a result of sickness or disability when certified by a qualified doctor of Medicine (M.D.), Osteopathy (D.O.), or Podiatry (D.P.M.), or to run for public office, or for additional vacation time, or for good and sufficient reason which the Chief Administrative Officer considers to be in the best interests of the city.

(B) Leave without pay may be granted for the purpose of attending schools for courses only when it is clearly demonstrated that the subject matter is directly job related and will result in improved job effectiveness in the organization.

(C) A permanent employee who has been elected or appointed to a public office may be granted sufficient leave without pay to enable the employee to hold the office.

(D) Except under unusual circumstances, voluntary separation to accept employment not in the city service shall be considered by the Chief Administrative Officer as insufficient reason for granting a

leave of absence without pay.

(E) Such leaves of over two calendar weeks shall require written approval of the Chief Administrative Officer. Leaves of two calendar weeks or less may be granted by the employee's department head.

(F) For good cause and under exceptional circumstances, a request for extension of leave without pay may be approved by the Chief Administrative Officer.

('74 Code, § 2-9-18) (Ord. 52-1978; Am. Ord. 69-1988; Am. Ord. 29-1998)

§ 3-1-18 LAYOFF AND FURLOUGH.

(A) Layoff is defined as the involuntary separation of classified, nonprobationary employees from city service as a result of the abolishment of a position, program elimination or a lack of funds. Probationary, unclassified, temporary, seasonal and student employees are not eligible for layoff privileges.

(B) The Chief Administrative Officer and the Director of the Human Resources Department are responsible for approving all layoffs and offering transfers or placement offers to employees who are or may be identified for layoff. Prior to a layoff, the Chief Administrative Officer shall develop a layoff plan which must be based on seniority principles and applicable collective bargaining agreements.

(C) If practicable, prior to the implementation of the layoff plan, the Chief Administrative Officer shall offer voluntary transfers to employees affected by the plan to avoid placing employees in layoff status. These voluntary transfers will be offered using seniority principles and respecting any applicable collective bargaining agreements. If practicable, the layoff plan shall provide for the retention of employees with more than five years of continuous city service. Employees placed in layoff status will be terminated two years from the effective date of layoff if they have not been placed or upon refusal to accept an offer of transfer or placement of equal grade or comparable pay.

(D) Furlough is defined as the temporary placement of an employee in a non-duty, non-pay status for budgetary reasons. Furloughs may be voluntary or mandatory.

(E) The Chief Administrative Officer and the Director of the Human Resources Department are responsible for imposing furloughs subject to any applicable collective bargaining agreements. Furloughs shall be implemented pursuant to a plan approved by the Chief Administrative Officer which at a minimum shall provide:

(1) The employees impacted and the furloughs to be imposed;

(2) Furloughed employees may not use annual leave, sick leave, compensatory time or any other leave in place of any unpaid furlough;

(3) Furloughs shall not constitute a break in service and shall not affect an employee's seniority status;

(4) Furloughs shall not affect the accrual of leave; and

(5) Medical, dental, vision and any other insured benefits coverage shall not be impacted by the furloughs.

(Ord. 21-2002; Am. Ord. 8-2010)

§ 3-1-19 RESIGNATIONS.

(A) Any employee of the city wishing to leave the service in good standing shall notify his or her immediate supervisor in writing at least two weeks before leaving.

(B) Unauthorized absence from work for a period of three consecutive regularly scheduled work shifts or three working days, whichever is greater, may be considered as an automatic resignation. Such an automatic resignation is not the subject of a grievance as defined in this article, but shall be subject to the procedure in § 3-1-22(C) of this article.

('74 Code, § 2-9-19) (Ord. 52-1978; Am. Ord. 29-1998)

§ 3-1-23 DISCIPLINARY ACTIONS.

(A) (1) Employees may be disciplined by written reprimand, suspension, demotion or dismissal. Just cause for discipline is any behavior significant or substantial in nature relating to the employee's work that is inconsistent with the employee's obligation to the city. Just cause shall also include prohibited retaliation as defined in the Whistleblower Ordinance and the Accountability in Government Ordinance and the filing of frivolous complaints or complaints based on false or confidential information pursuant to the Whistleblower Ordinance and the Accountability in Government Ordinance. The Chief Administrative Officer may enumerate in Personnel Rules and Regulations examples of behaviors that constitute just cause.

(2) The Chief Administrative Officer, a Deputy Chief Administrative Officer, a department director or an acting department director may impose any discipline. Division heads may issue reprimands and suspend an employee for five days or less after informing the department head. An employee's immediate supervisor may issue a reprimand after informing the division head or department head.

(3) Prior to passage of any year-end appropriation clean-up bill, the Chief Administrative Officer shall review expenditures of each City program strategy and determine which program strategies overspent their annual appropriations in excess of five percent or $100,000, whichever is lower, prior to Council appropriation of the amount overspent. This level of overexpenditure constitutes a violation of §§ 2-11-12 and 2-11-16 ROA 1994. Because management of program finances to conform to City ordinances is a primary responsibility of all City program directors, the Chief Administrative Officer shall place a written reprimand in the personnel file of any program director whose program is overspent by five percent or $100,000, whichever is lower, prior to Council appropriation. A program director who receives three reprimands for overspending his or her budget prior to the passage of any year-end appropriation clean-up bill by the Council during a five-year period demonstrates a lack of financial management skills critical to fulfilling the duties of a program director and, therefore, shall be demoted one grade and transferred to a position without financial management responsibility.

(4) As a requirement of assuming office, each department director shall execute an employment contract with the City, one of the provisions of which shall be that he or she will not allow their department to overspend their appropriated budget nor allow any program strategy to overspend its appropriated budget prior to the passage of any year-end appropriation clean-up bill by the Council. Department directors responsible for departments that overspend their budget prior to the passage of any year-end appropriation clean-up bill in two years during a period of four years shall be terminated. The Chief Administrative Officer shall place a written reprimand in the personnel file of any department directors in the event that a program in the department under the responsibility of the director similarly overspends its budget appropriation.

(B) No person except the Chief Administrative Officer shall discipline heads of departments. Only the Accountability in Government Committee may discipline the Director of the Office of Internal Audit and Investigations. In addition, only the Director of Council Services may discipline other employees of the Department of Council Services, and only the Director of the Office of Internal Audit and Investigations may discipline other employees of the Office of Internal Audit and Investigations.

(C) Before discipline is imposed, the employee shall be notified of the reasons for which discipline is contemplated, a summary of the evidence against the employee, and the employee's right to respond to the proposed action. After giving the employee the notice of contemplated action and before the employee makes any written or oral response, the supervisor contemplating the discipline shall request review by the City Employee Mediation Program Coordinator of the circumstances on

which the contemplated action is based in an effort to avoid the discipline. Mediation shall occur if it is deemed appropriate by the Coordinator. After this review or if mediation is unsuccessful, the supervisor may continue with the contemplated disciplinary procedure by giving the employee the right to respond to the notice of contemplated action.

(D) Suspensions shall not exceed 90 calendar days for any offense. The Chief Administrative Officer or department head has the option on a suspension of five days or less to prohibit the employee from attending the work place or to allow the employee to work through the suspension with pay. Suspensions may be held in abeyance for a stated period of no longer than six months.

(E) The Chief Administrative Officer shall promulgate rules of procedure concerning disciplinary actions.

(F) Any disciplinary action shall be noted in the employee's personnel file.

('74 Code, § 2-9-24) (Ord. 52-1978; Am. Ord. 48-1988; Am. Ord. 30-1989; Am. Ord. 55-1989; Am. Ord. 29-1998; Am. Ord. 13-2001; Am. Ord. 9-2002; Am. Ord. 2-2004; Am. Ord. 1-2005)

(22) ROA 1994,
§§ 9-4-4-1 to -99

PART 4: EMERGENCY MEDICAL SERVICES

§ 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)

§ 9-4-4-7 PROVIDERS ADVISORY COMMITTEE.

The Mayor shall appoint a Providers Advisory Committee. The Mayor shall appoint one Emergency Medical Technician (EMT) to the Committee from each EMS operator within Bernalillo County. The Mayor shall appoint one additional EMT from the Bernalillo County Fire Department, and one additional EMT from the Albuquerque Fire Department that will serve as the Chair. The Mayor shall appoint one EMT employed by the City Fire Department and one EMT employed by providers of ambulance services. The Providers Advisory Committee shall assist the Board in the performance of their duties through advice and consultation. The Committee shall meet at the call of its chairperson. Initial members shall have staggered terms and, thereafter, the term of appointment shall be for two years, and there shall be no limit on consecutive terms.

('74 Code, § 6-28-8) (Ord. 38-1989; Am. Ord. 12-1991; Am. Ord. 9-1993; Am. Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-8 911 SYSTEM.

The 911 System shall be the focal point for:

(A) Receipt of all requests for assistance for and emergency transport of sick and injured persons.

(B) Dispatch of all responses to requests for assistance and emergency transport of sick and injured persons.

(Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-9 PROCEDURES FOR BEING INCLUDED IN THE 911 SYSTEM.

(A) The Mayor shall enter into at least one contractual agreement with an operator to provide emergency transport ambulance services in the city pursuant to the 911 system. The application and request for proposal for such contract shall be subject to the City purchasing regulations.

(B) There shall be at least one contract awarded to provide emergency transport ambulance services.

(Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-10 PROCEDURES FOR RESPONSES TO REQUESTS FOR EMERGENCY TRANSPORT.

(A) The City through coordinated dispatch shall:

(1) Receive, evaluate, and categorize all requests for emergency transport of sick and injured persons within the community.

(2) Dispatch appropriate Fire Department response.

(3) Notify ambulance operator as to location and nature of call pursuant to written protocols prepared by the Medical Control Board.

(4) Take control of patient and scene and provide for patient care until care is transferred to a contracted emergency transport ambulance service.

(5) Continue patient care during transport when appropriate or upon the request of a contractor.

(6) Transport patients when medically necessary or when a contracted ambulance service is either delayed or unavailable.

(B) The ambulance transport providers shall respond to any request for emergency transport of sick or injured persons which has been referred to the ambulance provider by the City, pursuant to contract with the City.

(Ord. 40-1997; Am. Ord. 2017-001)

§ 9-4-4-11 JUDICIAL REVIEW.

All actions for judicial review must be filed within 30 days of receipt of notice of the determination in the Second Judicial District Court in Bernalillo County. All determinations made by the Mayor shall be sustained unless arbitrary, capricious, contrary to law, clearly erroneous, or not based upon substantial evidence.

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

§ 9-4-4-99 PENALTY.

Any person who violates § 9-4-4-5(C)(5) shall be deemed guilty of a petty misdemeanor and, upon conviction thereof, shall be subject to the penalty provisions set forth in § 1-1-99 of this code of ordinances. Every violation shall be a separate misdemeanor. Each day such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such hereunder.

('74 Code, § 6-28-13) (Ord. 9-1993; Am. Ord. 2017-001)

(23) ROA 1994, § 3-2-5

§ 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)

(24) City Charter art. I

ARTICLE I. INCORPORATION AND POWERS

The municipal corporation now existing and known as the City of Albuquerque shall remain and continue to be a body corporate and may exercise all legislative powers and perform all functions not expressly denied by general law or charter. Unless otherwise provided in this Charter, the power of the city to legislate is permissive and not mandatory. If the city does not legislate, it may nevertheless act in the manner provided by law. The purpose of this Charter is to provide for maximum local self government. A liberal construction shall be given to the powers granted by this Charter.

(Adopted at Special Election, June 29, 1971.)

(25) City Charter art. IV,
§ 10(e) & (h)

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.

(26) City Charter art. IV, § 8

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.

(27) City Charter art. V, § 3

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.

(28) City Charter art. V,
§ 4(c)& (l)

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.)

(29) City Charter art. XIX

ARTICLE XIX. [DETERMINATION OF SEPARATION OF POWERS ISSUES UNDER THE CHARTER]

A procedure for resolving disputes between the executive and legislative branches of government with respect to their respective duties and obligations under the City Charter shall be established by ordinance adopted by the Council after consultation with the Mayor. The ordinance shall establish a conference committee for the determination of the role of the City Council and the Mayor under the Charter. The committee shall be limited to making determinations on issues raised by either the Mayor or the City Council. The City Attorney shall not participate as either an advocate before or advisor to the committee. The committee shall be comprised of three members. The Mayor shall appoint one member and the Council shall appoint one member. The two members so appointed shall select the third member to serve as the chairperson of the committee. The appointment of a committee member by one appointing authority shall not be approved or disapproved by the other appointing authority.

(Article XIX adopted at Regular Municipal Election, October 6, 2009.)

(30) City Charter, art. XI, § 3

Section 3. MAYOR'S APPROVAL OR DISAPPROVAL; OVERRIDE VETO.

The Mayor shall have presented for approval every proposed ordinance, resolution or act creating rights or duties, and if the Mayor approves, shall within ten days from presentation sign it and deposit it with the City Clerk, and if the Mayor disapproves, the Mayor shall likewise within ten days return it to the Council with objections and the proposal shall not be effective unless two-thirds of the entire membership of the Council at the next regularly scheduled meeting approve the proposal. If the Mayor shall fail to approve or disapprove any such ordinance, resolution or act within ten days after presentation it shall nevertheless be in full force and effect as if the Mayor had approved the same. The Mayor's veto power shall not extend to any measure approved by the voters in accordance with the initiative procedure of this Charter and such measure shall be effective on the date approved by the voters or on any other effective date as stated in the measure.

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