

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

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

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

According to your letter: “We [Village of Hatch] have had several billings from the [City of Las Cruces staff] operator that have been questioned by our [Village] administrator and the Hatch

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

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

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



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Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

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