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May 11, 2011

OPINION
OF
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Opinion No. 11-04

TO: Randy M. Autio, Acting County Administrator¹
Los Alamos County
133 Central Park Square
Los Alamos, New Mexico 87544

BY: Elizabeth A. Glenn
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QUESTION:

May the Los Alamos County Charter properly require that certain capital projects of Los Alamos County receive the prior approval of County voters?

CONCLUSION:

Los Alamos County, which has adopted a home rule charter, may legally require the approval of County voters before the County proceeds with a capital project.

¹ This opinion was requested by the late State Representative Jeannette O. Wallace and we respectfully address the opinion directly to the Los Alamos County government on behalf of which Representative Wallace made her request.

FACTS:

An amendment to the Los Alamos County Charter was proposed that would require the County to hold an annual election to obtain voter approval of capital projects with a total cost of one million dollars or more.² The Los Alamos County Attorney at the time the amendment was proposed reviewed the amendment and concluded that, if adopted, the amendment would be unlawful. See memorandum from Mary M. McInerny, County Attorney to County Council Members (May 4, 2010).

Los Alamos County is an incorporated county under Article X, Section 5 of the New Mexico Constitution and has adopted a home-rule charter under Article X, Section 6.³ The purpose of the constitutional home rule provision “is to provide for maximum local self-government.” N.M. Const. art. X, § 6(E). See also New Mexicans for Free Enterprise v. City of Santa Fe, 2006 NMCA 7, ¶ 16, 126 P.3d 1149, 1158 (home rule provision is intended “to devolve onto home rule municipalities remarkably broad powers” and “the utmost ability to take policymaking initiative”). Except for “the power to enact private or civil laws governing civil relationships,” a home rule municipality “may exercise all legislative powers and perform all functions not expressly denied by general law or charter.” N.M. Const. art. X, § 6(D). As noted by the New Mexico Supreme Court, “a home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act.” Apodaca v. Wilson, 86 N.M. 516, 520, 525 P.2d 876 (1974).⁴

² Based on our review of Los Alamos County’s current charter, it appears that the proposed amendment has not been adopted at this time.

³ Article X, Section 5 authorizes an incorporated county to “exercise ... all powers granted to municipalities by statute,” which includes authority to adopt a home rule charter under the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990).

⁴ In contrast, a municipality or county that has not adopted a home rule charter is limited to the authority granted by statute or implied from its express statutory authority. See State ex rel. Haynes v. Bonem, 114 N.M. 627, 630, 845 P.2d 150 (1992) (non-home rule municipality cannot act without express or implied statutory authority); El Dorado at Santa Fe, Inc. v. Board of County Comm’rs, 89 N.M. 313, 317, 551 P.2d 1360 (1976) (“[a] county is but a political subdivision of the State, and it possesses only such powers as are expressly

For purposes of Article X, § 6(D), a general law “applies generally throughout the state, or is of statewide concern as contrasted to ‘local’ or ‘municipal’ law.” Apodaca, 86 N.M. at 521, 525 P.2d at 881. A general law “expressly denies” a home rule municipality’s power to legislate if it “evinces any intent to negate such municipal power, whether there is a clear intent to preempt that governmental area from municipal policymaking, or whether municipality authority to act would be so inconsistent with the [general law] that the [general law] is the equivalent of an express denial.” New Mexicans for Free Enterprise, 2006 NMCA 7, ¶ 19, 126 P.3d at 1159 (holding that the Minimum Wage Act did not conflict with and did not expressly deny a home rule municipality’s ordinance that imposed a higher minimum wage). See also Protection & Advocacy Sys. v. City of Albuquerque, 2008 NMCA 149, 195 P.3d 1 (holding that state law preempted a home rule municipality’s assisted outpatient treatment ordinance).

New Mexico statutes affirmatively require voter approval before a municipality may act in a variety of contexts. These include financing for capital projects, N.M. Const. art. IX, § 12, NMSA 1978, §§ 3-30-1 to -9 (1965, as amended through 1985); the adoption of ordinances imposing a gross receipts tax, NMSA 1978, § 3-18-2(D) (1980); the acquisition of a municipal utility financed with revenue bonds, id. § 3-23-2 (1979); and the adoption of an ordinance for the sale or lease of municipal utility property or real property with an appraised value of more than \$25,000. Id. § 3-54-1 (1999). We did not find a statute addressing a municipality’s authority or lack of authority to require voter approval for municipal capital projects generally.⁵


granted to it by the Legislature, together with those necessarily implied to implement those express powers”).

⁵ The Los Alamos County Attorney’s legal memorandum concluding that the County could not require voter approval of capital projects relied on the New Mexico Supreme Court’s decision in Johnson v. City of Alamogordo, 1996 NMSC 4, 910 P.2d 308. In that case, the City of Alamogordo blocked the efforts of certain of its citizens to use the referendum procedures under state law and the Alamogordo charter to place an ordinance increasing the rates for water and sewer services on the ballot. The Court sided with the city and held that the applicable law and charter provision, which permitted a referendum on the city’s ordinances and resolutions, applied only to ordinances and resolutions reflecting the city’s legislative acts, not its administrative or executive acts. We do not read Johnson as prohibiting a home rule municipality from affirmatively requiring voter approval for capital projects or other municipal action, absent a general law that expressly denies it.

The Municipal Charter Act, which implements Article X, Section 6, expressly authorizes a home rule charter to “provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including ... the petition and referendum of any ordinance, resolution or action of the municipality...” NMSA 1978, § 3-15-7 (1965) (emphasis added). Particularly in the absence of a general law expressly denying a referendum on capital projects,⁶ this provision provides additional support for the proposed amendment to the Los Alamos County Charter.

Based on our review of New Mexico statutes, it appears that a home rule municipality’s power to require voter approval of capital projects has not been “expressly denied” by general law and is not preempted by or is so inconsistent with state law that it amounts to an express denial. Accordingly, we conclude that the proposed amendment to the Los Alamos County Charter requiring voter approval of capital projects in excess of one million dollars is legally permissible. Our conclusion is limited to Los Alamos County’s authority to provide for voter approval of the specified capital projects in the County Charter. This opinion does not address the legality or propriety of a referendum on capital projects in the absence of a Charter provision expressly authorizing such a referendum.


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⁶ See Westgate Families v. County Clerk of Los Alamos County, 100 N.M. 146, 148, 667 P.2d 453 (1983) (holding that state zoning laws provided for zoning “only” by a majority vote of the governing body and thus expressly denied, a Los Alamos County ordinance that allowed zoning by referendum).