ATTORNEY GENERAL OPINION
No. 85-4

OPINION
OF
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Attorney General

To: Jim Baca
Commissioner of Public Lands
State Land Office
310 Old Santa Fe Trail
Santa Fe, New Mexico 87504

By: PAUL BARDACKE
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Question:

Article V, section 1 of the City Charter of the City of Albuquerque provides in part that no elector may be a candidate for the office of Mayor who holds a full-time elective office other than Mayor or Mayor Pro Tem. Is this provision constitutional?

Answer:

The provision that no full-time elective official other than the Mayor or the Mayor Pro Tem can be a candidate for the office of Mayor is unconstitutional because it violates article VII, section 2 of the New Mexico Constitution.

Discussion:

Article V, section 1 of the Albuquerque City Charter provides as follows:

> The Mayor shall be a registered qualified elector and resident of the City and shall be elected by the registered qualified electors of the City. No elector holding a full-time elective position (except a Mayor running for re-election or a Mayor Pro Tem running for election) shall be eligible to become a candidate for Mayor.

Article X, section 6 of the New Mexico Constitution, known as the municipal home-rule amendment, enables a home-rule city to "exercise all legislative powers and perform all functions not expressly denied by general law or charter." Subsection E of the amendment states that its purpose is to provide for maximum local self-government and that a liberal construction shall be given to the powers of municipalities.

In New Mexico, a home rule municipality does not look to the legislature for a grant of power to act. It looks only to legislative enactments to see if any express limitations have been placed on its power to act. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974). A home-rule municipality's actions must also be consistent with the constitution. 86 N.M. at 521.

A New Mexico constitutional provision exists which we have concluded does conflict with the charter provision at issue. Article VII, section 2.A. of the New Mexico Constitution provides as follows:

> Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.

Article V, section 13 of the constitution does contain additional qualifications for the holders of municipal offices. That section provides as follows:

> All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed. The legislature

> is authorized to enact laws permitting division of counties of this state into county commission districts. The legislature may in its discretion provide that elective county commissioners reside in their respective county commission districts.

The constitution provides no other qualifications for the holders of public municipal offices. The home-rule amendment, article X, section 6 of the constitution, contains no grant of authority to home-rule municipalities to impose additional qualifications for elective public office.

In Gibbany v. Ford, 29 N.M. 621 P. 577 (1924), the New Mexico Supreme Court interpreted article VII, section 2.A. In that case, a state statute required that, where a municipality is divided into wards, members of the municipal council must be residents of the wards from which they are elected. When Gibbany was decided, no constitutional requirement existed that members of municipal councils reside in the wards from which they are elected. Article X, section 6 of the constitution, adopted after Gibbany, now contains that requirement for municipalities which choose to district under the provisions of that section. See 1971 Op. Att'y Gen. No. 71-118. In Gibbany, the Supreme Court struck down the statute requiring residency within wards. The Court said the following concerning the provisions of article VII, section 2:

> ...[h]ere the Constitution gives the right to every person meeting the qualifications prescribed in the Constitution to hold any public office, and to say that the Legislature may restrict that right by providing that, although a person resides within a municipality, he cannot hold the office of alderman unless he meets still another requirement entirely beyond those set forth in the Constitution, is too obviously unconstitutional to warrant serious argument.

29 N.M. at 629.

In another case, the New Mexico Supreme Court held constitutional a statute which required certain public officers to post a bond before assuming office. See, Board of Commissioners v. District Court, 29 N.M. 244, 223 P. 516 (1924). In that case, decided earlier in the same year as Gibbany, the Court said the following concerning the purpose of article VII, section 2.A.:

> ...Article 7, §2 of which is above quoted, relates generally to the elective franchise and right to hold office. It is concerned entirely with the definition of the personal qualifications and characteristics of persons who may vote, hold office, and sit as jurors. It does not purport to deal with anything else. Under such circumstances, the word "qualified," as employed in the section, must be held to be the equivalent of the word "eligible." The section is designed merely to point out the class of persons who are eligible to be chosen to hold public office and does not in any way attempt to deal with the subject of how, and in what manner, these officers shall qualify before entering upon the discharge of their duties....

29 N.M. at 263.

The Court determined that the requirement that bonds be posted did not limit the class of persons eligible

to hold office and was therefore not unconstitutional.

The city charter provision at issue here, however, does limit the class of persons eligible to run for, and therefore hold, the office of Mayor. Only electors, other than the incumbent Mayor and Mayor Pro Tem, who do not hold full-time elective positions are eligible. It is thus similar to the residency requirement struck down in Gibbany.

That this charter provision limits who can be a candidate for the office of Mayor and not, at least explicitly, who can hold that office is not significant, in our opinion. A provision which limits the class of those eligible to run for an office in the same manner limits the class of those eligible to hold the office, since only the successful candidate assumes the office.

Therefore, we conclude that the requirement in article V, section 1 of the City Charter of the City of Albuquerque that no elector may be a candidate for Mayor who holds a full-time elective office other than Mayor or Mayor Pro Tem violates article VII, section 2 of the New Mexico Constitution.

We have also analyzed whether the charter provision at issue here violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or the Equal Protection Clause of the New Mexico Constitution, article II, section 18. We have concluded that it does not violate the Equal Protection Clause of the United States Constitution. In Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836 (1982), the United States Supreme Court upheld the constitutionality of provisions of the Texas Constitution similar to the provisions of Albuquerque's charter at issue here. Those provisions had been attacked on federal equal protection and first amendment grounds. The New Mexico courts, however, might still determine that the charter restriction violates the Equal Protection Clause of the New Mexico Constitution. State courts are not bound by United States Supreme Court decisions when they interpret their own constitutions if no federal question is involved. Waters-Pierce Oil Company v. Texas, 212 U.S. 86, 29 S.Ct. 220 (1909). This analysis of the Equal Protection Clauses does not, of course, affect the conclusion stated above that the charter provision is unconstitutional because it violates article VII, section 2 of the New Mexico Constitution.