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OPINION
OF
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Opinion No. 88-14

By: Duncan Scott
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To: Senator Michael Alarid
1608 Escalante, SW
Albuquerque, NM 87104

QUESTION:

1. Whether elections for TVI [technical and vocational institute districts] may be held under the provisions of Chapter 168, Laws of 1985, or whether they must be held under the repealed provisions (22-6-1 through 22-6-34 NMSA 1978).

2. Whether the election for board members and the election for the mill levy comprise a single election or two elections being held at the same time, and if the latter, whether the same procedure may be followed for both.

CONCLUSION:

1. The board member elections must be held under the repealed provisions.

2. See analysis.

ANALYSIS:

1. Section 21-16-5 of the Technical and Vocational Institute Act, Sections 21-16-1 through 21-16-23 NMSA 1978 ("Act"), provides the mechanism for electing the initial and subsequent governing boards for a technical and vocational institute ("TVI") district:

A. The initial governing board of the technical and vocational institute district shall be composed of:

1. the board of the initiating school district, if only one school district is involved; or

2. if more than one district is involved in the initiation of the district, one member delegated from each participating governing board; however, if there are [sic] an even number of participating school districts, the boards of all such participating districts shall jointly appoint an additional member to the governing board of the technical and vocational district, who shall serve as a member at large.

B. At the second school board election held pursuant to Section 22-6-1 NMSA 1978 following the creation of the technical and vocational institute district or on September 11, 1979, whichever comes later, an election shall be held to elect seven members to the institute board to replace the members holding office under the provisions of Subsection A of this section.

1. Except where specific provision is otherwise provided by law, all election proceedings for institute district elections shall be conducted pursuant to the provisions of Sections 22-6-1 through 22-6-34 NMSA 1978, with the president of the institute serving in the place of the superintendent of schools in every case.

2. The board shall consist of seven separate positions and each such position shall be designated by number. Qualified electors seeking election to the school board shall file and run for only one of the numbered positions.

3. At the special election to be held September 11, 1979, members of the board of the technical and vocational institute district elected to positions 1, 3, 5 and 7 shall be elected for terms ending on February 28, 1981, and members elected to positions 2, 4 and 6 shall be elected for terms ending on February 28, 1983. Thereafter, each institute board member shall be elected for a term of four years. The elections shall be held in the same manner and at the same time as regular school district elections on the first Tuesday in February of each odd-numbered year beginning with the election to be held February 3, 1981, for the positions 1, 3, 5 and 7 which terms expire February 28, 1981. Persons elected to the board at the special election of September 11, 1979 shall take office upon canvass of the returns and a certification of the results.

C. A vacancy occurring on the institute board shall be filled in the same manner as provided for school board vacancies, Section 22-5-9 NMSA 1978.

D. A member of the institute board may be recalled pursuant to the provisions of Sections 22-7-1 through 22-7-16 NMSA 1978, except that such recall election may be held only at the same time as a regular school district election.

(Emphasis added.) The underscored language in paragraph B provides that school board elections will be held pursuant to Sections 22-6-1 through 22-6-34 NMSA 1978, an act governing school district elections. In 1985, however, the legislature repealed this act (except Section 22-6-5) and created a new "School Election Law," which is codified in the Elections Code at Sections 1-22-1 through 1-22-19 NMSA 1978. This new section governs school board elections. We thus must opine whether future TVI board elections will be held pursuant to the repealed Sections 22-6-1 to 22-6-34, or the new Sections 1-22-1 to 1-22-19.

The Supreme Court of New Mexico has considered the interpretation of "referencing statutes," which it defines as "[s]tatutes which refer to other statutes and make them applicable to the subject of legislation." State v. Armstrong, 31 N.M. 220, 235, 243 P. 333, 339 (1924). In Armstrong, the Court said:

In the construction of [referencing] statutes, the statute referred to is treated and considered as if it were incorporated into, and formed part of that which makes the reference.... [citations omitted] The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action, and the alteration, change, or repeal of the one, does not operate upon or affect the other.... [citations omitted].

* * *

It is a general rule that when a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and descriptive reference thereto, the adoption takes statutes as it exists [sic] at that time. The subsequent amendment or repeal of the adopted statute has no effect on the adopting statute, unless it is also repealed expressively or by necessary implication.

31 N.M. at 235, 243 P. at 339 (emphasis omitted). Thus, in New Mexico the subsequent amendment or repeal of the referenced statute does not affect its operation in the referencing statute. Treatises on statutory construction recognize that this is the general rule:

Where a reference statute incorporates the terms of one statute into the provisions of another act, "the two statutes coexist as separate distinct legislative enactments, each having its appointed sphere of action." As neither statute depends upon the other's enactment for its existence, the repeal of the provision in one enactment does not effect its operation in the other statute.

1A N. Singer, Sutherland Statutory Construction §23.32 (4th ed.). See also Hassett v. Welch, 303 U.S. 303 (1938).

TVI board elections thus must be held pursuant to the repealed sections unless the statute citing the repealed section has been repealed expressly or by necessary implication. There is no indication that the legislature has repealed, either expressly or by implication, the references in Section 21-16-5B to the repealed election law sections. Further, New Mexico law disfavors repeal by implication. See Galvan v. City of Albuquerque, 87 N.M. 235, 237, 531 P.2d 1208, 1210 (1975). It therefore is our opinion that TVI board elections must be held pursuant to repealed Sections 22-6-1 through 22-6-34 NMSA 1978.

2. Section 21-16-12 of the Act provides for a special assessment to fund a technical and vocational institution:

A. In each district in which a technical and vocational institute has been established, the board may call an election for the purpose of approving or disapproving taxes, not to exceed a rate of five dollars (\$5.00) on each one thousand dollars (\$1,000) of net taxable value, as that term is defined in the Property Tax Code [Chapter 7, Articles 35 through 38 NMSA 1978], which may be levied annually on all taxable property within the school district, to be used for current operations and retirement of bonds.

B. Upon approval of the authorization for the additional taxes by a majority of those qualified electors voting in the election and based upon an annual budget approved by the director of public school finance, the board of county commissioners shall annually levy the tax at the rate approved, or at any lower rate required by operation of the rate limitation provisions of Section 7-37-7.1 NMSA 1978 upon a rate approved pursuant to this section, upon the taxable property of the technical and vocational institute district. No election is required to lower the levy if the lower rate is required by operation of the rate limitation provisions of Section 7-37-7.1 NMSA 1978.

C. Levies imposed for technical and vocational institute financing shall be made at the same time and in the same manner as levies for other ad valorem taxes. Upon collection of the levy by the county treasurer, the proceeds shall be deposited in a bank approved by the board. The board is authorized through

its financial agent and upon its order to draw upon these funds for the purposes specified at each election.

D. An election to raise, lower or abolish the approved levy shall be called by the technical and vocational institute board upon receipt by it of a valid petition. To be valid, the petition shall be signed by electors of the technical and vocational institute district in a number equal to ten percent of the number of votes cast in the district for the office of governor at the last general election and shall state the question to be voted upon.

Section 21-16-16 provides two alternative procedures for the board to follow when calling a mill levy election:

In addition to the election procedures provided in Laws 1963, Chapter 108 [21-16-1 to 21-16-7, 21-16-11 to 21-16-15 NMSA 1978] for an election for the creation of a technical and vocational institute district and for an election for the approval or disapproval of a tax levy of not to exceed five mills for current operations and retirement of bonds of a technical and vocational institute, the election procedures set out in this act [21-16-16 to 21-16-24 NMSA 1978] may be used for such purposes.

Thus the first procedure is pursuant to Sections 21-16-1 through 21-16-7 and 21-16-11 through 21-16-15. As discussed above, elections under these sections must be held in accordance with the repealed provisions of Sections 22-6-1 through 22-6-34.

Sections 21-16-16 through 21-16-24 describe the second procedure. Section 21-16-19 states that the board can submit the levy "at any general election or at any special election called for that purpose." Placing the issue on the general election ballot, however, raises constitutional questions. Article VII, section 1 of the Constitution of New Mexico provides that "[a]ll school elections shall be held at different times from other elections." The Supreme Court of New Mexico has applied this section to special school bond elections. Johnston v. Board of Education, 65 N.M. 147, 333 P.2d 1051 (1958). However, in Daniels v. Watson, 75 N.M. 661, 668, 410 P.2d 193, 197 (1966), the Court held that junior college legislation falls outside "constitutional provisions relating to schools." That court said:

[I]t appears to us that the better-reasoned decisions sustain junior college legislation as being outside the constitutional provisions relating to schools and being solely creations of the legislature. Id.

Thus the constitutional requirement that "school elections" must be held at times different from other elections does not apply to junior college elections. We find substantial similarities between a junior college and a technical and vocational institute.¹ Further, when passing on the constitutionality of statutes, we must indulge every presumption in favor of their validity. Board of Directors of Memorial General Hospital v. County Indigent Hospital Claims Board, 77 N.M. 475, 423 P.2d 994 (1967). It therefore is our opinion that a TVI levy question may be held at the same time as other elections, including general elections.

In following the second procedure, the Board also may submit the levy question at a special election. Section 21-16-21 provides that the special election:

shall be called, held and conducted in the same manner as elections for members of the board of education, except that, if such special election is held at the same time as a bond election in the school district, the hours of voting shall be the same as may be provided by law for such bond election.

Because Section 21-16-21 refers to another statute -- "the same manner as elections for members of the board of education" -- we

1 Compare Section 21-13-2A ("junior college" means a public educational institution which shall provide not to exceed two years of training in the arts, sciences and humanities beyond the twelfth grade of the public high school curriculum; or in lieu of such training or in addition thereto, not to exceed two years of a vocational and technical curriculum and appropriate courses of study for persons who may or may not have completed the twelfth grade of public high school) with Section 21-16-2A ("technical and vocational institute" means a public educational institution which shall provide not to exceed two years of vocational and technical curricula and, in addition, some appropriate courses in the arts and sciences).

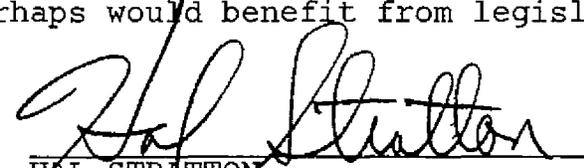
again face the question of interpreting a referencing statute. However, unlike Section 21-16-5, which referred to specific statutes, Section 21-16-21 refers to a general body of law. New Mexico case law provides that references to general areas of law adopt subsequent changes in the general law:

There is another form of adoption wherein the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied.

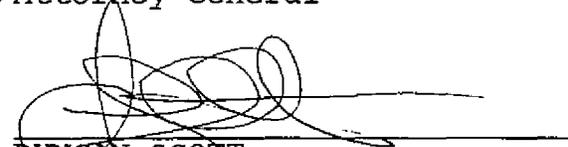
In re Heiman's Will, 35 N.M. 522, 526, 2 P.2d 982, 984 (1931).
Accord, Palermo v. Stockton Theatres, 32 Cal. 2d 53, 195 P.2d 1013 (1948); Davison v. Heinrich, 340 Ill. 349, 172 N.E. 770 (1930).

We must construe the general reference in Section 21-16-21 to "elections for members of the board of education" as adopting subsequent changes to school board election law, i.e., the new provisions of Sections 1-22-3 through 1-22-6. It is therefore our opinion that, pursuant to Section 21-16-16, which sets up two alternative election procedures, the board may hold a mill levy election pursuant either to the repealed Sections 22-6-1 through 22-6-34 NMSA 1978 or the new provisions at Sections 1-22-3 through 1-22-6 NMSA 1978.

We realize that our opinion means that TVI board elections might be run in accordance with one election procedure, while the mill levy election might follow another. We must assume, however, that the legislature was aware of existing law, including references to Sections 22-6-1 through 22-6-34 in Section 21-16-5, when it repealed Sections 22-6-1 through 22-6-34. City Comm'n v. State ex rel. Nichols, 75 N.M. 438, 444, 405 P.2d 924, 928 (1965). Nevertheless, the Act perhaps would benefit from legislative clarification.



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