

**Opinion No. 90-20**

October 29, 1990

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Elizabeth A. Glenn, Assistant Attorney General

**TO:** Honorable Toots Green, State Representative, 1019 Canyon Road, Alamogordo, NM 88310

**QUESTIONS**

Can a home rule municipality, pursuant to an initiative petition, enact an ordinance that would prohibit the local governing body from imposing any tax increase, whether property or gross receipts and compensating taxes, without first putting the question of the tax increase to a vote of the qualified electors of the municipality?

**CONCLUSIONS**

No, not if the ordinance alters the requirements of the statute imposing the tax.

**ANALYSIS**

On September 20, 1988, the voters in the City of Alamogordo approved the following ordinance pursuant to an initiative petition:<sup>1</sup>

**AN ORDINANCE REQUIRING AN ELECTION BEFORE THE CITY OF ALAMOGORDO IMPOSES ADDITIONAL OR INCREASED TAXES**

**WHEREAS, the State Legislature of the State of New Mexico has approved the levying of Municipal property and other taxes without a vote of the public; and**

**NOW THEREFORE** be it adopted by the City Commission of the City of Alamogordo as follows:

Section (1). **NO ADDITIONAL OR INCREASED TAXES WITHOUT VOTE OF PUBLIC.** The City Commission of the City of Alamogordo shall not increase or impose additional taxes, whether ad valorem, property or gross receipts and compensating taxes without first putting the question to a vote of the qualified electors of Alamogordo.

Section (2). **NO NEW ELECTION:** If a majority of the qualified electors of Alamogordo voting in any election called pursuant to Section 1 thereof vote against the imposition of the tax, the tax shall not be imposed and the question shall not be brought again before the citizens for one year from the date of the certification of the results of the election.

Section (3). EFFECTIVE DATE. This ordinance shall be effective on the 1st day of June, 1988.

(Emphasis added). Alamogordo has been a home rule municipality since 1983, when its voters adopted a city charter that provides for municipal home rule pursuant to Article X, Section 6 of the New Mexico Constitution. That provision states, in part:

**D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.** This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. **No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.**

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.

(Emphasis added).

The New Mexico Supreme Court addressed the extent of a home rule municipality's taxing authority in *Waksman v. City of Albuquerque*, 102 N.M. 41, 690 P.2d 1035 (1984), which prohibited a home rule city, after the effective date of a statute establishing a maximum license tax, from imposing a tax in excess of the statutory rate. The court acknowledged that, under N.M. Const. art. X, § 6(D), "a 'home rule' municipality in New Mexico need look to legislative enactments not for a grant of power to act, but only for express limitations on that power." *Id.* at 42, 690 P.2d at 1036 (citing *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974)). "Nevertheless," the court stated, "both our constitution and statutes specifically restrict the taxing power of a municipality," pointing to the restrictions in N.M. Const. art. X, § 6(D) and statutes governing municipal liquor taxes. *Id.* at 42-43, 690 P.2d at 1036-37. According to the court, a home rule municipality has no taxing power aside from state legislation; "[e]rgo, the municipality must comply with the authorizing legislation or it forfeits the granted power to tax." *Id.* at 43, 690 P.2d at 1037. See also AG Op. No. 89-04 (1989) (a home rule municipality did not have authority to pay public retirees' health insurance costs contrary to authorizing legislation).

Another instructive case is *Westgate Families v. County Clerk*, 100 N.M. 146, 667 P.2d 453 (1983), which held that a home rule county was precluded from zoning by referendum. According to the court, despite the county's home rule charter, its "authority to promulgate zoning ordinances must come from enabling legislation, and the exercise of power under a zoning ordinance must be authorized by statute." *Id.* at 148, 667 P.2d at 455. Although the enabling zoning legislation did not prohibit a referendum, the court observed that it expressly provided for zoning by representative bodies. The court concluded that the enabling statute "expressly denies an exercise of zoning power by

referendum, and... County is precluded by the Act from claiming the power to zone by referendum because the Act expressly provides for zoning by representative bodies." Id.

The legislature has prohibited municipalities from imposing income, property and excise taxes unless otherwise provided by law. NMSA 1978, § 3-18-2 (Repl. Pamp. 1985). The Municipal Gross Receipts Tax Act, NMSA 1978, §§ 7-19-1 to -9 (Repl. Pamp. 1990), allows the governing body of any municipality to impose by ordinance an excise tax on "the gross receipts of any person engaging in business in the municipality for the privilege of engaging in business in the municipality." Id. § 7-19-4. Subsection C of Section 7-19-4 states, in part:

Any such ordinance shall become effective on the date specified unless an election is held pursuant to this section. An election shall be called on the questions of disapproval or approval of any ordinance enacted pursuant to Subsection A of this section or any ordinance amending such ordinance:

(1) if the governing body chooses to provide in the ordinance that it shall not be effective until the ordinance is approved by the majority of the registered voters voting on the question at an election to be held pursuant to the provisions of a home rule charter or on a date set by the governing body and pursuant to the provisions of the Municipal Election Code governing special elections; or

(2) if the ordinance does not contain a mandatory election provision as provided in Paragraph (1) of this subsection, upon the filing of a petition requesting such an election if the petition is filed:

(a) pursuant to the requirements of a referendum provision contained in a municipal home-rule charter and signed by the number of registered voters in the municipality equal to the number of registered voters required in its charter to seek a referendum; or

(b) in all other municipalities, with the municipal clerk within thirty days after the adoption of such ordinance and the petition has been signed by a number of registered voters in the municipality equal to at least five percent of the number of the voters in the municipality who were registered to vote in the most recent regular municipal election.

The municipal gross receipts tax is a tax authorized by general law that does not require the governing body to provide for an election.<sup>2</sup> The ordinance approved by Alamogordo's voters attempts to deny the governing body the power conveyed by NMSA 1978, § 7-19-4, contrary to Article X, Section 6 of the Constitution, and purports to impose an election requirement contrary to the procedures dictated by the statute. Under *Waksman*, a municipality's power to tax depends on compliance with authorizing legislation. Under *Westgate Families*, where a home rule municipality depends for its power on an authorizing statute, the municipality cannot validly act by straying from the statute's express requirements. In our opinion, therefore, home rule municipalities do not have the power through initiative petition to alter the tax scheme mandated by the state constitution and statutes.

## ATTORNEY GENERAL

HAL STRATTON Attorney General

### GENERAL FOOTNOTES

[n1](#) Article X, Section 1 of the Alamogordo City Charter permits an ordinance to be proposed by initiative petition and adopted by the Commission or, if the Commission fails to adopt the ordinance, by a majority vote of the electorate.

[n2](#) Other constitutional and statutory provisions pertaining to municipal property and gross receipts taxes require a vote in the municipality and, therefore, are not necessarily inconsistent with Alamogordo's ordinance. See N.M. Const. art. VIII, § 2 (laws authorizing additional taxes to be levied outside the total public debt limit require approval of the majority of voters in the taxing district); NMSA 1978, § 3-18-2 (Repl. Pamp. 1985) (requiring a majority vote for authorized excise taxes on specific products and services); NMSA 1978, §§ 7-19-10 to -18 (Repl. Pamp. 1990) (requiring a majority vote of qualified electors before imposing a supplemental municipal gross receipts tax); NMSA 1978, §§ 7-19A-1 to -7 (Repl. Pamp. 1990) (requiring a majority vote of qualified electors before imposing a special municipal gross receipts tax).