

November 20, 2008 Creation of Special Assessment District

The Honorable Steve Komadina
New Mexico State Senator
P.O. Box 2085
Corrales, NM 87048

The Honorable Lynda M. Lovejoy
New Mexico State Senator
P.O. Box 705
Crownpoint, NM 87313

Re: Opinion Request - Creation of Special Assessment District

Dear Senators Komadina and Lovejoy:

You requested an Attorney General's opinion concerning the Rio Rancho City Council's creation of Special Assessment District No. 7. You ask whether the procedures followed by the City Council, particularly as to notice and hearing, comply with state law and are consistent with basic principles of due process. We conclude, based on relevant New Mexico constitutional, statutory and case law authorities, and information provided or available to us at this time, that the notice and hearing processes appear to have met the legal requirements set out in statute.[1] Our review of the City Council's actions throughout the numerous regular and special meetings that occurred over at least seventeen months at numerous public meetings seem to reflect substantial efforts by the City Council to address concerns raised by impacted property owners.

We understand that, in late 2006, Rio Rancho City Council (hereinafter "Council") believed the creation of a special assessment district was necessary to deal with extensive flooding in the area that occurred in June through September of 2006, and, in late 2006, began the process of establishing Special Assessment District 7 (hereinafter "District 7").[2] See Agenda Briefing Memorandum from Public Works Department for Dec. 12, 2007 meeting. In May 2007, the Council expanded the coverage of the proposed District and the improvements proposed to be made. Id. In December, 2007, the Council adopted a provisional order relating to the establishment of District 7.[3] See December 12, 2007 Council meeting minutes, item 11, and Resolution 103, adopted at that meeting and attached to those minutes. See also NMSA 1978, § 3-33-1(A)(1) (2001).[4] This resolution describes the over \$70,000,000 in proposed District improvements, including street improvements, storm drainage improvements, sanitary sewer improvements, water improvements and utility improvements, which are all proper projects under the law. See NMSA 1978, § 3-33-3 (2001). The resolution also sets January 9, 2008 as the date for the statutorily required hearing which is described in more detail below.

By law, a governing body that has adopted a provisional order creating a special assessment district, like that adopted by the Council on December 12, 2007, is required

to conduct a hearing on that order, and must provide notice (which may be from the city's engineer, among other municipal officials) of the date and place of that hearing, describe the improvements that are to be constructed and their general location, and notify persons that they may ascertain in the municipal clerk's office a description of the property to be assessed and the estimated maximum amount of benefit to be conferred on each tract of land. NMSA 1978, § 3-33-12(A) (1965). This notice must be mailed to the owner of each tract to be assessed the cost of the improvements not more than thirty days nor less than ten days before the date of the hearing. Id. at (B). Proof of mailing is by affidavit filed in the office of the municipal clerk, and the statute expressly directs that "failure to mail any notice shall not invalidate any of the proceedings" authorized by these statutes. Id. Notice of the hearing is also required to be published once each week for three consecutive weeks, the last publication being at least one week prior to the day of the hearing, and verified by an affidavit of publication from the publisher, which affidavit must be filed with the municipal clerk. Id. at (C).

At the hearing on a provisional order, any owner of property subject to assessment may file a written protest or objection questioning the propriety and advisability of constructing the improvements, the estimated cost of those improvements, the manner of paying for those improvements, or the estimated maximum benefit to each parcel or tract of land. See NMSA 1978, § 3-33-13(A) (1999). This statute also authorizes the governing body to recess the hearing from time to time to allow all protestants to be heard, and sets a limitations period for any appeal by any property owner who has filed a written protest of any adverse determination of that body within thirty days of the adoption of a resolution by the governing body concluding the hearing and creating the district. Id. at (C).

The gravamen of the questions raised by the materials that accompanied each of your requests concerns the Council's compliance with these notice and hearing requirements. We note that the New Mexico Supreme Court has upheld the constitutionality of the Improvements District Act. See Fowler v. City of Santa Fe, 72 N.M. 60, 63, 380 P. 2d 511, 512 (1963) and Ellis v. N.M. Construction Co., 27 N.M. 312, 321-322, 201 P. 487, 491 (1921), as cited in Village of Angel Fire v. Wheeler, 133 N.M. 421, 425-426, 63 P.2d 524, 528-529 (N.M. Ct. App. 2003). Our highest court has also declared, that "a city council in New Mexico, in establishing a municipal improvement district, is acting in its legislative capacity". See Feldhake v. City of Santa Fe, 61 N.M. 348, 357, 300 P.2d 934, 939 (1956). Thus, a council's actions, "in the absence of proof of fraud or such arbitrary conduct as amounts to fraud is conclusive." Id. It is against this high standard that the Council's actions regarding District 7 would be subject to court review.

The materials submitted with Senator Komadina's opinion request include a copy of the notice of hearing received by one property owner that was sent by the Council's engineer and was dated December 17, 2007. That document gives notice of a public hearing for District 7 on January 9, 2008 at 6:00 p.m. The notice and its attachments contain the other information required by Section 3-33-12(A), including the estimated benefit and the estimated assessment applicable to that particular property owner, the

right to present a written protest at or before the hearing, and notice of the right to appeal within the thirty day period set out in section 3-33-13(C).[5] The statutory period for mailing the notice begins to run from the date of mailing. Thus, a notice mailed December 17, 2007 is 23 days prior to the hearing date, well within the parameters set out in statute. Although mail delivery during the month of December and into January is often slower than at other times during the year, the statute makes no distinction as to the time of year. It allows for mailing as late as 10 days before the hearing, and the Council's mailing was more than double that time. Further, Section 3-33-12(B) provides that failure to mail any notice does not invalidate the proceedings, perhaps because publication of the notice once a week for three weeks is also required.[6]

According to our files, on the evening of the hearing itself, more members of the public attempted to attend the hearing than city staff had estimated and made provision for in preparing space for attendees. Although it appears that at least some members were not allowed to enter city hall due to maximum capacity fire code concerns, we have determined that city staff members made reasonable efforts to provide access for those that wished to attend and address the Council (see OMA determination addressed to Cynthia and Dwight Walsh, dated September 4, 2008). At the meeting, which lasted more than 4 hours, beginning at 6:00 pm and adjourning at 10:27 pm and included several other items, the Council heard from 77 members of the public concerning establishment of District 7 before moving on to other items without taking any action on District 7. See January 9, 2008 meeting minutes, Public Hearings, item 3.

It was not until February 13, 2008 that the Council, after receiving public input from 24 members of the public, concluded the protest hearing, considered the written and oral protests made at or before the hearing, and adopted a resolution creating only one sub-district, denominated 7A. The area included in this sub-district was represented by the City Attorney as being a much smaller, non-controversial area within the original proposed District 7. See Resolution No. 10 and Feb. 13, 2008 minutes. This meeting, which contained other non-related items on the agenda, lasted five hours and 30 minutes. Two months later, the Council met on April 23, 2008, first in special session to again take up the question of assessment districts in the geographic area that was initially envisioned in District 7. It received public input from 31 members of the public, and received city staff's recommendation to create a totally new district--District 8--for flood control, water and sewer.[7] See April 23, 2008 special meeting minutes. Following adjournment of the special meeting, the Council met again that evening in regular session and acted to delete certain areas from District 7, created the new District 8, and accepted staff's recommendations not to proceed with District 7B, 7C, and 7D. See April 23, 2008 regular meeting minutes, items 1,2,3,4,and 5.[8] [9]

Based on the facts provided and available to us, the notice prepared by the City's engineer met the legal requirements set out in statute. The City Council's actions relating to the creation of District 7 demonstrate what appears to be a deliberative process beginning in late 2006 and running some seventeen months. That process was likely in response to the protests and complaints of property owners and perhaps other members of the public as to the creation of the original District 7, the proposed

construction of improvements there, and the costs associated with that construction, and resulted in the adoption of a substantially modified boundary area.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you 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 public.

Sincerely,

MARTHA A. DALY
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Our office also received an Open Meetings Act complaint from two impacted property owners, the response to which is made separately. This advisory letter is based primarily on the facts and documents submitted by your requests and received in conjunction with those complaints, supplemented as necessary by meeting minutes, agenda briefing memoranda, resolutions, and other materials available on the City of Rio Rancho's website. The easy accessibility of these City documents has been very helpful in our review of the Council's actions as they relate to the matters discussed herein.

[2] Such a district is referred to in the relevant statutes as an improvement district, but the City referred to the district under discussion as an assessment district throughout these proceedings and we use that terminology in this advisory letter.

[3] "Provisional order" is a method authorized by statute by which a governing body initiates the formation of a district pursuant to the Improvements District Act, NMSA 1978, §§ 3-33-1 through 43 (as amended through 2003).

[4] The improvements of this district were to be funded by an assessment on each real property owner within the district. See NMSA 1978, § 3-33-11 (1991). According to our files, some owners were concerned that they could lose their homes if they were unable to pay the assessment (estimated in one instance at \$13,000) because they were retired or otherwise on a fixed income. Our records also show that the City was considering a ten-year repayment period with interest rates to be determined by the City's own borrowing costs (via a loan from the New Mexico Finance Authority).

[5] Although the notice documents appeared to provide an opportunity to protest the creation of District 7 not only in written form but orally at the hearing, the statute requires any protest be made in writing. It is unclear whether a solely oral protest would constitute a basis for appeal. The City Attorney has advised this office that no protest

appeals were filed. In any event, because the 30 day limitations period has expired, this issue is moot. Further, the high standard of review set out in Feldhake and discussed above may help explain the lack of any appeals.

[6] The opinion request materials also reference certain difficulties encountered by property owners in efforts to obtain information from the city clerk as to their specific properties. The sample notice we have reviewed suggests that at least some if not all of that information was provided with each individual notice, but an extensive review as to each owner is beyond the scope of our review. Further, we note that this office has received no complaints under the Inspection of Public Records Act as to the accessibility or availability of these documents.

[7] We were not provided information on whether District 8 includes any property that was to be included in District 7, but city staff advised the Council that out of 107 property owners in the effected area, 71 were in favor of the district, 3 were opposed and the remaining 25 did not respond to staff inquiry. See April 23, 2008 special meeting minutes.

[8] Because the minutes of the April 23, 2008 meeting posted on the City's website did not clearly reflect the action of the Council as to District 7B, we requested clarification, and have received a corrected set of minutes for the April 23, 2008 meeting setting forth the action taken by the Council as to District 7B.

[9] In an interesting twist, on July 23, 2008, the Council considered a petition by residents in a portion of the geographic area originally included in District 7 to create a new special assessment district, which proposed action apparently is still under review. See July 23, 2008 meeting minutes.