

## **Opinion 05-03**

July 7, 2005

**OPINION OF: PATRICIA A. MADRID** Attorney General

**BY:** Sally Malavé, Assistant Attorney General

**TO:** The Honorable Jeannette O. Wallace, Representative - District 43, 1913 Spruce, Los Alamos, New Mexico 87544

### **QUESTIONS:**

1. Whether school-owned lands that are used by the schools for school purposes directly in support of educating children, such as classroom facilities, or indirectly, such as school administration offices, are subject to Los Alamos County zoning requirements and development code?
2. Whether school-owned lands that are used for commercial purposes, such as a hotel, are subject to the zoning/development code requirements of the county?

### **CONCLUSION:**

1. In the absence of express legislative intent regarding a school district's immunity from local zoning regulations and upon balancing the interests of Los Alamos County in the orderly development of the community with the interests of the Los Alamos school board in developing a revenue stream for the benefit of Los Alamos schools, we believe that lands owned by the Los Alamos Public School District and used for school purposes, directly and indirectly, may be subject to local zoning and development ordinances.
2. Similarly, we believe that lands owned by the school district and used for commercial purposes also may be subject to local zoning and development ordinances.

### **DISCUSSION:**

As a preliminary matter, in order to determine whether the Los Alamos Public School District is subject to Los Alamos County zoning and development requirements, we believe it would be helpful to review the relevant statutes relating to a school board's authority to own land and a county's authority to zone land.<sup>1</sup> Under the Public School Code, NMSA 1978, § 22-1-1 et seq., local school boards have express authority to acquire, lease and dispose of property, to acquire property by eminent domain, and to provide for the repair and maintenance of all property belonging to the school district.<sup>2</sup> NMSA 1978, § 22-5-4. The Public School Code does not grant or otherwise reserve to local school boards the authority to determine the general location of their schools. That

authority is vested in counties and municipalities. See, e.g., NMSA 1978, §§ 3-19-9(B) and 3-21-1(A) (5).

The statutory provisions governing the sale, lease or trade of public property further provide that local school boards are authorized to sell, lease or trade school-owned property. NMSA 1978, §§ 13-6-1 through 13-6-4. These same provisions differentiate between state agencies, local governing bodies, school districts, and state educational institutions.<sup>3</sup> Id. An entity's status as a state agency, local public body, school district, or state educational institution determines whether it needs board of finance or legislative approval prior to the disposition of real property.<sup>4</sup> But neither the Public School Code nor any other statutory provision addresses a local school board's powers and/or duties relating to the zoning or development of school-owned lands or otherwise expressly exempts school-owned lands from the local zoning jurisdiction within which they are located.

Zoning generally has been defined as governmental regulation of the uses of land and buildings according to districts or zones. Miller v. City of Albuquerque, 89 N.M. 503, 505 (1976). When used to promote the public interest, the New Mexico Supreme Court has concluded that local zoning is justified and has upheld it as a legitimate exercise of the police power. Id. The Supreme Court also has concluded, however, that a city or county has no inherent right to exercise control over state land unless authorized by statute. City of Santa Fe v. Armijo, 96 N.M. 663, 664 (1981). Although a statute may grant general zoning power to a local body, it does not give that local body the power to enforce zoning ordinances on state land absent express delegation of such power by statute. County of Santa Fe v. Milagro Wireless, LLC, 2001-NMCA-070, ¶7, 130 N.M. 771, 773 (Ct. App. 2001) (citing Armijo, 96 N.M. at 665).

The New Mexico legislature has granted counties the same powers as municipalities to enact ordinances and exercise various statutory powers and duties, except those powers that are inconsistent with statutory or constitutional limitations placed on counties. NMSA 1978, § 4-37-1. Counties and municipalities are designated zoning authorities for the purposes of promoting health, safety, morals, and the general welfare. NMSA 1978, § 3-21-1. As a zoning authority, a county, in planning for its physical development, may include the general location of public schools in its master plan, § 3-19-9, accept title to lands dedicated for public use, which use may include school use, § 3-20-11, and regulate and restrict within its jurisdiction the location and use of buildings, structures, and land for trade, industry, residence or "other purposes," § 3-21-1. We believe "other purposes" may reasonably be understood to include school use. Furthermore, counties have been authorized not only to enact and enforce zoning ordinances, § 3-21-13, but also to adopt ordinances that are applicable to all or any portion of the territory within the county that is not within the zoning jurisdiction of a municipality. § 3-21-2. A review of the County of Los Alamos Development Code reveals that, in accordance with § 3-21-2, only the County itself, on a case-by-case basis, and those lands lying within federal lands district identified on the Official Zoning Map of Los Alamos County are exempt from the development code's application. Los Alamos Development Code, Chap. 16, §§ 16-2 and 16-533 (24). The development code

does not exempt school-owned lands from its application. Finally, the statutory provisions authorizing counties to pass local zoning ordinances expressly or impliedly do not exempt school-owned lands from county zoning, although the legislature could have stated that school-owned lands would not be subject to county or municipal zoning regulations, if it so desired. Therefore, we discern no clear legislative intent in the Municipal Code to immunize local school districts from local zoning regulations.

Moreover, New Mexico courts have not determined whether the power of a county to zone school-owned lands, like state-owned lands, must be delegated by statute. Because legislative intent regarding a school district's immunity from local zoning regulations is not clear and because New Mexico courts have not addressed this question, we look to the law of other jurisdictions for guidance.

What we have found is that courts of other jurisdictions have resolved the conflict between an intended governmental use and local zoning restrictions through a variety of methods. Hayward v. Gaston, 542 A.2d 760, 765 (Del. 1988) (citations omitted). One approach, the so-called hierarchical test, resolves the issue in favor of the governmental entity in a position of greater sovereignty unless the legislature has expressly directed a contrary result. *Id.* Under this test, a state agency's actions have been consistently upheld when in conflict with local zoning regulations. *See id.* Other courts have resolved such zoning disputes in terms of whether the proposed land use was governmental or proprietary in nature.<sup>5</sup> *Id.* A third, and often applied, test of governmental immunity from zoning restrictions is the eminent domain approach. *Id.* This approach generally finds immunity from local zoning regulations if the governmental entity claiming to be exempt from zoning has the right of eminent domain, i.e., whether the governmental entity has the right to condemn private property for the use in question, even where the property has been acquired through negotiated purchase. *Id.*

All of these tests have been criticized, however, as overlooking the central question of whether the proposed use or its restriction best serves the public interest. *Id.* In other words, courts frequently have resolved intergovernmental zoning conflicts in "simplistic" terms and by the use of labels rather than through a critical analysis of which governmental interest should prevail in the particular relationship or factual situation. Rutgers, State University v. Piluso, 286 A.2d 697, 701 (N.J. 1972). The balancing of interests first articulated in Rutgers is generally regarded as the most well-reasoned and enlightened approach to resolving intergovernmental conflicts over zoning and land use in the absence of express legislative intent. Hayward v. Gaston, 542 A.2d at 765; contra Macon Ass'n for Retarded Cit. v. Macon-Bibb, 314 S.E.2d 218, 223 (Ga. 1984).

In Rutgers, Rutgers, the State University, sued the local township after being denied a variance from the zoning ordinance that limited student family housing units to 500 units. 286 A.2d at 698. On appeal from a grant of summary judgment in favor of the university, the immediate question presented was whether Rutgers, the State University, was subject to the zoning regulations of the municipality in which one of its campuses was located, but the broader issue necessarily presented was the matter of intergovernmental land use regulation in general as well as the particular status of

Rutgers. 286 A.2d at 698. After reviewing earlier cases decided under the various tests discussed above and rejecting a mechanical finding of immunity, the New Jersey Supreme Court remained convinced that the true test of immunity was the legislative intent with respect to the particular agency or function. 286 A.2d at 701-703. It stated:

“That intent, rarely specifically expressed, is to be divined from a consideration of many factors, with a value judgment reached on an overall evaluation. All possible factors cannot be abstractly catalogued. The most obvious and common ones include the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect the local land use regulation would have on the enterprise concerned, and the impact upon legitimate local interests. In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. No one factor, such as the granting or withholding of the power of eminent domain should be thought of as ritualistically required or controlling. And there will be cases where the broader public interest is so important that immunity may be granted even though the local interests are great. The point is that there is no precise formula that will determine every case mechanically and automatically.”

286 A.2d at 702-3.

After balancing the interests of the university with those of the local community, the Rutgers court held the university’s proposed use of land for student housing was reasonable. Id. It also stressed, however, that such immunity in any situation is not without its limits.

“Even where [immunity] is found to exist, it must not be exercised in an unreasonable fashion so as to arbitrarily override all legitimate local interests. This rule must apply to the state and its instrumentalities as well as to lesser governmental entities entitled to immunity.”

286 A.2d at 703.

Since Rutgers, other jurisdictions have embraced the balancing-of-interests methodology in cases involving intergovernmental zoning conflicts because it is the fairest method by which such conflicts can be resolved as it is sensitive to the needs and concerns of the competing governmental entities, potentially affected property owners, local residents and the public as a whole, taking into consideration all of the salient factors that may properly influence the result. See Blackstone Park Improvement Association v. State Board of Standards and Appeals et al., 448 A.2d 1233, 1240 (R.I. 1982) (citations omitted). In Independent School District No. 89 of Oklahoma County v. City of Oklahoma City, 722 P.2d 1212 (1986), for example, the question presented before the Oklahoma Supreme Court was whether a public school district, lying within the city limits of an incorporated city, was automatically immune from the local zoning

ordinance of that municipality insofar as the ordinance purported to control the district's location and use of its school facilities, a question similar to questions you raise. The Court said no - in the absence of clear legislative intent, a school district is not automatically immune from a local zoning ordinance and whether it is subject to local zoning depends on an inference of legislative intent derived from an overall evaluation of all the relevant factors identified in Rutgers. 722 P.2d at 1213.

In Independent School District No. 89 of Oklahoma County, the Oklahoma County school district had sought a declaratory judgment in the trial court below that the City of Oklahoma was without authority to regulate the location and use of public schools through its zoning code and that school districts are entitled to exercise their powers and duties to provide public education without interference by the City through enforcement of its zoning code. The School District maintained that, as subdivisions of the state, school districts (1) are not subject to local zoning regulations, (2) have the power of eminent domain and are therefore immune from local zoning, (3) are superior sovereign to municipalities and thus not subject to local zoning, and (4) are not subject to local zoning under the balancing test. Id. at 1214. The School District did not argue that Oklahoma law granted or reserved to local school districts express authority to determine the location of their schools. See id. Apparently, and like New Mexico law, it did not. Instead, the District relied on its general powers and duties to provide public education to the citizens it served. Id. In response, the City asked the trial court to uphold the local zoning code as a lawful exercise of its police power. The trial court sustained the City's motion for summary judgment and the school districts appealed. Neither the City's nor the school district's arguments persuaded the state Supreme Court, which remanded the case to the lower court to consider all pertinent factors to divine the legislative intent as to whether or not school districts are immune for local zoning regulations concerning site location. Id. at 1217.

Like the Independent School District No. 89 of Oklahoma County court, we believe it is reasonable to conclude that the Los Alamos Public School District is not automatically immune from local zoning regulations. Neither the New Mexico Public School Code nor the Municipal Code exempt local school districts or school-owned lands from the application of local zoning ordinances. Thus, based on the case law from other jurisdictions discussed above, we believe that a New Mexico court would resolve the issue by balancing of all pertinent factors such as the nature of the instrumentality seeking immunity, the kind of function or planned use involved, the extent of the public interest to be served by the proposed function or use, the effect local zoning regulation would have upon the proposed function or use, and the impact the proposed function or use would have on legitimate local interests.

[1] We assume for the purposes of this analysis that the school-owned lands you refer to are not state trust lands granted to the state for the support of common schools pursuant to the Enabling Act for New Mexico, Act of June 20, 1910, 36 Statutes at Large, chap. 310, § 6.

[2] Under the Public School Code, a “local school board” is defined as “the policy-setting body of a school district” and “school district” is defined as “an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for bonding purposes.” NMSA 1978, § 22-1-2(H) and (R).

[3] Pursuant to NMSA 1978, § 13-6-4, “state agency” means the state of New Mexico or any of its branches, agencies, departments, boards instrumentalities or institutions other than state educational institutions designated under the state constitution, whereas “local public body” means all political subdivisions, except municipalities and school districts. “School district” means those political subdivisions of the state established for the administration of public schools, segregated geographically for taxation and bonding purposes and governed by the Public School Code [22-1-1 NMSA 1978], and “state educational institutions” means those institutions designated by N.M. Const., art. XII, § 11. *Id.*

[4] For example, a local public body or a school district may enter into a long-term lease exceeding a period of twenty-five years and valued at over one hundred thousand dollars with board of finance approval only, whereas the same transaction by a state agency requires legislative approval. See NMSA 1978, §§ 13-6-2.1 and 3.

[5] New Mexico, however, has rejected the distinction between governmental and proprietary functions for any legal analysis purpose. *City of Santa Fe v. Milagro Wireless, LLC*, 2001-NMCA-070, ¶ 5, 130 N.M. at 773 (citing *Morning Star Water Users Ass’n v. Farmington Municipal School District No. 5*, 120 N.M. 307, 313-17 (1995)).