



Winter 1964

Constitutional Law—Delegation of Power—New Mexico Bypass Law

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Recommended Citation

William C. Bowers, *Constitutional Law—Delegation of Power—New Mexico Bypass Law*, 4 Nat. Resources J. 160 (1964).

Available at: <https://digitalrepository.unm.edu/nrj/vol4/iss1/12>

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COMMENTS

CONSTITUTIONAL LAW—DELEGATION OF POWER—NEW MEXICO BYPASS LAW*—In 1963 the New Mexico Legislature enacted a law prohibiting highway bypassing of municipalities without prior approval of the municipalities or appropriate boards of county commissioners.¹ Although couched in terms of regulating the expenditure of Highway Commission funds,² the purpose of the bypass law is to delegate to the interested governing bodies the power to negate the Commission's highway design and location authority.

The Highway Commission is a creature of the New Mexico Constitution³ and not of the Legislature. The Commission is "empowered and charged with the duty of determining *all* matters of policy relating to the *design*, construction, *location*, and maintenance of state highways and public roads."⁴ The only limit placed on the specified powers of the Commission concerns "matters pertaining to the expenditure of funds" which are "subject to such regulation as may hereafter be provided by law."⁵ Interpretation of this limi-

* N.M. Laws 1963, ch. 114; see N.M. Stat. Ann. §§ 55-2-50 to -51 (Supp. 1963).

1. *Ibid.*

2. N.M. Stat. Ann. § 55-2-50 (Supp. 1963):

The purpose of this act [55-2-50, 55-2-51] is to foster and insure the correlation of state highway construction programs closely affecting smaller municipalities and unincorporated communities with the future economic growth, livelihood, development, safety and general welfare of the communities, *by limiting the use of public funds for the construction of highway bypasses* or relocation projects diverting traffic and commerce from existing state highway routes through communities, without the express approval of the governing authority of the municipalities or the board of county commissioners wherein the unincorporated communities are located, acting on behalf of the unincorporated communities. [Emphasis added.]

3. N.M. Const. art. 5, § 14(A):

The state highway commission is empowered and charged with the duty of determining all matters of policy related to the *design*, construction, *location*, and maintenance of state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have charge, *subject to such regulation as may hereafter be provided by law*, of all matters pertaining to the expenditure of highway funds. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law. [Emphasis added.]

4. *Ibid.* (Emphasis added.)

5. *Ibid.*

The New Mexico Supreme Court has upheld legislation requiring the Highway Commission, in certain cases, to pay the nonbetterment costs of utility relocations necessitated by highway improvements. State *ex rel.* City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961) (regulation of Highway Commission activities not in question).

tation requires application of accepted rules of construction. It has long been an established rule of constitutional and statutory construction that the enactment must be read as a whole and every word and clause be given effect, if possible.⁶ It is not likely a court would hold that the power of the Legislature to regulate expenditure of funds can override the design and location power of the Commission.⁷ Since this is the purpose and effect of the bypass law, it is an unconstitutional usurpation of the design and location power of the Commission.⁸

Supposing, *arguendo*, the bypass law were *not* a usurpation of the Commission's highway design and location authority, the law would then be only an attempt by the Legislature to delegate the expendi-

6. Chief Justice Marshall, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803), said: "It cannot be presumed, that any clause in the constitution is intended to be without effect." In *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879), Mr. Justice Strong, whose rule of statutory construction has been frequently cited, said:

We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

See also *United States v. Alpers*, 338 U.S. 680, 682 (1949); *Ex parte Public Nat'l Bank*, 278 U.S. 101, 104 (1928); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409-10 (1914); *Ringling Bros.—Barnum & Bailey Combined Shows v. Sheppard*, 123 F.2d 773, 775 (5th Cir. 1941); *Long v. United States*, 78 F. Supp. 35, 37 (S.D. Cal. 1948); *Drier v. United States*, 108 Ct. Cl. 487, 70 F. Supp. 888, 892 (1947). *But see* generally Horack, *The Distintegration of Statutory Construction*, 24 Ind. L.J. 335 (1949).

7. A specific provision on a particular subject contained in the constitution will govern as to that subject even though general provisions therein, if standing alone, would include such subject. *City of Tulsa v. Southwestern Bell Tel. Co.*, 75 F.2d 343, 351 (10th Cir. 1935); *Employees' Retirement Sys. v. Ho*, 352 P.2d 861, 876 (Hawaii 1960).

8. "Acts generally lawful may become unlawful when done to accomplish an unlawful end, . . . and a constitutional power cannot be used by way of a condition to attain an unconstitutional result." *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (declaring state act redistricting Tuskegee, Alabama unconstitutional), quoting from *Western Union Tel. Co. v. Foster and Macleod*, 247 U.S. 105 (1918); cited with approval in *Baker v. Carr*, 369 U.S. 186, 229 (1961).

The New Mexico Legislature has proposed an amendment which would repeal article 5, § 14 and enact a new article 5, § 14:

The commission shall *within the limitations prescribed by law* determine matters of highway locations and priorities and shall set general policies on expenditures of funds.

Proposed Constitutional Amendment No. 9, N.M. Laws 1963, at 1162. (Emphasis added.) If this amendment is adopted, the Highway Commission will be a creature of the Legislature and subject to complete control of that body.

ture regulating power to local governing bodies. The only regulating of Highway Commission expenditures done directly by the Legislature in 1963 was the appropriation of over sixty-six million dollars for expenditure by the Commission.⁹ The bypass law, however, would give the various municipalities and boards of county commissioners authority to reduce the availability of this appropriation, since it prohibits any expenditure of funds on projects rejected by those bodies.¹⁰ The Legislature may have power to control the appropriation, and it may have power to delegate that control; it cannot, however, abdicate in favor of municipalities and county boards.

Municipalities are corporations formed by authority of the state of which they are a part. They are creatures of the law of the state, and their powers are derived from the state.¹¹ Municipalities have been granted general authority to pass ordinances¹² and power to

9. The 1963 General Appropriation Act provides:

STATE HIGHWAY COMMISSION.—All receipts of the state road fund including federal grants made under Federal Highway Acts, motor fuel taxes, motor vehicle registration fees and other income, as authorized by law. There may be expended from this amount the sum of \$66,625,000.

N. M. Laws 1963, ch. 287, § 8.

10. N.M. Stat. Ann. § 55-2-51 (Supp. 1963):

No expenditure, or contract for the expenditure, of state public funds for purposes of construction of highway bypasses or highway relocation projects diverting public motor vehicle travel from a previously existing highway route through a municipality with a population of fifty thousand [50,000] persons or less or through an unincorporated community shall be made by the state highway commission, without prior consent of the *governing authority of the municipality* affected or the *board of county commissioners* on behalf of the unincorporated community affected. The consent shall be expressed in the form of a resolution, duly adopted and passed by a majority of the members of the proper governing authority. The resolution expressing approval or disapproval shall either approve or reject the proposed construction in toto. Once such authority is given by the governing authority, and the state highway commission has affirmatively acted in reliance upon the expressed approval, public funds may be expended, and contracts executed, despite subsequent withdrawal of approval by the governing authority. [Emphasis added.]

11. Purcell v. City of Carlsbad, 126 F.2d 748 (10th Cir. 1942); Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1944).

Powers granted must be strictly construed. City of Clovis v. Crain, 68 N.M. 10, 357 P.2d 667 (1960); Fancher v. Board of Comm'rs, 28 N.M. 179, 210 Pac. 237 (1922).

12. N.M. Stat. Ann. § 14-25-1 (1953):

Municipal corporations shall have power to make and publish . . . ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by law, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and conveniences of such corporation and the inhabitants thereof

regulate specified activities.¹³ Delegation to a municipality of power to control legislative action is an unusual concept, but it has been held a proper delegation if adequate standards are provided.¹⁴ A

13. N.M. Stat. Ann. § 14-21-2 (1953):

All municipal corporations organized under article 2 of this chapter shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this article.

For example, N.M. Stat. Ann. § 14-21-12 (1953), provides:

To suppress gaming and gambling-houses, lotteries, and fraudulent devices and practices, for the purpose of gaining or obtaining money or property, and to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations.

This enabling legislation has not been attacked, but Albuquerque Commission Ordinance 851, § 7.432(2)(6), was adjudged invalid. *City of Albuquerque v. Nieri*, No. 3076 P.C., D. Bernalillo, Aug. 10, 1962 (obscenity ordinance lacking scienter requirement).

14. In *Woods v. Shoreline Co-op Apartments, Inc.*, 84 F. Supp. 660, 663-64 (N.D. Ill. 1949), *rev'd per curiam*, 338 U.S. 897 (1949), the district court held the local option provision of the 1949 amendment to the Housing and Rent Control Act, 63 Stat. 27, was unconstitutional, saying:

[I]n any incorporated city, town or village, . . . [application of the act may be suspended] merely upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law based upon a finding by such governing body reached as the result of public hearing held after ten days' notice that there no longer exists such a shortage in rental housing . . . as to require rent control

No standard is laid down as to what is or what is not a shortage of rental housing The vice of the present Act lies in the very fact that no authorized person is required to use any judgment and there is a grant of unbridled administrative discretion subject to neither reason nor findings of fact. This delegation of power is not to an administrator whose selection is controlled by Congress but to States, municipalities, other subdivisions or town meetings.

The district court said *Shoreline* was quite different from *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1947), which upheld the 1947 Act, 61 Stat. 198, authorizing the Housing and Rent Expediter to remove rent controls in any "defense-rental area if in his judgment the need no longer exists by reason of new construction or satisfaction of the demand in other ways." 333 U.S. at 144.

Miller was mentioned in a list of cases cited as examples of adequate power delegation where state or municipal law or rulings are the basis for, or are enforced as, federal law, in *United States v. Sharpnack*, 355 U.S. 286, 294-96 (1957).

The law of state delegation differs substantially from the law of federal delegation. Whereas only two delegations by Congress to public authorities have ever been held unconstitutional . . . [*Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], numerous delegations by state legislatures have been invalidated, and the non-delegation doctrine in the state courts continues to have a good deal of force [S]tate legislatures more than Congress tend to delegate to petty officials who are authorized to act without adequate safeguards.

¹ *Davis*, *Administrative Law Treatises* § 2.07 (1958) [hereinafter cited as *Davis*].

Davis § 2.07 goes on to say that state doctrine as actually applied by the courts does not generally concern itself with pettiness of officials or with safeguards; rather, it is concerned with the unconstitutionality of delegating legislative power, as distinguished from power to fill in details, and the appearance in enabling legislation of vague phrases known as "standards."

grant of legislative authority must establish standards under which that authority is to be exercised.¹⁵ The Legislature cannot delegate its "exclusive power of deciding how, when and for what purpose the public funds shall be applied in carrying on the government."¹⁶

The New Mexico bypass law would delegate power to whatever municipality happens to be astraddle an existing highway and which the Highway Commission considers should be bypassed. That power purports to be absolute. The municipality need give no reason, need not support its decision in any way; the city or town, or board of county commissioners need only say "no bypass." The plans of the Highway Commission are then nullified, and whatever funds were appropriated or apportioned (or available for apportionment) for that work are not available.¹⁷

Davis § 2.10 suggests what *might* be adequate or proper standards saying: "The act provides for an administrative hearing . . . and allows judicial review . . ." This remark puts the emphasis where it belongs."

Most of the difficulty encountered in state doctrine is concerned with delegation to the executive or to administrative agencies. It appears that the constitutional separation of powers doctrine causes its share of trouble. Davis § 2.12 notes that the New Mexico Supreme Court "rendered the astounding holding that the legislature cannot confer state-wide judicial power upon a workmen's compensation commission." The case is *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957). For an excellent discussion of the separation of powers doctrine, see Comment, 3 *Natural Resources J.* 178 (1963).

See also Jaffe, *Law Making by Private Groups*, 51 *Harv. L. Rev.* 201 (1937).

15. *State ex rel. Holmes v. State Bd. of Fin.*, 69 N.M. 430, 367 P.2d 925 (1961). In *Holmes*, a proceeding on a petition for a writ of prohibition commanding the Board of Finance to refrain from cutting or reducing the budget of the State Tax Commission, the Supreme Court of New Mexico held a statute authorizing the Board of Finance to reduce all annual operating budgets not to exceed ten per cent (subject to certain exceptions) did not provide *any* standards to guide the Director of the Department of Finance and Administration and was, therefore, unconstitutional. *Id.* at 440, 367 P.2d at 933. See also *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964).

The writer is unable to conceive of any standard under which a municipality could constitutionally exercise power to manipulate the design and location of state highways to the supposed advantage of the municipality. Improbably, a requirement that hearings be held and disapproval registered only on a finding that relocation of the highway (or construction of the bypass) would result in diversion of traffic and in *economic loss* to the municipality *and the state as a whole* might suffice. Compare note 14 *supra*.

16. *State ex rel. Holmes v. State Bd. of Fin.*, 69 N.M. 430, 441, 367 P.2d 925, 933 (1961), quoting from *State ex rel. Zimmerman v. Dammann*, 229 Wis. 570, 283 N.W. 52 (1938).

17. This power would be as absolute and untrammelled as that of the Emergency Board in a Wisconsin case:

State ex rel. Zimmerman v. Dammann, 229 Wis. 570, 283 N.W. 52 . . . [considered] whether or not sufficient standards were provided by the legislature to guide an administrative agency in the exercise of . . . control over application of public funds . . . : 'In each of those sections it is provided that "The amount herein appropriated shall not become effective or available until re-

Should the Legislature be found to have power to emasculate the Highway Commission through control of appropriations, delegation cannot be constitutional when no standards of any kind are provided for the exercise of that power.¹⁸

Exercise of the bypass veto power has handicapped the Highway Department, caused delay of projects of the National System of Interstate and Defense Highways,¹⁹ and resulted in a general slow-down of the program in New Mexico.²⁰ Opposition to the limited

leased in whole or in part by the emergency board". By that provision the legislature has attempted to delegate to that board the power to render the appropriations in question either effective and available, or wholly or in part ineffective and not available, as well as the power to determine when, if at all, they shall be available and subject to transfer and disbursement by the Secretary of State and the State Treasurer, respectively. Thus in those provisions there is no exercise by the legislature of its "exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government". * * *

State *ex rel.* Holmes v. State Bd. of Fin., 69 N.M. 430, 440-41, 367 P.2d 925, 933 (1961), quoting from State *ex rel.* Zimmerman v. Dammann, 229 Wis. 570, 283 N.W. 52, 54 (1938).

18. *Id.* at 440, 367 P.2d at 932.

19. "The term 'Interstate System' means the National System of Interstate and Defense Highways . . ." 23 U.S.C. § 101 (1958). This system is to consist of not more than forty-one thousand miles of highway in the continental United States and shall connect principal metropolitan areas and industrial centers to serve the national defense and connect with routes in Canada and Mexico. 23 U.S.C. § 103(d) (1958).

The Interstate System in New Mexico, financed approximately ninety-two per cent by the federal government, includes I-10 east-west through Las Cruces and Lordsburg, I-25 north-south through Albuquerque, and I-40 east-west through Albuquerque. The New Mexico program has been delayed by failure of cities or boards of county commissioners to approve bypasses which are required to comply with Bureau of Public Roads (BPR) "standards" in order to obtain federal approval and financing. See Levin, *Federal Aspects of the Interstate Highway Program*, 38 Neb. L. Rev. 377 (1959), for a discussion of these "standards."

Harold Adkinson, BPR district engineer for New Mexico, said interchanges from bypass locations had been planned for Tucumcari, Santa Rosa, Moriarty, and Socorro and that those cities have denied bypass clearance or withheld action thereon. Albuquerque Journal, Sept. 6, 1963, p. A-1, col. 1. Failure of these projects blocks completion of I-25 and I-40.

20. A BPR report indicates the bypass law, in effect for more than half the January-June period of 1963, had a pronounced effect on contracts awarded. Interstate System contracts awarded in New Mexico during the period dropped 33% below the corresponding period of 1962. Dollar values were \$7.4-million compared to \$11.1-million. The contrast with the last six months of 1962 was even greater; in that period \$18-million had been awarded. The national total *gained* 35% in January-June of 1963 compared to the same period of 1962. Albuquerque Journal, Oct. 27, 1963, p. A-4, col. 4.

The State Highway Department reports "construction contract lettings dipped sharply downward in 1963 from the 1962 total." Contracts awarded were \$34,714,000 in 1963 and \$46,591,000 in 1962, a 25.5% decrease. "The anti-bypass law enacted by the 1963 Legislature was a major factor in the sizeable drop." Albuquerque Journal, Dec. 29, 1963, p. B-7, col. 3.

access and bypass provisions of the Interstate System is shortsighted and ill-advised.²¹ Opposing bypasses cannot accomplish the desired objectives and may have far-reaching results in the opposite direction.²²

21.

The controlled access feature of the Interstate network can be most important to the local merchant. A good example of new highway construction without the controlled access feature can be observed in Deming, New Mexico. In the early fifties, US 70-80 passed through Deming along Spruce Street. Because of congestion and restricted right of way, a new 4-lane highway was placed through Deming along Pine Street. . . . [T]he major businesses . . . deserted Spruce Street and are now located on Pine. If the highway built in the mid fifties . . . [had been constructed with limited access] the effect of the relocation . . . would not have been nearly so severe. Without the controlled access features of the Interstate System, it would be quite likely that the merchants of Deming would once more pack up and move over to the new location.

* * * *

The controlled access feature of the Interstate System is a part of the Federal law that also grants New Mexico 92 per cent of the construction cost. There are many arguments pro and con as to the effect of alternate routes around a town. Raton is the first town in New Mexico to be completely bypassed by the Interstate System. Recent traffic counts indicate that some 1200 to 1400 vehicles a day are using the Raton Bypass. In spite of the vehicles using the bypass, the traffic count on Main Street in Raton indicates that 400 more vehicles a day are on Main Street than were there before the bypass was opened.

There is more to these figures than meets the eye. Before the bypass was built around Raton, the Highway Department estimated that some 1,700 vehicles per day would be using the bypass. This estimate was based on the experience of other State Highway Departments in the midwest and eastern part of the country. It seems that the sparsely settled New Mexico is different than the more congested states. I think is [sic] would be reasonable to conclude that the tourists coming to New Mexico want to see our towns and in the case of Raton, a much greater percentage of traffic than anticipated is turning off the bypass.

Smith, *The Need For Better Highways*, New Mexico Professional Engineer, Dec. 1963, at 15, 17, 25.

22.

There is one very important factor on completion of the Interstate System that all New Mexicans should keep in mind. If you will take a good look at a map of the United States, you will note that the simplest way to travel from the Midwest to Southern California is by way of New Mexico. A portion of the Interstate System that is being rushed to completion in Interstate 70 from west of Denver across the Rocky Mountains range. If this Interstate 70 were to be completed before the eastern tourists are permitted modern highways in New Mexico, we may see a permanent diversion from New Mexico to Colorado.

Id. at 25.

Citizens of northern and north-central New Mexico, especially those of Tucumcari, Santa Rosa, Moriarty, Albuquerque, Grants, and Gallup, might well be concerned over the habit-forming effect which I-10 may have if completed well ahead of I-25

No further delay in the construction of New Mexico's Interstate and other primary state highways should be countenanced. The Legislature should repeal the bypass law at the earliest opportunity. The Highway Commission should proceed with highway construction, perhaps at the same time taking the issue to the courts.

WILLIAM C. BOWERS

and I-40. I-10 improves the southern route and will replace old U.S.-80 which has always been quite a favorite highway in the winter.

Compromise with highway safety would not be justified even if it were economically sound. The bypass law is not economically sound. *But see* Morgan, *Anti-Bypass Law Among Most Revolutionary in U.S.*, Albuquerque Journal, Dec. 25, 1963, p. A-12, col. 1. It appears that some 500 members of the Bypass Association believe in this strategy.