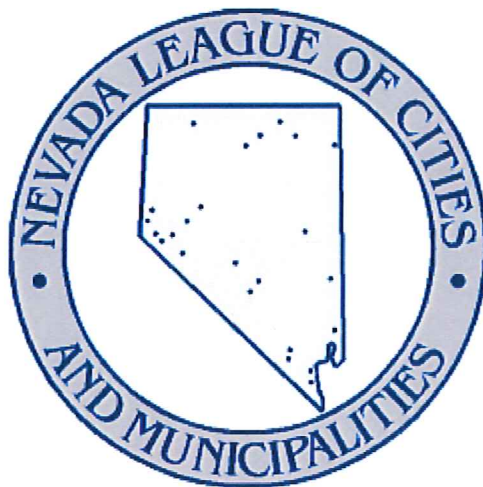


Report to the Nevada Legislature on the Implementation of AB493 of the 2015 Legislative Session



Submitted by the Nevada League of Cities and
Municipalities

January 2017

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Introduction

Nevada has long been a “Dillon’s Rule” state. The rule is named after Iowa Supreme Court Justice John Forrest Dillon. In 1868, Justice Dillon opined that “Municipal Corporations owe their origin to, and derive their powers and rights wholly from, the legislature.” (*City of Clinton v. Cedar Rapids & M.R.R. Co.* 24 Iowa 455 (Iowa 1868)). In another case, *Merriam v. Moody’s Executor*, 25 Iowa 163 (Iowa 1868) Dillon wrote:

It is a general and undisputed proposition of law that that a municipal corporation possesses and can exercise the follow powers and no others: (1) Those granted in express words; (2) Those necessarily or fairly implied in or incident to the powers expressly granted; (3) Those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable. Any fair doubt concerning the existence of a power is resolved by the courts against the corporation and the power is denied.

Assembly Bill 493 of the 2015 Legislative Session relaxed “Dillon’s Rule” to allow the governing body of an incorporated city, with certain exceptions, to exercise all powers necessary or proper to address matters of local concern for the effective operation of city government, whether or not the powers are expressly granted to the governing body. Any such powers remain subject to all federal and state constitutional, statutory and

regulatory provisions. The bill exempts matters that have a state interest that requires statewide uniformity or regulation, the regulation of business activities that are subject to substantial regulation by a federal or state agency and any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or the State of Nevada to federal or state regulation that preempts local regulation.

The submittal of this report was required by Section 8 of the bill.

Implementation

The Nevada League of Cities and Municipalities (League) assisted our member incorporated cities in implementing the provisions of AB493 by providing training and distributing information regarding the bill. These efforts are detailed below.

Following the adjournment of the 2015 Legislative Session, the League distributed the enrolled version of AB493 to our member cities. The bill was distributed to members of the governing bodies, city managers, city attorneys and senior staff.

The League held a panel discussion regarding the passage of AB493 during a general session at our 2015 annual conference. The panelists were Senator Pete Goicoechea (Chair, Senate Government Affairs Committee), Assemblyman John Ellison (Chair, Assembly Government Affairs Committee), Reno City Councilman David Bobzien (former member of the Nevada Assembly) and Kevin Powers (Senate Legal Counsel, Legislative Counsel Bureau). The panel was moderated by Robert Morin, Ph.D., JD (Professor, Western Nevada College). Mr. Powers went through the sections of AB493 and explained what each section meant or did not mean. The other panelists offered their interpretation of what the modification of “Dillon’s Rule” meant to the

incorporated cities in the state. The panel discussion was followed by a lengthy question and answer period.

The League's Board of Directors authorized the funding of a study of the provisions of AB493 at their February 29, 2016 meeting. The League subsequently contracted Dr. Jesse Richardson, Associate Professor, West Virginia University College of Law to review the provisions of AB493 and produce a report on his findings. (Dr. Richardson was one of the authors of a January 2003 Brookings Institution Center on Urban and Metropolitan Policy paper titled "*Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*") Dr. Richardson made a presentation on his findings at the May 23, 2016 meeting of the League Board of Directors which was followed by a question and answer period.

Another panel discussion was held during the League's 2016 conference in October 2016. Dr. Richardson participated as a panelist for this session. Other panelists were Reno Councilman David Bobzien, Sparks City Manager Steve Driscoll, and City of Las Vegas Deputy City Attorney Jim Lewis. Dr. Robert Morin again moderated this panel.

In addition to the training provided by the League, several of our members received further briefing on the provisions of AB493 from their city attorneys.

None of our members have reported that they adopted any ordinances using only the authority granted by the relaxation of “Dillon’s Rule” provision of AB493. At least one of our members did cite the additions to NRS 268 that came from the passage of AB493 as additional authority to enact several ordinances.

A copy of Dr. Richardson’s findings is included as an attachment to this report.

Conclusion

The passage of AB493 provided a needed tool for local governments to deal with matters of local concern. As subsection 5 of section 2 of the bill states:

As a general rule on local governmental power, Dillon's Rule serves an important function of defining the powers of city government and remains a vital component of Nevada law. However, with regard to matters of local concern, a strict interpretation and application of Dillon's Rule unnecessarily restricts the governing body of an incorporated city from taking appropriate actions that are necessary or proper to address matters of local concern for the effective operation of city government and thereby impeded the governing body from responding to and serving the needs of local citizens diligently decisively and effectively.

We conclude that this limited relaxation of "Dillon's Rule" provides Nevada's incorporated cities with the authority needed to deal with the rare instances where guidance has not been provided by statute or city charter while maintaining the Legislature's rightful oversight of municipal government.

Attachment

Nevada League of Cities and Municipalities
Home Rule Study Report
October 14, 2016

Jesse J. Richardson, Jr.

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Nevada League of Cities and Municipalities
Home Rule Study Report
October 14, 2016

Jesse J. Richardson, Jr.

"Ours is a 'dual system of government' which has no place for sovereign cities."

Community Communications Co., Inc. v. City of Boulder, Colo., 455 U.S. 40, 53, 102 S. Ct. 835, 70 L. Ed. 2d 810, 1982-1 Trade Cas. (CCH) ¶64448 (1982).

Introduction

"Home rule" generally refers to authority delegated from the state through the state constitution or the state legislature in the form of enabling authority or local government charters. "[T]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than 'home rule'" (Chicago Home Rule Commission 1954). A generally accepted definition of home rule refers to the concept as "the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives and referenda" (Krane, Rigos, and Hill 2001). Home rule has also been referred to as "talismanic".

Commentators have identified several types of home rule. Structural home rule refers to the ability of local governments to control the organizational aspects of the city, while functional home rule addresses the day-to-day tasks to operate the city. Fiscal home rule refers to the power to tax and borrow. Finally, administrative home rule applies to personnel issues.

Nevada local governments have generally been considered to have little or no home rule authority. Local government authority may be granted to local governments, in general, through the state constitution, municipal charters, and state legislation (referred to as enabling authority).

The Nevada Constitution grants little or no authority to cities and municipalities in the state, and an examination of city charters reveal little substantive authority is granted in that way. While N.R.S. Section 266.010 appears to grant broad home rule authority to cities incorporated under Chapter 266, court rulings with respect to similar broad, general grants of authority have not usually been favorable to local governments.

Nevada state courts use Dillon's Rule to interpret grants of authority from the state legislature to local governments. Dillon's Rule states that the governing body of an incorporated city possesses and may exercise only the following powers and no others:

- (a) Those powers granted in express terms by the Nevada Constitution, statute or city charter;
- (b) Those powers necessarily or fairly implied in or incident to the powers expressly granted;
- and
- (c) Those powers essential to the accomplishment of the declared objects and purposes of the city and not merely convenient but indispensable.

if there is any fair or reasonable doubt concerning the existence of a power, that doubt is resolved against the governing body of an incorporated city and the power is denied.

Dillon's Rule has been vilified in the academic literature, being described as a "yoke" under which local governments must "struggle" (Albuquerque 1998) and a "straitjacket" on local governments; "rigid and inflexible" (Gere 1982). The doctrine has been accused of effecting "a widespread impact upon the American community and urban landscape and [having] permanently colored the nature of state-local relations in each of the fifty states" (Gere 1982). The rule is said to be "overwhelmingly weighted in favor of supreme state authority and control" (Gere 1982).

In fact, 39 states use Dillon's Rule (Richardson, Gough, Puentes 2003) (Richardson 2011). Although many correlate Dillon's Rule with local government autonomy, no relationship exists between Dillon's Rule and local government autonomy (Richardson, Gough, Puentes 2003) (Richardson 2011). In addition, no relationship exists between home rule and local government autonomy (Richardson, Gough, Puentes) (Richardson 2011). The key factor with respect to local government autonomy is how much authority the state legislature (or state constitution) grants local governments.

Clearly, however, Nevada cities and municipalities have suffered from uncertainty as to whether they possess particular authority to act. Municipal attorneys generally strive to keep their clients out of court. With respect to Dillon's Rule and local government authority, that inclination most often results in the attorney advising the local government to not carry out a particular authority.

Nevada Assembly Bill 493

Introduction

Nevada Assembly Bill 493 ("the Act") became effective on July 1, 2015. The bill attempts to remedy the lack of local government autonomy in Nevada. The remedy comes in two forms. First, the Act expressly grant and delegate the authority to address "matters of local concern". Secondly, the Act modifies Dillon's Rule with respect to authority to address "matters of local concern". The Act mainly addresses functional home rule.

Authority to Address Matters of Local Concern

Section 7.1(c) of the Act serves to delegate the authority to address matters of local concern through a modification of Dillon's Rule. That subsection grants local governments, except as prohibited, limited or preempted by the Constitution, statutes or regulations of the United States or Nevada, and except as otherwise provided in 7.1, all powers necessary or proper to address matters of local concern for the effective operation of city government, whether or not the powers are expressly granted to the governing body.

Section 6. 1. Defines "matter of local concern" as any matter that:

- (a) Primarily affects or impacts areas located in the incorporated city, or persons who reside, work, visit or are otherwise present in areas located in the city, and does not have a significant effect or impact on areas located in other cities or counties;
- (b) Is not within the exclusive jurisdiction of another governmental entity; and
- (c) Does not concern:
 - (1) A state interest that requires statewide uniformity of regulation;
 - (2) The regulation of business activities that are subject to substantial regulation by a federal or state agency; or
 - (3) Any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this State to federal or state regulation that preempts local regulation.

Section 6.1(c)(3) is somewhat problematic, since Section 7.1 already addresses preemption. The most reasonable interpretation of Section 6.1(c)(3) is that the subsection refers to preemption. Despite the fact that this interpretation raises a redundancy, that interpretation is the most reasonable, and most likely.

Section 6.2. provides that the term includes, without limitation, any of the following matters of local concern:

- (a) Public health, safety and welfare in the city.
- (b) Planning, zoning, development and redevelopment in the city.
- (c) Nuisances and graffiti in the city.
- (d) Outdoor assemblies in the city.
- (e) Contracts and purchasing by city government.
- (f) Operation, management and control of city jails and prisoners by city government.
- (g) Any public property, buildings, lands, utilities and other public works owned, leased, operated, managed or controlled by city government, including, without limitation:
 - (1) Roads, highways and bridges.
 - (2) Parks, recreational centers, cultural centers, libraries and museums.

Section 6.3. strengthens the grant of authority to address matters of local concern by making clear that the provisions of subsection 2 are only intended to be illustrative, and are not

exhaustive or exclusive. However, Section 6.3(c) cautions that the provisions should not be read as limiting or expanding the definition of “matter of local concern” set out in Section 6.1.

Sections 7.3 and 7.4 list certain actions that incorporated cities may not undertake under the grant of home rule. Except as expressly authorized by statute or city charter, the governing body of an incorporated city shall not:

- (a) Condition or limit its civil liability unless such condition or limitation is part of a legally executed contract or agreement between the city and another governmental entity or a private person or entity;
- (b) Prescribe the law governing civil actions between private persons or entities;
- (c) Impose duties on another governmental entity unless the performance of the duties is part of a legally executed agreement between the city and another governmental entity;
- (d) Impose a tax; or,
- (e) Order or conduct an election.

In addition, except as expressly authorized by statute or city charter or necessarily or fairly implied in or incident to powers expressly authorized by statute or city charter, the governing body of an incorporated city shall not:

- (a) Impose a service charge or user fee; or
- (b) Regulate business activities that are subject to substantial regulation by a federal or state agency.

Modification of Dillon's Rule

Section 7. 1. Of the act modifies Dillon's Rule as applied to matters of local concern. That section provides that, except as prohibited, limited or preempted by the Constitution, statutes or regulations of the United States or this State and except as otherwise provided in Section 7.1, the governing body of an incorporated city has:

- (a) All powers expressly granted to the governing body;
- (b) All powers necessarily or fairly implied in or incident to the powers expressly granted to the governing body; and
- (c) All other powers necessary or proper to address matters of local concern for the effective operation of city government, whether or not the powers are expressly granted to the governing body. If there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter of local concern pursuant to this paragraph, it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature.

This provision significantly flips the presumption provided by Dillon's Rule with respect to matters of local concern. Courts should now assume that local governments possess the authority to address matters of local concern, unless a challenging party provides evidence to the contrary. With this provision, cities and municipalities may move forward to address matters of local concern with more confidence than prior to the Act.

Section 7.2 addresses the manner in which an incorporated city may address matters of local concern. If there is a constitutional or statutory provision or provision of a city charter requiring

the governing body of an incorporated city to exercise a power addressing a matter of local concern in a specific manner, the governing body may exercise the power only in that specific manner. However, if there is no constitutional or statutory provision or provision of city charter requiring the governing body to exercise the power in a specific manner, the governing body may adopt an ordinance prescribing a specific manner for exercising the power.

Impact of Assembly Bill 493

Introduction

Given the provisions of Assembly Bill 493, the major question concerns the real effect of the Act on incorporated cities in Nevada. Unfortunately, no clear answer can be given. However, some conclusions can be drawn from the Act.

Matters of Local Concern

The key to whether the Act will have a broad or narrow impact concerns the definition of "matters of local concern". Courts struggle to demarcate the line between matters of "purely local concern," which form the exclusive province of local legislation under home rule, and matters of statewide concern, which fall under the control of the state legislature (McQuillin 1966). Legislatures also struggle to draw this line. This lack of clarity may narrow the impact of the Act (Briffault 1990).

Court decisions muddy the waters further. The "constitutional concept of municipal affairs ... changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state" (California). Some describe the case law as more a "jurisprudence of labels" than any consistent principle of analysis. Courts apply several different tests to determine what constitutes a matter of local concern, but none of these tests provide much clarity.

Modification of Dillon's Rule

The modification of Dillon's Rule could prove to be a huge benefit to incorporated cities in Nevada. In the past, use of new power had to be viewed cautiously. Straying too far from the certain powers could easily cause litigation. Now, however, if the city can justifiably classify a power as one addressing a matter of local concern, the city may proceed with some confidence. The assumption now is that if the matter is one of local concern, the city holds the authority. Challengers now hold the burden of proving otherwise.

Conclusions and Recommendations

Although Nevada Assembly Bill 493 fails to provide absolute certainty to cities in Nevada, the Act gives hope and confidence to cities. If the authority seeks to address matters of local concern, the city can feel much more confident that it may address the matter without litigation, as the Act makes challenges more difficult. If a challenge is mounted, the city is much more likely to prevail.

Cities should carefully examine proposed actions that fall outside of expressly granted authority. First, ask whether the power falls within the list of matters of local concern contained in Section 6.2 of the Act. If the answer is no, does the power fall within the list of prohibited actions under Sections 7.3 and 7.4. If the answer to that question is no, analyze the action under the definition of “matters of local concern” under Section 6.1 of the Act. If the action reasonably fits within those parameters, the city can move forward with a fair amount of confidence that the action will be upheld.

Cities should carefully document their analysis of the proposed action under the provisions of the Act to prepare for a possible challenge, however unlikely. In addition, all cities in the state will benefit from communication and collaboration among the cities. Comparison of proposed actions and discussion of strategies to move forward will ensure a safer and more successful future for home rule. If there is a person or agency close to the Nevada state legislature that local governments can consult with to “test the waters” with respect to particular authority, that process would also aid the advancement of home rule.

As cities carefully move forward with home rule actions, the experience in West Virginia may prove instructive. Cities in West Virginia may apply for specific home rule authority. Cities have “experimented” with various authorities, and many new powers have been extremely successful. The program has been so successful that West Virginia legislature has granted all municipalities the authority to engage in actions that started with one municipality in the home rule program.

Although cities in Nevada have labored for decades with very little authority, Assembly Bill 493 presents the possibility large expansions of city authority. The key will be for cities to act in unison in a proactive and thoughtful manner.