

## **DILLON'S RULE...AND THE BIRTH OF HOME RULE**

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*"Whoso desireth to discourse in a proper manner concerning corporated towns and communities must take in a great variety of matter and should be allowed a great deal of time and preparation...The subject is extensive and difficult."*

*Thomas Madox, British Historiographer, 1726 (The Law of Local Government Operations, Rhyne, p. 1)*

Many of the inquiries the League staff receives have, at their root, the question of whether a municipality can exercise a particular power. The answers to these questions generally involve interpretations of the New Mexico statutes in light of something called "Dillon's Rule," named for Judge John Forest Dillon, a noted local government scholar. As the Chief Justice of the Iowa Supreme Court over 100 years ago, Judge Dillon authored two seminal opinions establishing the modern rule of law by which the powers of local government are evaluated.

Partly because Judge Dillon was considered to be a great authority on municipal law -- albeit one who distrusted local government -- his rule was adopted by other state supreme courts and ultimately by the United States Supreme Court in the early twentieth century. Dillon's Rule became cemented into the legal system as a fundamental rule of statutory construction. It still is the most determinative factor in interpreting general and specific powers of non home rule municipalities in New Mexico as well as in most states around the country.

### **WHAT IS DILLON'S RULE?**

Under Dillon's Rule, the state legislature is recognized as having plenary (complete) control over municipal government except as limited by the state or federal constitution. As a result of this complete legislative control, local government powers are quite limited and only extend to those powers which are:

- (1) granted in express words;
- (2) necessarily implied or necessarily incident to the powers expressly granted; and
- (3) absolutely essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable.

Dillon's Rule also establishes that any fair doubt by the courts as to the existence of a power is to be resolved against the municipality. In other words, if the power in-question isn't expressly authorized by the statute or the Constitution, or cannot be necessarily implied from a power that has already been authorized, it is presumed that a municipality does not have the power.

### **HISTORY OF STATE -- LOCAL RELATIONS**

In order to fully appreciate Dillon's Rule and its profound impact on the city-state relationship, one must focus upon the history of local-state legal relations in the years preceding it.

The modern municipal corporation, as we now know it, and its relationship to the state has developed over many centuries. From the ancient Egyptians living along the Nile, to the North American cliff dwellers, to the early Creeks and Romans, people have gathered together to form cities which became natural self-governing entities and logical seats of power. In fact, "the word 'municipal' is derived from the Roman 'municipium,' meaning a free city capable of governing its local affairs, even though subordinate to the sovereignty of Rome. In early England, the term was applied to self governing cities and towns; hence, from its origin, the word municipal connoted local self-government." (*The Law of Local Government Operations, Rhyne, p. 1*).

The English municipal governments served as the model for the early American, pre-Revolutionary War colonial governments. In the mid-17th century, corporations or boroughs were formed by grant or charter by the governors of the various new world colonies. The boroughs were somewhat independent from the colonial legislatures and their charters were considered to be contracts, which could be changed only with the approval

of both the colonial legislature and the local municipal corporation. In practice, however, the relationship developed into one of direct control by the legislature over the individual boroughs.

After the Revolutionary War, cities and towns were formed by act of the state legislature. Those that existed before the Revolution continued, for the most part, to operate under their existing charters. New municipalities were created by the state legislature adopting a special or local law establishing a separate charter for each municipality. Even though, in theory, the state legislature retained direct control over municipalities, by custom the actual control was lax, primarily due to the fact that the county was still largely rural. Prior to 1820, there were no cities with a population of over 50,000. These fledgling cities did not yet engage in large-scale activities that merited extensive concern by the state legislature. In fact, local laws often reflected the lack of municipal services and activity (e.g., there were laws against animals running at large but pigs were often exempted because they ate the garbage in the streets). With relatively few functions performed by cities, not much regulation was necessary by the state.

The need for more municipal activity came with the explosive growth that transpired in the mid-1800's. After the Civil War, the now united states began a metamorphosis from an agrarian society to an urbanized nation – the catalysts being the great waves of European immigration and the industrial revolution. Cities were not equipped to handle this overwhelming need for new infrastructure and services. The municipal governments were typically weak, not well organized, and public improvements did not function well. This made them easy victims for political machines and local bosses that led to a widespread and fundamental corruption in municipal government. Cities came to be viewed as the core of all that was wrong with society.

Accordingly, the state legislatures were reluctant to confer upon municipalities the powers necessary to professionally address the new and complex problems they faced. It was in 1868, amidst the backdrop of this corruption – the lowest point in the history of this nation's municipalities – that Judge Dillon issued his two famous opinions. Because of the rampant corruption in cities, he had little faith in local government and local officials' abilities and, thus, his opinions reflected the view that cities are creatures of the state and must be limited to those powers specifically granted to them by state laws or constitutions.

## **INHERENT RIGHT OF LOCAL SELF-GOVERNMENT THEORY**

Prior to Dillon's Rule, when legislatures had first begun to exercise greater control over municipal matters, opponents of this growing state control had emerged. Led by Judge Thomas Cooley of the Michigan Supreme Court, they argued that municipalities possessed an "inherent right of local self-government." They contended that such a power could be traced historically to colonial days when municipalities were created to govern their own affairs.

Further, the proponents of the inherent right of local self-government argued that the framers of the state constitutions intended to recognize this right as it existed in the colonial era unless the right was specifically rejected in a state's constitution.

The inherent right to self-government rule was, in fact, adopted by the courts in several states. By the mid-1800s, the extent to which the state legislature could control municipal government had become an issue that most state courts would eventually be forced to decide.

## **WHY DILLON'S RULE PREVAILED**

Many factors probably contributed to the fact that Dillon's Rule was the theory that was eventually adopted by the courts. The prevailing view of that time was that the state legislature should have the ultimate authority and control over municipal affairs. The sad plight of the cities at that time most certainly strongly reinforced that notion. Judge Dillon being a very highly respected authority on municipal law was also no small factor. During the mid-1800s, it would have been difficult for Judge Dillon and others to imagine any other kind of system that could work in practice other than plenary control of the state over the municipalities.

## **RESPONSE OF STATE LEGISLATURES**

With Dillon's Rule firmly in place as the accepted theory, there was no constitutional check on the state legislatures' power to become deeply involved in municipal matters of purely local concern. The state legislatures began enacting innumerable local or special laws to apply to individual municipalities and even to an individual department within a single municipality. They very frequently amended city charters – granting powers, then taking them away controlling minute details of municipal functions – all with hardly any consistency from one city to another. Municipal governments were reorganized on a regular basis.

Ironically, these special laws also allowed the state legislators to enhance their own power by rewarding their friends, penalizing their foes and, in general, by taking advantage of the corruption in municipalities. Corrupt local and state political machines often worked hand in hand with one another.

As the state legislatures necessarily devoted more and more of their time to the details of local government, they found less and less time to deal with substantial matters of state policy. The result of all this was unnecessary meddling in local affairs by the state, lack of uniformity in local government, increased corruption and a failure to provide for professional local self-government.

## **THE BIRTH OF HOME RULE**

In response to these conditions, and other abuses of local and special laws, many state constitutions were amended to limit the use of these local and special laws. In some states they were completely prohibited; in others they were allowed for certain enumerated purposes or when the subject matter would not be capable of treatment in a general law. States then began authorizing incorporation of municipalities under general laws instead of individual charters. As early as 1884, the Territory of New Mexico allowed municipalities to incorporate via procedures established by general law.

The New Mexico Constitution, adopted January 21, 1911, strictly limited the Legislature's authority to enact local and special laws [Article IV, Section 24].

The intent of such constitutional limitations on special and local legislation was, in part, to eliminate the use of such laws to unduly interfere in municipalities' local affairs and to ameliorate some of the worst abuses. However, since these states did not at the same time amend their constitutions to grant more local powers to the municipalities, a void was created. The state legislature's power was limited but a corresponding amount of power was not delegated to municipalities in order to enable them to respond properly to local problems. There was no affirmative strong role granted to local government in reaction to the limitation on state legislative power.

It became evident to municipal reformers that a new relationship between state and local government was necessary which would allow local matters to be handled at the municipal level without the need for constant state special or local legislation. The reformers created a new concept of local control, which incorporated part of the inherent right to local self-government rule, yet retained a part of the sovereignty of the states. That new principle became known as home rule.

## **WHAT IS HOME RULE?**

In very general terms, home rule can be defined as the transfer of power from the state to units of local government for the purpose of implementing local self-government. In most states, it also provides those local governments with some measure of freedom from state interference as well as some ability to exercise powers and perform functions without a prior express delegation of authority from the state.

Home rule has taken various forms around the country in the over 40 states that have adopted it. The New Mexico home rule provision (N.M. Constitution, Article X, Section 6) was passed by the electorate in 1970 and follows what is known as the devolution of powers model. Under this model the state constitution authorizes the citizens of a municipality to adopt a home rule charter. Upon adoption of such a charter, the constitution automatically grants or devolves upon such a municipality all powers which the legislature could grant or devolve.

To counterbalance this broad constitutional grant of powers, the state constitution also empowers the legislature to enact statutes that limit or prohibit the exercise of powers by local governments.

Whereas under Dillon's Rule it is assumed that a city does not have a particular power unless granted by the legislature, broadly speaking, the opposite is true with home rule. Under home rule, it is assumed that a municipality has a power unless it is expressly denied by state statute or constitution.

## **BENEFITS OF HOME RULE**

Although home rule may not be the choice for all municipalities, it can be advantageous for many reasons. Advocates cite the ability to act more quickly and effectively to solve local problems, rather than waiting for state enabling legislation. Home rule can be a tool municipalities can use to respond to complex local problems with creative solutions. Home rule empowers local officials to solve local problems, leaving state legislators free to address issues of primarily statewide concern. It allows communities the freedom to choose the best form of government to best suit their needs.

New Mexico has six municipalities which have elected to become home rule and two more are presently considering it. The remaining 93 still operate under Dillon's Rule. (*This should read: New Mexico has 10 municipalities that have elected to become home rule cities and two chartered cities. The remaining 90 operate under Dillon's Rule.*)

Even though New Mexico is a "home rule" state, Mr. Dillon's principles are alive and well here. For instance, New Mexico courts have chosen, thus far, to rule against home rule powers in specific areas such as zoning. It is ironic that here and elsewhere around the country, the judiciary has been more reluctant than the state legislature to provide any real teeth to home rule, especially since it was the legislature who created it at the expense of their own power.

Needless to say, times have changed drastically since Judge Dillon issued his opinions. Professional management of municipalities has replaced the corrupt political machines of the 1800s. Many federal laws, state statutes and court cases effectively guard against the worst abuses of the system by regulating open meetings, finance, personnel administration, etc. Amazingly, the past two New Mexico legislative sessions have seen the introduction of bills which would have not only severely restricted or completely abolished home rule powers, but also would have even restricted statutory municipal powers to an extent greater than Dillon's Rule by limiting municipal powers to only those explicitly expressed in Chapter 3, NMSA 1978.

## **WHAT ABOUT THE FUTURE?**

We live in an era of increasingly complex and intricate problems. As states and the federal government cut back on program funding, municipalities are required to fill in the gaps as well as respond to federal mandates. Municipalities need to continue to move forward with the tools to implement new and creative solutions. They need the power and authority to adequately perform their rightful functions and to fulfill their role as full, participating partners with the state and federal government.

Back in 1914 at the National Municipal League's annual meeting, then President William Dudley Foulke spoke in a pro-home rule speech on the wisdom of a sufficient amount of local autonomy. Although his language is a bit archaic, he strikes a chord with his analogy to man and life which is even more relevant today:

*"In the words of Judge Dillon, 'Cities possess no powers or faculties not conferred upon them by the law which creates them or other statutes applicable to them.'*

*"Now an organization which has its form and character thus impressed upon it by an outside body is more like a plaster than a living organism, and whatever life it has is stunted. Just as a man's individuality is dwarfed if in every act he must perform the will of a master, so the individuality of a city is necessarily stunted if in all that it does it is the mere creature and servant of the state. In organic life, all normal and healthy growth comes from within. It is the development of that which we know as the life principle, and while the sunshine, the air and the nutriment are supplied from the outside world, yet the power transmuting these into the thing which grows and develops and becomes a new form and living substance – that comes from this internal vital principle. It is more apt to be cramped than stimulated by outside interference and control, and unless it can have a certain liberty of action, all growth is impossible.*

*"In a general way, a city, like a man, can be trusted to do that which is for its own benefit more certainly than any outside instrumentality can be trusted to do good to it against its will. In the long run we can more safety trust liberty than autocracy."*

*4 National Municipal Review 13, 14 (1915)*