

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**THE STATE OF NEW MEXICO, ex rel.
MARIA PEREZ, CRAIG O'HARE, ELLEN
ACKERMAN, SAGE BIRD, and
ANNE NOSS,**

Petitioners,

vs.

Case No. D- 101-CV-2017-02778

**CITY COUNCIL OF SANTA
FE, NEW MEXICO, and MAYOR
JAVIER GONZALES, as the governing
body of the City of Santa Fe, New Mexico,**

Respondents.

**ORDER GRANTING PEREMPTORY WRIT OF MANDAMUS
AND DENYING MOTION TO DISMISS AND MOTION FOR RELIEF FROM
JUDGMENT**

This matter comes before the Court on the 1) Emergency Verified Petition for an Alternative Writ of Mandamus filed on September 29, 2017 ("Petition"); 2) Respondents' Motion to Dismiss Petitioners' Emergency Verified Petition for Alternative Writ of Mandamus, filed on October 17, 2017; and 3) Rule 1-060 Motion for Relief from Judgment or Order, filed on November 13, 2017 (collectively, "Respondents' Motions"). Having reviewed the Petition, Respondent's Answer to the Alternative Writ, the Respondents' Motions and Petitioners' responses thereto, heard oral argument of the parties, and having conducted an evidentiary hearing, the Court denies Respondents' Motions and grants a Preemptory Writ of Mandamus as set out below.

Procedural History

Petitioners filed their Petition on September 29, 2017 requesting that a writ of mandamus issue to compel the City of Santa Fe's Governing Body ("City" or "Santa Fe") to implement Section 4.06 of the Santa Fe Municipal Charter (1997 amended through 2014) ("Charter") requiring that candidates for municipal office be elected by a majority of the voters through a ranked choice voting ("RCV") system, a form of runoff election that combines the initial vote with an "instant" runoff vote in a single election. Charter, § 4.06. After several recusals, the case was assigned to Judge Greg Shaffer who issued an Alternative Writ on November 7, 2017 which ordered that the pleadings filed in a matter in the New Mexico Supreme Court, by the same Petitioners against the same Respondents, be judicially noticed. The City filed a Motion to Dismiss the Petition and also exercised its right to peremptorily recuse Judge Shaffer. The case was thereafter assigned to this court on November 9, 2017. The Court issued an Alternative Writ of Mandamus on November 9, 2017 and ordered the City to appear and show cause on November 21, 2017. At the November 21, 2017 hearing, the Court heard oral argument from the parties on Respondents' Motions, as well as on the merits of the Petition. Following oral argument, the Court issued a ruling from the bench denying Respondent's Motions for the reasons as set out below. The Court recognized that it was important to hold an evidentiary hearing to determine if there were undisputed facts which would give rise to a mandatory duty. The Court was specifically interested to determine if there were un rebutted facts regarding the "availability" of the software and equipment to run an RCV election that would impose a non-discretionary duty on the City. The Court set an evidentiary hearing for November 27, 2017.

The Court granted the City until November 26, 2017 to file a written answer to the Petition. At the November 21, 2017 hearing, the City also raised a challenge to the constitutionality of Charter Section 4.06. The Court further ordered the parties to address this issue at the November 27, 2017 evidentiary hearing.

Emergency Verified Petition for Alternative Writ of Mandamus

1. The Court recognizes that a writ of mandamus is an extraordinary remedy.

A mandamus proceeding is technical in nature and closely regulated by statute. The statutes regulating a mandamus proceeding are at NMSA 1987, Sections 44-2-1 to -14. Mandamus lies only to compel a public officer to perform an affirmative act where, on a given set of facts, the public officer has a clear legal duty to perform the act and there is no other plain, speedy, and adequate remedy in the ordinary course of law. The writ applies only to ministerial duties and it will not lie when the matter has been entrusted to the judgment or discretion of a public officer. A “ministerial duty” arises only when the law directs that a public official must act when a given set of facts exist.

Mimbres Valley Irrigation v. Salopek, 2006-NMCA-093, ¶¶ 10-11, 140 N.M. 168 (citations omitted); *see also Lovato v. City of Albuquerque*, 1987-NMSC-086, ¶ 6, 106 N.M. 287 (“[t]he act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.”)

2. In ruling on the Petition as well as the Motions, the Court notes that “[p]rovisions reserving to the people the powers of initiative and referendum are to be given a liberal construction to effectuate the policy thereby adopted.” *Albuquerque Bus Co. v. Everly*, 1949-NMSC-058, ¶ 6, 53 N.M. 460.

3. Following the hearing on November 21, 2017 and the evidentiary hearing on November 28, 2017, the Court finds that the undisputable facts necessary to give rise to a mandatory duty to

implement RCV for the March 6, 2018 election have been proven. The Court will issue a preemptory writ on this same date.

4. The Court reviewed the testimony and evidence concerning the City's argument that the Secretary of State could not certify Version 5.4 since it was not submitted by June 1, 2017 under NMSA 1987, 1-9-14. The Secretary of State Maggie Oliver Toulouse and Ms. Kari Fresquez, Elections Director and Chief Information Officer at the Secretary of State's Office, testified that the Secretary of State had discretion to voluntarily certify new software systems under NMSA 1987, 1-9-7.2. This provides the Secretary of State's office the ability to upgrade election systems software to take advantage of better technology and improved interface such as is the case with Dominion's Democracy Suite Version 5.4 ("Version 5.4"). As Ms. Fresquez was trying to explain to the City Council, this is necessary to ensure that the latest updates are included in a previously certified system and available for use throughout New Mexico.

5. The State Legislature gave the Secretary of State the discretion and authority to voluntarily test and certify voting systems outside of the June 1 application period in Section 1-9-7.2, which she used to certify the machines and software at issue here. The Legislative intent to allow such certification cannot be ignored, or treated as superfluous. "[A] statute must be construed so that no part of the statute is rendered surplusage or superfluous." *State v. Javier*, 2001-NMSC-030, ¶ 32, 131 N.M. 1 (citation omitted).

6. The Court finds that the City's argument that all election systems software can only be certified if submitted prior to June 1st of odd years would freeze any upgrades for almost two years. It would nullify NMSA 1986, 7-9-7.2 and the discretion afforded the Secretary by that

statute. The City's argument is absurd and is rejected by the Court which will give deference to the Secretary in her interpretation of the election statute she is charged with overseeing. *Atty. Gen. v. Public Regulation Comm'n*, 2013-NMSC-042, ¶ 12, 309 P.3d 89 (citations omitted); *Dona Ana Mutual Domestic Water Consumers Assoc. v. N.M. Public Regulation Comm'n*, 2006-NMSC-032, ¶ 10, 140 N.M. 6 ("we have long recognized the power of agencies to interpret and construe the statutes that are placed, by legislative mandate, within their province") (citations omitted); *Talamante v. Pub. Emps. Ret. Bd*, 2006-NMCA-032, ¶ 7, 139 N.M. 226 ("When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation." (citations omitted)); *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2001-NMCA-047, ¶ 19, 130 N.M. 497 ("the court should defer to the administrative agency's view of a statute unless the legislative history or purpose and structure of the statute clearly reveal a contrary intent"); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

7. The Court also heard legal argument and reviewed evidence concerning the City's claim that the Charter amendment is unconstitutional. The Court reviewed legal authority and began its Order from the bench citing *Dudum v. City & County of San Francisco*,

The Constitution does not compel a "fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9, 102 S. Ct. 2194, 72 L. Ed. 2d 628 (1982). After all, "[t]he science of government is the most abstruse of all sciences . . . It is a science of experiment." *Anderson v. Dunn*, 19 U.S. 204, 226, 5 L. Ed. 242 (1821). States and municipalities are free to experiment with reform in an endeavor to craft more perfect or workable systems. Save and unless a state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs. *Sailors v.*

Board of Ed. of Kent City, 387 U.S. 105, 111, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967).

Dudum v. City & County of San Francisco, 2010 WL 3619709, at * 6 (N.D. Cal. Sept. 9, 2010).

8. The Court recognizes that "provisions reserving to the people the powers of initiative and referendum are to be given a liberal construction to effectuate the policy thereby adopted." *Albuquerque Bus Co. v. Everly*, 1949-NMSC-058, ¶ 6, 53 N.M. 460. The Court finds that section 4.06 of the Charter is constitutional. The New Mexico Constitution grants home rule municipalities the right to amend their charter to allow for runoff elections. N.M. Const., art. VII, § 5(C). The New Mexico Constitution specifically provides that the purpose of home rule "is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities". *Id.*, § 6 (E).

9. The New Mexico Supreme Court has ruled that a home rule municipality may:

exercise all legislative powers and perform all functions not expressly denied by general law or charter. . . *Thus, home rule municipalities do not look to the legislature for a grant of power to legislate, but only look to statutes to determine if any express limitations have been placed on that power.*

State ex rel. Haynes v. Bonem, 1992-NMSC-062, ¶11, 114 N.M. 627 (emphasis added) (citations omitted). Respondents did not cite to any provision in statute or constitution that limits, restricts or prohibits conducting runoff elections using instant runoff also known as ranked choice. The Charter Review Committee appointed by the City of Santa Fe in 2007, which recommended submitting the option of conducting a runoff using rank choice voting to the citizenry, cited the

benefits of this method of conducting a runoff versus having two separate elections. City of Santa Fe Charter Review Comm'n, Report and Recommendations to the Governing Body (Jan. 24, 2007), at 15.

10. The Court desires to set out a full explanation of its analysis of the parties' legal arguments, and its review and adjudication of the evidence submitted during the evidentiary hearing to assist the parties and any potential reviewing court understand the Court's reasoning. However, in the interest of entering an Order expeditiously, the Court shall issue the preemptory writ today. An extended order with findings of fact and conclusions of law will follow. The factual and legal basis for the writ are as set out in more detail on the preemptory writ.

NOW, THEREFORE, the Verified Emergency Petition for Writ of Mandamus is GRANTED as amended and set out in the preemptory writ.

Motion to Dismiss

11. On August 30, 2017 Petitioners filed an Emergency Verified Petition for Alternative Writ of Mandamus in the New Mexico Supreme Court ("Supreme Court Petition") arguing that the necessary conditions had been met and that the City of Santa Fe had a non-discretionary duty to implement the RCV provision of the City Charter.

12. The New Mexico Supreme Court issued an order requesting a Response to the Emergency Petition, and Respondents filed a timely Response to the Supreme Court Petition arguing, as they do here, that the City had the discretion to not implement the RCV provision.

13. The New Mexico Supreme Court issued an order on September 21, 2017 stating: "Whereas, this matter came on for consideration by the Court upon emergency petition for writ

of mandamus, and the Court having considered the foregoing and being sufficiently advised . . . the petition for writ of mandamus is hereby denied.” *New Mexico ex rel. Maria Perez v. City Council of Santa Fe*, No. S-1-SC-36639 (Sept. 21, 2017) (the "Supreme Court Denial"). No findings and conclusions or other explanation for the denial were given by the New Mexico Supreme Court.

14. On September 29, 2017, Petitioners filed an Emergency Verified Petition for Alternative Writ of Mandamus ("District Court Petition") in this Court, which acknowledged the Supreme Court Denial, and alleged facts to show that the facts and circumstances alleged in the Supreme Court Petition had changed materially since the Supreme Court Denial, namely the New Mexico Secretary of State’s certification of Dominion’s Democracy Suite Version 5.4, which contained the RCV functionality, on September 27, 2017.

15. In the Motion to Dismiss Petitioners’ Emergency Verified Petition for Alternative Writ of Mandamus, Respondents argued that the District Court Petition is barred by *res judicata* because the Supreme Court Denial was a final judgment on the merits, the parties in both petitions were the same, and that the cause of action was the same in both petitions.

16. At the time the New Mexico Supreme Court issued its one page denial of the Supreme Court Petition, the software at issue had not been certified for use in the State of New Mexico. On September 27, 2017, the State of New Mexico certified the software for use. Thus, the conditions which mandate the issuance of a writ are different in this District Court proceeding than they were when Petitioners filed the Supreme Court Petition.

17. “The doctrine of *res judicata* was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants.” *Mershon v. Neff*, 1960-NMSC-096, ¶ 13, 67 N.M. 311.

18. This Court does not take lightly its obligations under the New Mexico constitution and the mandamus statutes to compel public officials to do their non-discretionary duty. The Charter section at issue mandates that City officials *shall* be elected using a ranked choice or instant runoff system when the two previously mentioned factual conditions are met. The question arises then, as to whether those two factual conditions were adjudicated in the previous case.

19. The Court finds that there is no evidence in the Supreme Court proceeding that there was any adjudication of the facts which would underlie a mandatory duty to act. *But cf.* *Cohn v. Isensee*, 45 Cal. App. 509, 510-511 (Cal Ct. App. 1920) (dismissing an application for writ when it was found to have been adjudicated in a superior court).

20. As noted in *Hoyt v. State*, 2015-NMCA-108, ¶ 18, following an answer to an alternative writ, “the issues thereby joined shall be tried and further proceedings had in the same manner as a civil action.” And again in *Mimbres*, if “issues of fact are raised by the alternative writ and answer, a trial must first be held to resolve those factual issues to determine if the petitioner is entitled to the extraordinary writ of mandamus.” *Mimbres*, 2006-NMCA-093, ¶ 19.

21. Since there has been no adjudication of whether undisputed facts exist to give rise to the mandatory duty, the Court finds that the Supreme Court Denial does not serve as *res judicata* for the Petition now before this Court.

NOW, THEREFORE, Respondents' Motion to Dismiss is hereby DENIED.

Rule 1-060 Motion for Relief from Judgment or Order

22. In the Rule 1-060 Motion for Relief, Respondents' argued that the Court should rule on the Motion to Dismiss before the Respondents were required to file an answer.

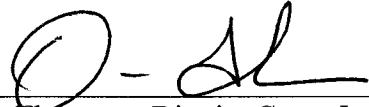
23. This Court held a hearing on November 21, 2017, at which time the Court found that there was limited material and mixed questions of law and fact as to whether the City's acts raised in the Petition are discretionary. The Court held that the question was whether or not equipment or software for tabulating the votes and allowing correction of incorrectly marked in-person ballots are in fact available, and that it would be the factual issue determined by the Court at an evidentiary hearing on November 28, 2017. The Respondents were ordered to file an Answer to the Alternative Writ of Mandamus by November 27, 2017.

24. Following the evidentiary hearing on November 28, 2017 this Court granted the Emergency Verified Petition for Writ of Mandamus.

NOW, THEREFORE, the Rule 1-060 Motion for Relief from Judgment or Order is hereby DENIED.

IT IS SO ORDERED.

Date: 11/30/2017



David K. Thomson, District Court Judge

Prepared by:

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