

Opinion No. 52-5529

March 31, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Manuel R. Baca, Secretary State Tax Commission Santa Fe, New Mexico

{*238} Recently you asked this office whether the fact that the 1950 U. S. Census gave the town of Aztec a population of less than 1000 precludes the town from issuing negotiable street improvement bonds under Sections 14-3335 to 14-3340, {*239} NMSA, inclusive. Section 14-3335, which relates specifically to the population requirement in such bond issues, reads in part as follows:

"Any city, town or village incorporated under the laws of the state of New Mexico, having a bona fide population of not less than one thousand (1,000) persons, as shown by the last school census taken before any election to be held under the provisions of this article, is hereby authorized and empowered to borrow money and issue the negotiable bonds of such city, town or village, from time to time, in an amount or amounts not exceeding in the aggregate one hundred thousand dollars (\$ 100,000) for the improvement of streets in any such city, town or village. Provided, that the limitation of \$ 100,000 shall not be applicable to any city in the state of New Mexico having more than 15,000 inhabitants, as shown by the last U. S. census."

It will be noted that the population requirement of this section is that the town have a "bona fide population of not less than 1000 persons, as shown by the last school census." The language of this specific requirement has remained unchanged since its original enactment as Chapter 35, Section 1, Laws of 1907. It is clear that in 1907 a "school census" had a two-fold function. The applicable statute at that time providing for school census was Chapter 23, Section 1, Laws of 1905 as amended by Chapter 35, Section 7, Laws of 1907 (Codified as Sec. 4857 Code of 1915). This statute provided not only for a census of unmarried persons between the ages of 5 and 21 in each school district, but also authorized a further enumeration of all persons residing in a municipality, in the following language:

"Whenever a petition signed by one hundred qualified voters shall be presented to the board of education or school trustees of any incorporated city, town or village in this State praying therefor, any such board to which such petition is presented shall require the person appointed to make the school census at the time of making such school census to also ascertain and enumerate the number of persons residing in any such city, town or village. All resident unmarried persons between said ages shall be entitled to attend the schools of their districts."

Section 4857 Code of 1915 was repealed in Chapter 148, Sec. 1431, Laws of 1923, and it is readily apparent that at the present time there is no statutory provision in New Mexico authorizing the use of school census machinery for the purpose of enumerating

the entire population of a municipality. Inasmuch as the means of determining the population of a municipality to qualify it under Sec. 14-3335 to issue bonds no longer exists, we must turn our attention to the legislative intent in the enactment of 14-3335 to determine whether the "bona fide population" of a municipality may be reckoned by other means. In my opinion the Legislature took note of the fact that the U. S. census is taken only once every ten years, and that Laws of 1884, Ch. 39, Sec. 14 and amendatory Acts (14-1836 NMSA 1941), authorized a city or town to provide for the taking of the census only "once between the years prescribed by law for census to be taken by the United States." On the other hand, under the old school census law discussed above, a municipality was authorized to have a census taken by the school census enumerator as often as once a year. In my opinion, therefore, it was clearly the intention of the Legislature in the enactment of Chapter 35, Laws of 1907 to provide that a municipality's bona fide population could be determined frequently and by a convenient method to enable it to meet the population requirement for the issuance {240} of street improvement bonds. Certainly there was no legislative intent to make it difficult for a town to show a sufficient population for this purpose.

As has been mentioned above, this convenient method of determining a town's population no longer exists. However, in my opinion, this fact cannot be taken to mean that a municipality must now show a population in excess of 1000 by the last U. S. census in order to meet the qualification of 14-3335. The original intent of the 1907 Legislature is still inherent in the Act, and the key to that intent is that a municipality be shown to have a **bona fide population** of 1000.

How may a town show a bona fide population of 1000? I have learned that since the 1950 U. S. Census Aztec has taken two steps to determine its population. Several months after the official 1950 census, I am informed, the Editor of the Aztec newspaper conducted a census and the results showed a population of just under 1200. Also, in the last few weeks the Aztec School Superintendent determined that there are 423 children in Aztec schools who actually reside within the town limits. This latter figure would also seem to reflect an over-all population in excess of 1000. In my opinion, these two determinations, reduced to affidavit form and filed with the town records, could in themselves very likely stand the test of a "bona fide population of over 1000" in the New Mexico courts, if the town ever issued bonds pursuant to Sec. 14-3335, et seq., and the legality of the bond issue were contested.

There is, however, in the case of Aztec, an even better method of determining its present population, a method which could not, in my opinion, possibly be attacked successfully. In Sec. 14-1836 we find the following language pertaining to the taking of a local census:

"The city council or trustees of a town shall have power to provide for the taking of the city or town census; but no city or town census shall be taken by authority of council or trustees oftener than once between the years prescribed by law for census to be taken by the United States."

I understand that no such census has been taken by Aztec since 1950, so the town obviously comes within the purview of this statute. Therefore, since in my opinion the taking of this type of census fits clearly into the spirit of Sec. 14-3335, it is my suggestion and recommendation that the town trustees follow the procedure authorized in 14-1836 before issuing street improvement bonds. The results of such census should be certified and made a part of the town and county records. It would also be well to reduce to affidavit form and file in like manner the figures derived from the enumerations mentioned in the previous paragraph.

If the procedure recommended above is followed and the result of the census taken shows a population in excess of 1000, it is my opinion that the town of Aztec will then have met the population requirement of Sec. 14-3335.

I am taking the liberty of forwarding to the Town Attorney of Aztec a copy of this opinion, which I trust, has answered fully your questions on this subject.