

Opinion No. 61-44

June 1, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Carl P Dunifon, Assistant Attorney General

TO: Stanley J. Leland, M.D., Director, New Mexico Department of Public Health, Santa Fe, New Mexico

QUESTION

In the preface to your request you mention Chapter 77, Article 16, Sections 77-1601 to 77-1609, N.M.S.A., 1941 Compilation. In order to avoid confusion, said sections of 1941 statutes are now 75-17-1 through 75-17-9, N.M.S.A., 1953 Compilation. The so-called Sanitary Projects Act, Chapter 122, N.M.S.A., 1957 Compilation as amended by Chapter 284, Laws of 1959, is now Section 14-40-91 through 14-40-109 (PS) N.M.S.A., 1953 Compilation.

QUESTIONS

1. In the preamble to the proposed Articles of Incorporation, two purposes are set forth for incorporation under two separate statutes. One purpose provides for incorporation under the existing Water Users' Association and the other provides for incorporation as a Mutual Domestic Water Consumer's Association under the Sanitary Projects Act. Can a non-profit association be incorporated under more than one New Mexico statute?
2. If the answer to the first question is no, are there legal procedures for dissolution of a non-profit association that might be followed?
3. One of the purposes for incorporation given in the preamble to the Association Articles is that of "forming a mutual domestic water consumers' association" under the Sanitary Projects Act. As this is the stated reason for incorporation, should the name of the Association include the words "Mutual Domestic Water Consumers' Association"?
4. Article II of the amended Articles lists five incorporators. The Sanitary Projects Act provides that "all persons within a community who participate or desire to participate in any project may become members of an association upon complying with the rules and regulations prescribed by the Board of Directors of the Association, such rules and regulations to meet with the approval of the Department." Are all members of the old Association meeting these requirements of the Village who are not members be given an opportunity to join the new or reorganized Association as the new water supply will have been constructed with State funds?

5. If the answer to Question No. 4 is yes, should the signatures of all the original incorporators appear on the original copy of the amended Articles of Incorporation filed with the Corporation Commission?

6. Article IV, Section 2, states that the Association can borrow from any source without limitation. Is this section in conflict with the provisions of Section 15 of the Sanitary Projects Act?

7. Can the reorganized Association (reorganized or chartered under the Sanitary Projects Act) assume the bond debt of the previous corporation or is this in conflict with the provisions of Section 15 of the Sanitary Projects Act?

8. Are the provisions of Article VII, Section 1, concerning the election of a Board of Commissioners in conflict with Section 12 of the Sanitary Projects Act?

9. Article IX lists five commissioners who are to serve as "incorporating directors for the first term". Should these five Commissioners or Directors be elected by the entire membership of the new or reorganized Association prior to incorporation?

CONCLUSIONS

1. See Analysis

2. Yes, see Analysis

3. Yes, see Analysis

4. See Analysis

5. See Analysis

6. See Analysis

7. See Analysis

8. See Analysis

9. See Analysis

OPINION

ANALYSIS

1. New Mexico has neither statutory nor case law which sheds light on the question involved. We are unable to find case law in other states which enables us to give a yes or no answer to this question.

It is our suggestion that in the interest of administrative convenience and to prevent confusion, that the old or present corporation be dissolved and that a new corporation be formed by virtue of the provisions of the Sanitary Projects Act, Section 14-40-91 through 14-40-109 (PS), N.M.S.A., 1953 Comp., supra.

2. We take the liberty of advising that under the provisions of Section 51-14-30 (PS) (n), N.M.S.A., 1953 Compilation, a nonprofit corporation can dissolve and wind up by majority vote of its duly accredited members in attendance at any regular meeting upon notice. Our answer is that there are legal procedures for dissolution of a non-profit association.

3. Although we see no particular magic in the word "consumer" as contrasted with the word "user" it is our feeling that it would be the part of wisdom to include the words "Mutual Domestic Water Consumers' Association" in the name of the association. This, particularly in view of the fact that one of the purposes of incorporation given in the preamble to the Association Articles, is that of "forming a mutual domestic water **consumers'** association" under the Sanitary Projects Act.

4. In view of our answer to your first question, we deem it unnecessary to answer the question "Are all members of the old Association meeting these requirements considered to be incorporators."

Suffice it to say that **all** residents of the Village, whether members of the present association or not, should be given **equal** opportunity to join the new or reorganized association. We feel that this is the intent of the Sanitary Projects Act, particularly by virtue of Section 14-40-101 (PS), N.M.S.A., supra, which bears the heading "Membership". The use of the phraseology "as determined by the board of directors and the **department**", is very significant. "Department" of course means your department. Your department has supervisory control which could effectually prevent one officer, member or group of members from riding rough-shod as it were, over the rights and wishes of other members or groups.

5. Again, in view of our answer to your first question, we deem it to be superfluous and unnecessary to answer your question No. 5. All proceedings would be had under the Sanitary Projects Act.

6. Section 14-40-105 (PS) (B), N.M.S.A., 1953 Compilation, reads as follows:

"Association constitutes body corporate -- Debts -- Issuance of bonds. --

. . .

B. Associations which have been established and in existence for a period of two (2) or more years have power to become indebted or issue bonds in a form approved by the attorney general for expansion and improvement of the association's facilities by pledging future income from service charges. Such indebtedness by an association is

contingent upon approval by the department of public health and the department of finance and administration and upon a proper showing by the association to both departments that the indebtedness is for necessary expansion or improvement purposes and that the financial condition and future income of the association warrants approval of such indebtedness or issuance of bonds by the association. No association has power to become indebted or issue bonds of any kind other than as permitted by this section."

The language of this section spells out and circumscribes the money borrowing powers of associations either to become indebted or to issue bonds.

Article IV, Section 2 of the proposed amended Articles reads:

"To borrow from any source, money, goods or services without limitation as to the amount of corporate indebtedness or liability; and to pledge as security therefor, from service charges, assessments or other revenues."

It would appear obvious that by no stretch of the imagination can Article IV, Section 2, supra, of the proposed Articles be retained **as is** if the association proposes to comply with Section 14-40-105 (B), supra.

7. Section 14-40-105 (A) (PS), supra, provides:

"Upon the filing of each certificate and copy thereof as provided in section 14-40-107 New Mexico Statutes Annotated, 1953 Compilation, the persons so associating, their successors and those who may thereafter become members of the association constitute a body corporate by the name set forth in the certificate and by such name may sue and be sued, have capacity to make contracts, acquire, hold, enjoy, dispose of and convey property real and personal and do any other act or thing necessary or proper for carrying out the purposes of their organization."

We have already quoted verbatim paragraph B of the same Section in answer to question No. 6, supra. Although the language of neither paragraphs A or B, Section 14-40-105 (PS), supra, specifically authorizes the refinancing of a pre-existing association or corporation, it would seem that the legislative intent is clear that financing or refinancing could be effected with the joint approval of the Department of Public Health and the Department of Finance and Administration. It is our opinion that the new association can assume the bonded indebtedness of the previous corporation subject to the approval of the departments just mentioned.

8. Section 14-40-102 (PS), N.M.S.A., 1953 Compilation states:

"The local administration of any project and the operation and maintenance of the completed project shall be carried out in each community by a board of directors chosen from the membership of the association, said board to be composed of five (5)

members; said board of directors to be chosen annually at a meeting to be held in each community where an association has been organized . . ."

Article VII, Section 1 of the proposed new Articles of Incorporation provides overlapping terms for members of the Board of Commissioners. Incidentally, we assume that the word commissioners as used in the new Articles is synonymous with the word directors as used in Section 14-40-102, supra. The staggered terms are not in keeping with Section 14-40-102 (PS), supra.

It is our opinion that the provisions of Article VII concerning the election of a board of commissioners is in conflict with Section 12 of the Sanitary Projects Act (14-40-102 (PS), N.M.S.A., 1953 Comp.).

9. In keeping with what to us is the spirit and intent of the provisions of the Sanitary Projects Act, and particularly, in keeping with Section 14-40-102 (PS), supra, it is our thinking that the five commissioners or directors should be elected by the entire membership of the new or reorganized association prior to incorporation.

In concluding this opinion, we will state that as far as possible, we have endeavored to bear in mind the words in the last paragraph of your request:

"The water situation at Cuba, New Mexico becomes more hazardous each day."

We trust that Cuba will soon have an adequate supply of good water.