

Opinion No. 65-73

May 3, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Luis L. Fernandez, chief, Local Government Division, State Capitol, Santa Fe, New Mexico

QUESTION

STATEMENT OF FACTS

Pursuant to the authority contained in Section 14-4-1, et seq., N.M.S.A., 1953 Compilation, the Village of Questa, New Mexico was incorporated. The election of officers was held on June 16, 1964. Subsequently, on June 18, 1964, Cause No. 7008 was instituted in the District Court of Taos County upon a Petition applying for a recount of votes cast for the offices of Mayor and one Council member. The date originally set for recount was postponed by Order of the Court dated August 11, 1964, due to the failure of the attorney for the applicants to request that notice be given to the election judges and clerks. The Court directed that counsel for applicants take whatever action they deemed advisable to correct the error regarding the request for recount. The latest entries appearing of record subsequent to the Order of Postponement are a Motion to Dismiss filed by the elected officials on October 15, 1964, and a Notice of Hearing setting October 23, 1964 as the date for hearing on the recount of ballots. It is our understanding that no further action has been taken upon this cause to date.

With regard to the incorporation of the Village of Questa, a second cause was instituted in the District Court of Taos County on September 15, 1964, by Complaint in the nature of a Petition in Quo Warranto in the name of the State ex rel. three specified individuals, naming as defendants the elected officials of the Village of Questa, the Village of Questa, the Taos County Board of County Commissioners, and the individual members of that Board of County Commissioners, and the individual members of that Board of County Commissioners. Said Complaint generally attacked the validity of the incorporation above mentioned and plaintiffs prayed for "Judgment as to the validity of said act of incorporation, and the right of defendants herein named or others not named, to levy any taxes as against them or pass ordinances or otherwise act as a duly incorporated legal body of government." Two separate answers were filed on October 12, 1964 and October 22, 1964, respectively, by the officials and the Village of Questa, both of which denied the allegations of invalidity of the incorporation set forth in the Complaint. With issue thus joined, the case is still pending as of this writing.

We have been advised further that the elected Village officials acting under advice of counsel have adopted several ordinances authorizing taxes and licenses.

QUESTION

May the Local Government Division of the Department of Finance and Administration approve a budget for the Village of Questa authorizing the disbursement of public funds acquired through the collection of taxes by said village?

CONCLUSION

Yes.

OPINION

{*124} ANALYSIS

The "Order declaring Questa, New Mexico to be an incorporated Village and that an election be held" issued by the Board of County Commissioners, County of Taos, indicates that all conditions precedent had been met by the petitioners for incorporation. The attorney for petitioners as well as the then District Attorney of the Eighth Judicial District approved said Order as to form. Besides declaring the incorporation, the Board set forth in that Order certain findings of fact bearing upon the requirements of the statutes relating to incorporation and further directed that an election for officers be held pursuant to Section 14-16-8, N.M.S.A., 1953 Compilation.

The primary problem confronting us here centers around the effect, if any, of the suits filed, contesting such incorporation as specified in the facts above, upon the ability of the elected officials to act in their official capacity.

Section 14-4-3, N.M.S.A., 1953 Compilation (P.S.), states in pertinent part:

". . . If the board of county commissioners finds that the provisions of this section and the provisions of sections 14-14-1 and 14-14-2 New Mexico Statutes Annotated, 1953 Compilation have been fully complied with it shall promptly declare the proposed village to be an incorporated village and shall order an election to be held for the election of those officers thereof as are provided for in Section 14-16-8 New Mexico Statutes Annotated, {*125} 1953 Compilation; . . ."

And, Section 14-16-8, supra, referred to in the above quotation provides in part as follows:

". . . Provided, however, that the **first officers elected** after the incorporation of any village **shall assume the duties of the respective officers after canvass of the vote and qualification of such officers** and shall hold office until the next regular election for village officers." (Emphasis supplied.)

It is our understanding from information received from the County Clerk of Taos County that the persons who were elected to the posts of Mayor and Village Trustees on June 16, 1964 have been issued certificates of election and have otherwise been qualified.

An attempt to create a municipal corporation may bring about one of three results -- a de jure corporation, i.e., one which is an entirely valid municipal corporation; a de facto corporation, i.e., one which is valid because there has been substantial compliance with incorporation requirements, though subject to question in a direct proceeding; or, a wholly invalid corporation, i.e., one where there has been a lack of substantial compliance with **mandatory** provisions of the law as regards incorporation.

It has been said of a de facto corporation:

"A de facto corporation has been defined as one so defectively created as not to be a de jure corporation, but nevertheless the result of a bona fide attempt to incorporate under existing statutory authority, coupled with the exercise of corporate powers, and recognized by the courts as such on the ground of public policy in all proceedings except a direct attack by the state questioning its corporate existence . . .

"The general rule is that, in order to be a de facto municipal corporation there must be (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempted compliance in good faith with the requirements of the statute as to incorporation; (3) a colorable compliance with the statutory requirements; and (4) an assumption of corporate powers . . ." (McQuillin, Municipal Corporations, Vol. 1, § 3.48, pp. 587, 588.)

It is our opinion that in the instant case there has been created, at the very least, a de facto corporation. We cannot, of course, look behind the record which exists in this situation evidencing incorporation, without invading the province of the trier of facts in the aforementioned suits, i.e., the court. Therefore our conclusion is based upon the action taken by the Board of County Commissioners, which we must assume has acted in good faith in the performance of its duties.

The purpose of the de facto doctrine is forcefully evident in the present instance. As the statement of facts recites the election of officers was held on June 16, 1964. At this late date no final action has been taken in the suits filed.

Certainly no one would contend, considering the circumstances present here, that the Village of Questa should cease all municipal activity, due to the absence of officers, pending the outcome of the suits. Such a pronouncement would be contrary to public policy, in that it would bring to a standstill important public functions with ensuing public disorder and possible chaos. The doctrine of de facto would be a useless one if it could be circumvented by the mere filing of a lawsuit.

We must conclude therefore, based upon the foregoing analysis, that the Local Government Division {**126*} may proceed to approve a budget for the Village of Questa

authorizing the disbursement of public funds acquired through the collection of taxes by said Village.