Opinion No. 67-18

February 1, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Quentin B. Rodgers State Representative /- Eddy County House of Representatives Santa Fe, New Mexico

QUESTION

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Is Section 14-20-2 (B), as amended, under Chapter 64 of the 1966 Session Laws constitutional?

CONCLUSION

Yes.

OPINION

*{*22}* **ANALYSIS**

Section 14 -- 20-2 (B), N.M.S.A., Chapter 64, Laws 1966 reads as follows:

"B. a municipal zoning authority may adopt a zoning ordinance applicable to all or any portion of the territory within the subdividing and platting jurisdiction of the municipality; provided, that in the absence of a county zoning ordinance a qualified elector may file a petition, signed by the qualified electors of the county equal in *{*23}* number to not less than ten percent of the votes cast for the office of governor at the last preceding general election, seeking the adoption of a zoning ordinance by the county zoning authority. Within one year of the filing of the petition seeking the adoption of a county zoning ordinance, the board of county commissioners shall adopt a county zoning ordinance."

Section 14-18-5 A. (1) reads as follows:

". . . The planning and platting jurisdiction of a municipality having a population of twenty-five thousand or more persons includes all territory within five miles of its boundary and not within the boundary of another municipality; . . ."

The question asked as to the constitutionality of these laws has arisen because the sections have allowed the municipal authorities to extend their zoning jurisdiction five miles into the county. Heretofore, county authorities had the responsibility of zoning and policing that five mile area.

The power to zone is a valid exercise of the state's police power, **Robertson v. Salem,** 191 F. Supp. 604 (1961). Generally, a municipality has no police power to zone. Accordingly, it must be delegated by the state to the municipality, **People v. Barry,** 32 Misc. 200, 228 NYS2d 106 (1961). Under these general rules, Section 14-20-2(B) would appear to be constitutional. It is simply the delegation of the state's police power to a municipality.

However, certain standards must be met in the implementing of the zoning provisions. We start with the proposition that zoning provisions are presumed to be valid, **Lockard v. Los Angeles,** 33 Cal. 2d 453, 202 P.2d 38 (1949). But the zoning provision must have a reasonable objective. It may not be arbitrary in operation, **Lockhard v. Los Angeles,** supra, **Robertson v. Salem,** supra.

The statute here in question appears to be reasonable. The extension of five miles around the municipality's boundaries is uniform. It does not appear to be arbitrary. It does not appear to violate the "public interest", **Wilkins v. San Bernadino** 29 Cal. 2d 332, 175 P.2d 542 (1946).

Further, if the municipality may constitutionally zone certain areas, it has the police power to enforce the provisions, **Ex Parte Hobbs,** 143 Tex. Crim. 100, 157 S.W. 2d 397 (1941).

Therefore, it is the opinion of this office that Section 14-20-2 (B) is a legitimate delegation of the state's police power. It is neither arbitrary, unreasonable, nor discriminatory. The mere fact that the zoning ordinance give municipalities authority where the counties used to have it is not a proper basis for holding the statute unconstitutional. In the absence of a showing of the above factors, this office must presume the statute to be constitutional.

By: Donald W. Miller

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