

Opinion No. 68-81

August 7, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Robert W. Botts Attorney Albuquerque Public Schools 724 Maple, S. E.
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QUESTION

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1. In a county income surtax election held pursuant to Senate Floor Substitute for Senate Bill No. 2, enacted by the 1968 Special Session of the Legislature, is it necessary for a majority of all qualified electors living in the county to vote in favor of the resolution before it is adopted?
2. Must voter registration books be used at an election held pursuant to the county income surtax law?

CONCLUSIONS

1. No.
2. No.

OPINION

{*131} ANALYSIS

In Attorney General Opinion 68-75, issued July 19, 1968, this office answered a number of questions directed to the county income surtax law enacted by the 1968 Special Session of the New Mexico Legislature. We have now been asked to answer one additional question concerning the type of majority needed to adopt a county income surtax resolution and also to reconsider one of the conclusions we reached in our first opinion.

In the first question we are asked if a majority of all qualified electors in the county is needed to adopt a resolution imposing a county income surtax or whether only a majority of those qualified electors voting on the resolution is needed. Section 2C of the county income surtax act provides as follows:

"No resolution imposing the tax shall go into effect until after an election is held and a majority of the qualified electors residing in the county voting on the question vote in favor of imposing the surtax. The resolution submitted to the

electors for approval shall {^{*132}} be the same resolution as that approved by the school board or boards after public hearing and approved in form by the commissioner of revenue. The board of county commissioners shall provide, at the expense of the school district or districts, for an election on the question of imposing the surtax within sixty days after the day the board or boards of education pass the resolution. Any election held pursuant to this section shall be conducted and canvassed in the same manner as any primary election. (Emphasis added.)

It has been contended by some that the emphasized portion of the above section can be interpreted to mean that a majority of the qualified electors of the county must vote in favor of the resolution imposing a county income surtax before the resolution is adopted. We cannot agree with this interpretation.

A similar contention was made in **Davy v. McNeill**, 31 N.M. 7, 27, 240 Pac. 482 (1925). Section 15 of an act providing for the organization of irrigation districts in New Mexico provided in part as follows:

"If a majority of the qualified electors who are freeholders within said district have voted 'Bonds Yes' the board of directors shall immediately cause bonds to be issued in amounts and payable in series as follows, to-wit:"

In holding that only a majority of the voters voting on the issue was necessary to authorize issuance of the bonds, the New Mexico Supreme Court relied on the following quote from 9 Ruling Case Law § 117:

"Ordinarily, the vote of voters who do not choose to participate in an election are not to be taken into consideration in declaring the result. If the law requires a question to be decided, or an officer to be elected by the votes of the majority of the voters in the county, this does not require that a majority of all the persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by a majority of the votes cast."

See also **Fabro v. Town of Gallup**, 15 N.M. 108, 103 Pac. 271 (1909) which reaches a similar result as that reached in the decision of **Davy v. McNeill**, supra.

From the foregoing it must be concluded that for a county income surtax resolution to be adopted, it is only necessary that a majority of the qualified electors voting on the county income surtax resolution vote in favor of the resolution.

Next we are asked to reconsider our conclusion in Opinion No. 68-75, supra, regarding the registration of voters in a county income surtax election. While we may agree that reasonable men may well reach another conclusion than was reached in Attorney General Opinion No. 68-75, our research and analysis of the county income surtax law as well as applicable provisions of our election code and relevant New Mexico Supreme Court decisions require us to again conclude that an otherwise qualified elector need

not be a registered voter to vote in a county income surtax election. We do not believe that this conclusion in any way impairs the holding of a county income surtax election.

The prevailing view in this country is that one presenting himself at the polls to cast his vote must furnish some proof of his qualifications to vote. See 25 Am. Jur. 2d § 102. Thus we believe it will be necessary for an unregistered voter who wishes to vote in a county income surtax election to sign an affidavit stating that he is at least twenty-one years of age, a citizen of the United States, has resided in New Mexico twelve months, in the county ninety days, { *133 } and in the precinct in which he offers to vote thirty days next preceeding the election. Such other information that may be necessary to satisfy election officials that the unregistered voter is a qualified elector may be required. If registration books are used, it will not be necessary for those voters who are registered to sign an affidavit and prove that they are qualified electors.

By: Gary O'Dowd

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