Opinion No. 71-118

November 22, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Betty Fiorina Secretary of State Legislative-Executive Building Santa Fe, N.M. 87501

QUESTIONS

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1. Does the recently approved addition of Article X, Section 6 to the New Mexico State Constitution affect the validity of the statutes relating to the election of councilmen, trustees or commissioners for wards or districts?

2. In view of the fact that the 1971 Legislature failed to enact a law authorizing municipalities to elect members of governing bodies from districts pursuant to Article X, Section 6, what procedure must now be followed for the election of such governing bodies?

3. How should the names of candidates for municipal office now be listed on the ballot in those mayorcouncil and commission-manager municipalities in which the members of the governing bodies have previously been elected for wards or districts?

CONCLUSIONS

1. No.

2. See analysis.

3. See analysis.

OPINION

*{*178}* **ANALYSIS**

The 1965 New Mexico State Legislature in enacting the Municipal Code, attempted, among other things, to solve problems pertaining to the selection of members of governing bodies in municipalities. Two of the laws passed specifically dealing with the subject are Sections 14-11-2(D), and 14-13-6(A):

"14-11-2. Governing body -- Corporate authority -- Legislative body -- Members of council and boards of trustees -- Quorum. --

. . .

D. The governing body of a municipality having a mayor-council form of government is the council or board of trustees whose members are the mayor and not less than four [4] nor more than ten [10] councilmen or trustees. The governing body may provide by ordinance for the election of one [1] or two [2] councilmen or trustees for each ward, or create or abolish wards, alter the boundary of existing wards, or provide for the election of councilmen or trustees on an at-large basis.

. . .

14-13-6. Commission-manager -- Districts for selections of commissioners -- Redistricting. -- A. The governing body of a municipality organizing under the commission-manager form of government shall district the municipality into five [5] commissioner districts. Each district shall be compact in area and equal in population, as nearly as possible. A commissioner shall be elected for each district but shall be voted on at large."

In 1970, the voters approved Article X, Section 6 of the New Mexico State Constitution, the Home Rule Provision, which provides in part as follows:

"A. For the purpose of electing some or all of the members of the governing body of a municipality:

(1) the legislature may authorize a municipality by general law to be districted;

*{*179}* (2) if districts have not been established as authorized by law, the governing body of a municipality may, by resolution, authorize the districting of the municipality. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality; and

(3) if districts have not been established as authorized by law or by resolution, the voters of a municipality, by a petition which is signed by not less than five percent of the registered qualified electors of the municipality and which specified the number of members of the governing body to be elected from districts, may require the governing body to submit to the registered qualified electors of the municipality, at the next regular municipal election held not less than sixty days after the petition is filed, a resolution requiring the districting of the municipality by its governing body. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality. The signatures for a petition shall be collected within a six-months period.

B. Any member of the governing body of a municipality representing a district shall be a resident of, and elected by, the registered qualified electors of that district."

Whether this later constitutional enactment renders the legislation quoted above unconstitutional is the question at issue here.

Prior to the adoption of Article X, Section 6, the only constitutional provision setting forth qualifications for elective public office were those at Article VII, Section 2(A):

"Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective office **except as otherwise provided in this constitution.** " (Emphasis added).

Article V, Section 13 of the State Constitution requires that "[a]ll district, county, precinct and municipal officers, shall be residents of the **political subdivisions** for which they are elected or appointed." (Emphasis added). In **Gibbany v. Ford,** 29 N.M. 621, 225 P. 577 (1924), the Supreme Court declared that:

". . . the legislature has no power to add restrictions upon the right to hold office beyond those provided in the constitution, because the constitutional provision is not a negative one, providing that no person shall not be eligible to hold an office unless he possesses certain qualifications, as is often the case in other states, but is a positive provision, giving the right to every person possessing the qualifications therein set forth to hold office except as otherwise provided in the constitution itself. Manifestly, therefore, the legislature is without power to make added restrictions as a qualification to the right to hold the office of alderman. To permit it to do so would authorize the super-addition of requirements to hold office beyond those provided by the constitution."

This interpretation of the constitution was followed in Opinion of the Attorney General No. 67-14, dated January 24, 1967, which held that a commissioner in a commission-manager municipality was not required to be a resident of the district he represented under Section 14-13-6, **supra.**

However, subsection B of Article X, Section 6, now appears to require a conclusion exactly opposite that reached in Attorney General Opinion No. 67-14, **supra.** That is:

"Any member of the governing body of a municipality representing a district **shall** be a resident of, and elected by, the registered qualified electors of that district." (Emphasis added).

The correctness of such a conclusion is dependent on an analysis of the entire "Home Rule Amendment" to determine whether or not the Amendment is self-executing. If the Amendment is self-executing, those statutes relating to the election of councilmen, trustees or commissioners for wards or districts *{*180}* (Sections 14-11-2(D) and 14-13-6(A), **supra)** will no longer be valid, since a further constitutional requirement in partial conflict with a provision in the original instrument will effect a modification of the Constitution and legislation. See **Asplund v. Alarid,** 29 N.M. 129 P. 786 (1923); Article VII, Section 2(A), **supra.**

A constitutional provision is selfexecuting when it takes immediate effect and ancillary legislation is not necessary to the enjoyment of the duty imposed. **State v. Perrault,** 34 N.M. 438, 283 P. 902 (1929); **Lanigan v. Gallup,** 17 N.M. 627 131 P. 997 (1913).

The Supreme Court of New Mexico has used this test many times in determining whether a constitutional provision is or is not self-executing. See **City of Raton v. Sproule,** 78 N.M. 138, 429 P.2d 336 (1967); **Jaramillo v. City of Albuquerque,** 64 N.M. 127, 329 P.2d 626 (1958); **In re Conley's Will,** 58 N.M. 771, 276 P.2d 906 (1954); **McAtee v. Gutierrez,** 48 N.M. 100, 146 P.2d 315 (1944). An analysis of subsection A(1), Article X, Section 6, wherein districting is dependent upon legislative authorization, would indicate, according to the reasoning in the above-cited cases, that subsection A[1] is not self-executing. However, subsection B of the same provision is a declaration of principle, but fails to lay down rules by means of which the principle may be given the force of law. **State v. Rogers,** 31 N.M. 485, 247 P. 828 (1962). For while the provision very clearly requires that a member of a governing body representing a district be a resident of, and elected by, the registered qualified electors of that district, without the authorization for the machinery to implement such principle the provision is not self-executing. Without the essential legislation in the case of A[1] this provision of the Home Rule Amendment will not affect the validity of any statute.

As quoted above, Article X, Section 6(A) (1) provides that the legislature "may authorize" a municipality by general law to be districted. The 1971 New Mexico Legislature failed to enact such authorization. See Opinion of the Attorney General No. 71-26, dated February 19, 1971. But either of the other two alternatives set forth in Article X, Section 6 may be utilized without additional legislation in order to achieve districting.

The first of these alternatives is that the governing body of a municipality may, by resolution, authorize the districting of the municipality. The second provides that if districting is not achieved through the resolution method, a petition method may be utilized. However, in either the resolution or petition method of districting the constitutional provision requires approval of the plan by a "majority vote in the municipality." Therefore, under these alternatives any districting plan must be approved by the electorate prior to its adoption.

If either of these alternatives is used, subsection B will be self-executing and is to be followed. The obvious result will be that the provision will supersede statutes requiring candidates for municipal governing bodies to run at large yet be representative of a particular ward or district. Thus, where the alternatives have been followed, names of candidates for the governing body must now be listed on the ballot as representing a district, voted on by residents of that district and must themselves reside in that district.

However, where neither alternative has been utilized, subsection B has no effect upon prior legislation. These statutes, Sections 14-11-2(D) and 14-13-6(a), **supra,** and the procedures set forth therein, retaining their validity, should be followed until the Legislature authorizes elections under the Home Rule Provision or either of the alternatives discussed above calling for approval by the electorate have been utilized.

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